

D R A F T

FOR APPROVAL

**UNIFORM CHILD WITNESS TESTIMONY
BY ALTERNATIVE METHOD ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**UNIFORM CHILD WITNESS TESTIMONY
BY ALTERNATIVE METHOD ACT**

WITH PREFATORY NOTE AND REPORTER'S NOTES

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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1 **UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT**

2
3 **Prefatory Note**

4
5 In the process of revising Rule 807 of the Uniform Rules of Evidence (1999), the
6 statement of child victim exception to the hearsay rule, the Drafting Committee
7 eliminated the provisions in then Subdivision (d) providing for alternative methods for
8 taking the testimony of a child victim. Basically there were three reasons for this
9 decision.

10
11 First, the Committee believed that detailed provisions providing for alternative
12 methods of taking the testimony of a child were incompatible with a child victim or
13 witness exception to the hearsay rule. It believed that this was an issue more effectively
14 dealt with in a separate rule or act. Accordingly, Rule 807(a)(2) of the Uniform Rules of
15 Evidence (1999) more generally provides that the child must either testify at the
16 proceeding “[or pursuant to an applicable state procedure for the giving of testimony by a
17 child].” Thus, the Uniform Rules of Evidence (1999) recognize that a statement of a
18 child may be introduced through an alternative method recognized under applicable state
19 procedure without unduly complicating the Rule 807 exception to the hearsay rule.
20

21 Second, the Committee also believed that the extreme diversity among the several
22 state jurisdictions with respect to alternative methods for taking the testimony of a child
23 warranted an attempt at drafting a uniform act on the subject. As such, the National
24 Conference of Commissioners on Uniform State Laws might provide some leadership in
25 an area where there is presently a noticeable lack of uniformity.
26

27 Third, the Committee also believed that this approach would provide the basis for
28 dealing more sensitively with the decisional law in this area in both criminal and
29 noncriminal proceedings.
30

31 This approach to alternative methods for taking the testimony of a child was
32 presented to the Committee on Scope and Program. It then authorized the effort and, with
33 the addition of new members, the Drafting Committee was continued as a Standby
34 Committee to draft a Uniform Child Witness Testimony By Alternative Method Act. The
35 following draft of the Act was approved by the Committee on March 23, 2002, at its
36 meeting in St. Louis, Missouri, and is now submitted to the Conference, with appropriate
37 Comments, for Final Reading at the Conference’s Annual Meeting in Tucson, Arizona,
38 July 26 to August 2, 2002.
39

1 **UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT**

2
3 **SECTION 1. SHORT TITLE.** This [Act] may be cited as the Uniform Child
4 Witness Testimony by Alternative Method Act.

5
6 **SECTION 2. DEFINITIONS.** In this [Act]:

7 (1) "Alternative method" means a method of presenting the testimony of a
8 child witness other than by having the child appear in person, in an open forum, in the
9 presence and full view of the finder of fact and the presiding officer, with the parties
10 allowed to be present, to participate, and to view and be viewed by the child.

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

13 (3) "Criminal proceeding" means a trial or hearing before a court in a
14 prosecution of a person charged with violating a criminal law of this State.

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

18 **COMMENT**

19 In litigation to which the Act should apply, Sections 2(3) and (4) define criminal
20 and noncriminal proceedings broadly. In these sections, the word "court" contemplates
21 both jury and non-jury actions. The section 2(3) definition includes quasi-criminal or
22 equivalent proceedings before juvenile, family or similar courts. See In re Gault, 387

1 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) and In re Winship, 397 U.S. 358, 90 S.
2 Ct. 1068, 25 L. Ed. 2d 368 (1970). In noncriminal proceedings, the Act may be invoked:
3 in civil cases generally; in juvenile proceedings; in family law proceedings subject to the
4 provisions of Section 3; and in administrative hearings. In the context of physical or
5 sexual abuse, the impact upon and risks to a child testifying in the courtroom in civil
6 cases for damages, in juvenile proceedings and in family law proceedings are potentially
7 as real as in criminal prosecutions. Similarly, the testimony of a child may be relevant in
8 an administrative proceeding to revoke the license of a day care center. In such a
9 proceeding the testimony of a child by an alternative method may be appropriate.

10
11 "Child witness" is defined in Section 2(2) as an individual under the age of a
12 bracketed [13] who is competent to testify and is called to testify in the proceeding. The
13 Act thereby accommodates the diverse approach to age currently recognized among the
14 several states for taking the testimony of a child by an alternative method. For example,
15 while in Georgia the taking of testimony by closed-circuit television applies to a child ten
16 years of age or younger (Ga. Code Ann. § 17-8-55), in Florida the age is under sixteen
17 years (Fla. Stat. Ann. ch. 92.54), and in Maryland the age is under eighteen (Md. Ann.
18 Code of 1957, art. 27, § 774). The approach in the Act is based upon a policy decision
19 that the minimum age should be thirteen.

20
21 The term "child witness" in Section 2(2) includes both a child who is a party to a
22 proceeding and one who is merely called to testify as a witness.

23
24 Finally, as to the taking of the testimony of a child by an alternative method, the
25 term is defined broadly in Section 2(1) to mean not only alternative methods currently
26 recognized among the several states for taking the testimony of a child, such as audio
27 visual recordings to be later presented in the courtroom, closed-circuit television which is
28 transmitted directly to the courtroom, and room arrangements that avoid direct
29 confrontation between a witness and a particular party or the finder of fact but also other
30 similar methods either currently employed or, through technology, yet to be developed or
31 recognized in the future.

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34
35 **SECTION 3. APPLICABILITY.** This [Act] governs the testimony of child
36 witnesses in all criminal and noncriminal proceedings. However, in a noncriminal

1 proceeding, the [Act] does not preclude other procedures permitted by law for
2 presentation of the testimony of a child witness.

