UNIFORM CHILD WITNESS TESTIMONY

BY ALTERNATIVE METHODS ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT

SECTION 1. SHORT TITLE. This [Act] may be cited as the Uniform Child Witness Testimony by Alternative Methods Act.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Alternative method" means a method by which a child witness testifies which does not include all of the following:

(A) having the child testify in person in an open forum;

(B) having the child testify in the presence and full view of the finder of fact and presiding officer; and

(C) allowing all of the parties to be present, to participate, and to view and be viewed by the child.

(2) "Child witness" means an individual under the age of [13] who has been or will be called to testify in a proceeding.

(3) "Criminal proceeding" means a trial or hearing before a court in a prosecution of a person charged with violating a criminal law of this State or a [insert term for a juvenile delinquency proceeding] involving conduct that if engaged in by an adult would constitute a violation of a criminal law of this State.

(4) "Noncriminal proceeding" means a trial or hearing before a court or an administrative agency of this State having judicial or quasi-judicial powers, other than a criminal proceeding.

Comment

In litigation to which the Act should apply, Sections 2(3) and (4) define criminal and noncriminal proceedings broadly. In these sections, the word "court" embraces both jury and non-jury actions. Section 2(3) defining criminal proceeding also includes a juvenile delinquency proceeding or comparable proceeding involving conduct that if engaged in by an adult would constitute a violation of the criminal law of the state. An alternative method by which a child testifies in a juvenile proceeding involving such conduct is no less important than in an adult criminal proceeding. See *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In noncriminal proceedings, the Act may be invoked in civil cases generally, in juvenile and family law proceedings, subject to the provisions of Section 3, and in administrative proceedings. In the context of physical or sexual abuse, the impact upon and risks to a child testifying in the courtroom in civil cases for damages, in juvenile proceedings and in family law proceedings are potentially as real as in criminal prosecutions. Similarly, the testimony of a child by an alternative method may also, for instance, be appropriate in an administrative proceeding to revoke the license of a day care center.

"Child witness" is defined in Section 2(2) as an individual under the age of a bracketed [13] who is competent to testify and is called to testify in the proceeding. The Act thereby accommodates the diverse approaches to age currently recognized among the several states for taking the testimony of a child by an alternative method. For example, while in Georgia the taking of testimony by closed-circuit television applies to a child ten years of age or younger (Ga. Code Ann. § 17-8-55) and in Florida the age is under sixteen years (Fla. Stat. Ann. § 92.54). The approach in the Act is based upon a recommendation that the maximum age should be thirteen.

The term "child witness" in Section 2(2) includes both a child who is a party to a proceeding and one who is merely called to testify as a witness.

Finally, as to the taking of the testimony of a child by an alternative method, the term is defined broadly in Section 2(1) to mean not only alternative methods currently recognized among the several states for taking the testimony of a child, such as audio visual recordings to be later presented in the courtroom, closed-circuit television which is transmitted directly to the courtroom, and room arrangements that avoid direct confrontation between a witness and a particular party or the finder of fact, but also other similar methods either currently employed or through technology yet to be developed or recognized in the future.

SECTION 3. APPLICABILITY. This [Act] applies to the testimony of a child witness in a criminal or noncriminal proceeding. However, this [Act] does not preclude, in a noncriminal

proceeding, any other procedure permitted by law for a child witness to testify[, or in a [*insert the term for a juvenile delinquency proceeding*] involving conduct that if engaged in by an adult would constitute a violation of a criminal law of this State, testimony by a child witness in a closed forum as [*authorized or required*] by [*cite the law of this State that permits or requires closed juvenile hearings*]].

Comment

Section 3 provides that in noncriminal proceedings the Act does not preclude the use of other recognized state procedures for taking the testimony of a child by an alternative method. For example, in Delaware in custody and visitation cases the court is authorized to "interview the child in chambers to ascertain the child's wishes as to his or her custodian." Del. Code Ann. Tit. 13, § 724. There are twenty states that have statutes similar to the Delaware statute. In addition, there are also a number of states in which a similar procedure is authorized by court rule or decisional law. See, for example, the Davidson County Juvenile Court Rules in Tennessee and the North Dakota case of *Ryan v. Flemming*, 533 N.W.2d 920 (N.D. 1995), authorizing a trial judge to interview a child in chambers. Section 3 also accommodates the law of eight states (and perhaps other states when children under 12 years of age are involved) authorizing or requiring a closed forum in juvenile proceedings in which criminal law violations are at issue. Thus, the Act preserves the right to utilize existing closed court procedures in an adopting state but, at the same time, also preserves the use of the other alternative method procedures provided for by the Act. The Act does not apply to or govern the taking or use of evidence obtained through discovery depositions or other discovery methods or devices authorized and regulated by the Rules of Civil or Criminal Procedure of the enacting jurisdiction.

As a legislative note, it should be observed that the bracketed material in Section 3 should be omitted in enacting states that require or substantially require an open forum in juvenile proceedings in which criminal law violations are at issue.

SECTION 4. HEARING WHETHER TO ALLOW TESTIMONY BY ALTERNATIVE METHOD.

(a) The presiding officer in a criminal or noncriminal proceeding may order a hearing to determine whether to allow a child witness to testify by an alternative method. The presiding

officer, for good cause shown, shall order the hearing upon motion of a party, a child witness, or an individual determined by the presiding officer to have sufficient standing to act on behalf of the child.

(b) A hearing to determine whether to allow a child witness to testify by an alternative method must be conducted on the record after reasonable notice to all parties, any nonparty movant, and any other person the presiding officer specifies. The child's presence is not required at the hearing unless ordered by the presiding officer. In conducting the hearing, the presiding officer is not bound by rules of evidence except the rules of privilege.

Comment

Sections 4(a) and (b) set forth the procedures for instituting and conducting the hearing to determine whether an alternative method for taking the testimony of the child should be authorized. The hearing authorized in Section 4 is in the nature of a preliminary hearing or a hearing on a motion in limine to determine only whether the testimony of the child should be taken by an alternative method. The Uniform Rules of Evidence (1999), Rule 104(d) and the Federal Rules of Evidence, Rule 104(c) provide for conducting a hearing on a preliminary matter out of the presence of the jury if the interests of justice require. The Section 4 hearing is a separate and distinct hearing from the proceeding defined in Sections 2(3) and (4) in which, upon order of the presiding officer, the testimony is actually presented by an alternative method. See also Sections 7 and 8, *infra*. The hearing under Section 4 may, in the discretion of the presiding officer, be conducted in an *in camera* proceeding.

The term "presiding officer" is used in this Act to broadly describe the person under whose supervision and jurisdiction the proceeding is being conducted. It includes a judge in whose court the case is being heard, a quasi-judicial officer, or an administrative law judge or hearing officer, depending upon the nature of the case and the type of proceeding in which the testimony of a child is sought or presented by an alternative method.

The hearing under Section 4 is initiated upon the motion of a party, the child witness, an interested individual with sufficient connection to the child to be a proper person to seek to protect the child's best interests, or the presiding officer *sua sponte*, all as set forth in Section 4(a).

It is also required under Section 4(b) that reasonable notice be given to all parties, a nonparty movant, or other appropriate person. The child's presence at the hearing is not required unless

ordered by the presiding officer. The presiding officer should consider the factors enumerated in Section 6 of the Act, *infra*, in determining whether the child should be present at the hearing.

In conducting the hearing under Section 4, the presiding officer is not bound by the rules of evidence except for the rules of privilege, for example, as set forth in Rule 104(a) of the Uniform Rules of Evidence (1999) or Rule 104(a) of the Federal Rules of Evidence. At the same time, if, as provided in Rule 104(b) of the Uniform Rules, "there is a factual basis to support a good faith belief that a review of the allegedly privileged material is necessary, the court [or presiding officer], in making its determination, may review the material outside the presence of any other person."

Finally, Section 4(b) also provides that the hearing to determine whether an alternative method for the presenting of the testimony of the child is to be permitted shall be conducted on the record. It is also expected that a transcript of the record of the hearing will be made available to the public and news media to the same extent as in similar motions in any other judicial or quasi-judicial proceeding, subject, of course, to the presiding officer's authority, as in any other case, to balance constitutional and privacy interests and seal from public view sensitive information that should be protected. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).

SECTION 5. STANDARDS FOR DETERMINING WHETHER CHILD WITNESS MAY TESTIFY BY ALTERNATIVE METHOD.

(a) In a criminal proceeding, the presiding officer may allow a child witness to testify by an alternative method only in the following situations:

(1) The child may testify otherwise than in an open forum in the presence and full view of the finder of fact if the presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact if required to testify in the open forum.

(2) The child may testify other than face-to-face with the defendant if the presiding officer finds by clear and convincing evidence that the child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact

if required to be confronted face-to-face by the defendant.

(b) In a noncriminal proceeding, the presiding officer may allow a child witness to testify by an alternative method if the presiding officer finds by a preponderance of the evidence that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the finder of fact. In making this finding, the presiding officer shall consider:

(1) the nature of the proceeding;

(2) the age and maturity of the child;

(3) the relationship of the child to the parties in the proceeding;

(4) the nature and degree of emotional trauma that the child may suffer in testifying; and

(5) any other relevant factor.

Comment

Section 5 sets forth the standards that must be applied by the presiding officer in determining whether to allow the child to testify by an alternative method. Sections 5(a)(1) and (2) prescribe the standards that must be applied in criminal proceedings. In the case of face-to-face confrontation, Section 5(a)(2) comports with the essence of the holding of the Supreme Court of the United States in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), that the presenting of the testimony by an alternative method is necessary to protect the welfare of the child witness and that the child would suffer serious emotional stress and be traumatized to the extent the child could not reasonably be expected to communicate in the courtroom or the personal presence of a party. The Act does not attempt to define the method or methods by which face-to-face confrontation may be avoided. Closed-circuit television projected directly into the courtroom, video-taped testimony presented in the courtroom or room arrangements or equipment that shield the witness from the defendant [or the finder of fact in the case of Section 5(a)(1)] have been used with varying degrees of approval by the courts. See *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988). The word "defendant" in Section 5(a)(2) is intended to include and incorporate the word respondent or other similar term, if any, that may be used to denote the accused in a juvenile delinquency proceeding included in Section 2(3).

Sections 5(a)(1) and (2) establish the standard of "clear and convincing evidence" (highly probably true) as the standard that must be met in determining whether to permit the presentation of testimony of a child by an alternative method. The standard of persuasion in criminal cases currently varies throughout the several states. However, there are at least four states that apply the clear and convincing evidence standard of persuasion in determining whether to permit the presentation of a child's testimony by an alternative method. These are: Alaska (*Reutter v. State*, 886 P.2d 1298 (Alaska Ct. App. 1994)); Arkansas (Ark. Code Ann. § 16-43-1001); California (Cal. Penal Code § 1347); Connecticut (Conn. Gen. Stat. § 54-86g); and New York (N.Y. Crim. Proc. Law § 65.10). Of these, the Alaska decision in *Reutter* seems most persuasive because of the court's reliance on *Maryland v. Craig*, *supra*. In *Craig*, the Supreme Court did not address the issue other than to require specific evidence and an express finding that the probable effect of the defendant's presence on the child witness would significantly impair the ability of the child to testify accurately. See *Maryland v. Craig*, 497 U.S. at 855-56, 110 S. Ct. at 3169. In *Reutter*, the court held that the preponderance of evidence standard was insufficient to meet the requirements of *Craig*. See *Reutter v. State*, 886 P.2d at 1308. Therefore, given the criminal nature of the proceedings under Sections 5(a)(1) and (2) and the persuasiveness of *Reutter*, it seems appropriate that any state adopting the Act should conform to the clear and convincing evidence standard of persuasion even though there are at least two jurisdictions which follow the preponderance of evidence standard of persuasion. See *Thomas v. People*, 803 P.2d 144 (Colo. 1990); *United States v. Carrier*, 9 F.3d 867 (10th Cir. 1993).

Section 5(b) sets forth the standards that must be applied in noncriminal proceedings to determine whether to permit an alternative method for presenting the testimony of a child. In these proceedings the Act sets forth the alternative standards of "best interests of the child" or to "enable the child to communicate with the finder of fact." However, unlike criminal proceedings, the standard of persuasion is only that the presiding officer must find by a preponderance of the evidence (more probably true than not) "that allowing the child to testify by an alternative method is necessary to protect the best interests of the child or enable the child to communicate with the finder of fact." Given the civil nature of these proceedings and the fact that the preponderance of evidence standard generally applies to civil proceedings, this lesser standard of persuasion is appropriate for noncriminal proceedings. Sections 5(b)(1) through (5) set forth a non-exclusive list of factors that the presiding officer may consider in making this determination.

SECTION 6. FACTORS FOR DETERMINING WHETHER TO PERMIT ALTERNATIVE METHOD. If the presiding officer determines that a standard under Section 5 has been met, the presiding officer shall determine whether to allow a child witness to testify by an alternative method and in doing so shall consider:

(1) alternative methods reasonably available;

(2) available means for protecting the interests of or reducing emotional trauma to the child without resort to an alternative method;

(3) the nature of the case;

(4) the relative rights of the parties;

(5) the importance of the proposed testimony of the child;

(6) the nature and degree of emotional trauma that the child may suffer if an alternative method is not used; and

(7) any other relevant factor.

Comment

If the presiding officer determines under Section 5 that the standards for permitting the use of an alternative method for the presentation of the testimony of a child witness have been met, then the presiding officer shall consider the factors set forth in Section 6 in deciding whether to allow the presentation of a child witness' testimony by an alternative method.

SECTION 7. ORDER REGARDING TESTIMONY BY ALTERNATIVE METHOD.

(a) An order allowing or disallowing a child witness to testify by an alternative method must state the findings of fact and conclusions of law that support the presiding officer's determination.

(b) An order allowing a child witness to testify by an alternative method must:

(1) state the method by which the child is to testify;

(2) list any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony;

(3) state any special conditions necessary to facilitate a party's right to examine or cross-examine the child;

(4) state any condition or limitation upon the participation of individuals present during the testimony of the child;

(5) state any other condition necessary for taking or presenting the testimony.

(c) The alternative method ordered by the presiding officer may be no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order.

Comment

Section 7 provides expressly for the issuance of an order either allowing or disallowing the presentation of the testimony of a child witness by an alternative method. First, Section 7(a) requires a statement of the findings of fact and conclusions of law that support the presiding officer's determination. Second, Section 7(b) specifies the conditions under which the testimony is to be presented if an alternative method is to be ordered. Third, Section 7(c) requires that the alternative method be no more restrictive of the rights of the parties than is necessary to serve the purposes of presenting the testimony by an alternative method. In this connection, it should also be observed that the Act does not expressly provide for a priority in the alternative methods that may be ordered by the presiding officer. Nevertheless, in complying with Section 7(c), the importance of the examination or cross-examination of the child witness as provided in Section 8 strongly suggests that the alternative method authorized would normally include only video-taped testimony, closed-circuit television, or shielding the child witness in the courtroom from a face-to-face confrontation with the defendant or other party against whom the testimony is being offered.

SECTION 8. RIGHT OF PARTY TO EXAMINE CHILD WITNESS. An alternative method ordered by the presiding officer must permit a full and fair opportunity for examination or cross-examination of the child witness by each party.

Comment

Section 8 ensures that the requirements of the Sixth Amendment right of confrontation will be met in criminal proceedings and, when applicable, preserves the right of examination and cross-examination of the child witness in noncriminal proceedings. However, Section 8 does not impact upon other state noncriminal proceedings where limitations are placed upon the right to examine or cross-examine the child witness through the interviewing of a child in chambers, or some other recognized *in camera* examination of the child witness. See Comment to Section 3, *supra*. When the testimony of a child witness is presented by an alternative method as permitted under this Act, such testimony becomes part of the trial or hearing record like any other evidence presented to the finder of fact.

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 10. SEVERABILITY CLAUSE. If any provision of this [Act] or the application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 11. EFFECTIVE DATE. This [Act] takes effect [ ].

SECTION 12. REPEALS. The following acts and parts of acts are repealed:

(1) . . .

(2) . . .