3 **COMMENT**

4 Section 3 provides that in noncriminal proceedings the Act does not preclude the
5 use of other recognized state procedures in place for taking the testimony of a child by an
6 alternative method. For example, in custody and visitation cases in Delaware the court is
7 authorized to "interview the child in chambers to ascertain the child's wishes as to his or
8 her custodian." Del. Code Ann. tit. 3, § 724. There are twenty states that have statutes
9 similar to the Delaware statute. In addition, there are also a number of states in which a
10 comparable procedure is authorized by court rule or decisional law. See, for example, the
11 Davidson County Juvenile Court Rules in Tennessee and the North Dakota case of Ryan
12 v. Flemming, 533 N.W.2d 920 (N.D. 1995), authorizing a trial judge to interview a child
13 in chambers. Accordingly, the Act preserves the right to utilize other currently
14 recognized alternative procedures in the adopting state for taking the testimony of a child,
15 but, at the same time, does not prevent the use of the procedure set forth in the Act in any
16 instance in any adopting state.

17
18
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20 **SECTION 4. HEARING WHETHER TO ALLOW TESTIMONY BY**
21 **ALTERNATIVE METHOD.**

22 (a) The presiding officer of a criminal or noncriminal proceeding may order
23 a hearing to determine whether to allow presentation of the testimony of a child witness
24 by an alternative method. The presiding officer, for good cause shown, shall order the
25 hearing upon motion of a party, a child witness, or an individual determined by the
26 presiding officer to have sufficient standing to act on behalf of the child.

27 (b) A hearing to determine whether to allow presentation of the testimony
28 of a child witness by an alternative method must be conducted on the record after

1 reasonable notice to all parties, any nonparty movant, and any other person the presiding
2 officer specifies. The child's presence is not required at the hearing unless ordered by the
3 presiding officer. In conducting the hearing, the presiding officer is not bound by rules of
4 evidence, except for the rules of privilege.

5 COMMENT

6 Sections 4(a) and (b) set forth the procedures for instituting and conducting the
7 hearing to determine whether an alternative method for taking the testimony of the child
8 should be authorized. The hearing authorized in Section 4 is in the nature of a
9 preliminary hearing or a hearing on motion in limine held to determine only whether the
10 testimony of the child should be taken by an alternative method. See also Unif. R. Evid.
11 104(d) and Fed. R. Evid. 104(c). It is a separate and distinct hearing from the proceeding
12 defined in Sections 2(3) and (4) in which, upon order of the presiding officer, the
13 testimony is actually presented by an alternative method. See also Sections 7 and 8, *infra*.
14 The hearing under Section 4 may, in the discretion of the presiding officer, be conducted
15 in an *in camera* proceeding.

16
17 The term "presiding officer" is used in this Act to broadly describe the person
18 under whose supervision and jurisdiction the proceeding is being conducted. It includes a
19 judge in whose court the case is being heard, a quasi-judicial officer, or an administrative
20 law judge or hearing officer, depending upon the nature of the case and the type of
21 proceeding in which the testimony of a child is sought or presented by an alternative
22 method.

23
24 The hearing under Section 4 is initiated upon the motion of a party, the child
25 witness, an interested individual with sufficient connection to the child to be a proper
26 person to seek to protect the child's best interests, or the presiding officer *sua sponte*, all
27 as set forth in Section 4(a).

28
29 It is also required under Section 4(b) that reasonable notice be given to all parties,
30 a nonparty movant, or other appropriate person. The child's presence at the hearing is not
31 required unless ordered by the presiding officer. The presiding officer should consider
32 the factors enumerated in Section 6 of the Act, *infra*, in determining whether the child
33 should be present at the hearing.

1 In conducting the hearing referred to in this section, the presiding officer is not
2 bound by the rules of evidence except for the rules of privilege, for example, as set forth
3 in Rule 104(a) of the Federal Rules of Evidence and Rule 104(a) of the Uniform Rules of
4 Evidence (1999). At the same time, if, as provided in Rule 104(b) of the Uniform Rules
5 "there is a factual basis to support a good faith belief that a review of the allegedly
6 privileged material is necessary, the court [or presiding officer], in making its
7 determination, may review the material outside the presence of any other person."
8

9 Finally, Section 4(b) also provides that the hearing to determine whether an
10 alternative method for the taking of the testimony of the child is to be granted shall be
11 conducted on the record. It is also expected that a transcript of the record of the hearing
12 will be made available to the public and news media to the same extent as in similar
13 motions in any other judicial or quasi-judicial proceeding, subject, of course, to the
14 presiding officer's authority, as in any other case, to balance constitutional and privacy
15 interests and seal from public view sensitive and protectible information. See Press-
16 Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986).
17
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19

20 **SECTION 5. STANDARDS FOR DETERMINING WHETHER CHILD**
21 **WITNESS' TESTIMONY MAY BE PRESENTED BY ALTERNATIVE METHOD.**

22 (a) In a criminal proceeding, the presiding officer may order the
23 presentation of the testimony of a child witness by an alternative method only in the
24 following situations:

25 (1) A child witness' testimony may be taken otherwise than in an
26 open forum in the presence and full view of the finder of fact if the presiding officer finds
27 by clear and convincing evidence that the child would suffer emotional trauma that would
28 substantially impair the child's ability to communicate with the finder of fact if required to
29 testify in the open forum.

1 (2) A child witness' testimony may be taken other than in a face-to-
2 face confrontation between the child and a defendant against whom the child's testimony
3 is offered if the presiding officer finds by clear and convincing evidence that the child
4 would suffer serious emotional trauma that would substantially impair the child's ability
5 to communicate with the finder of fact if required to be confronted face-to-face by the
6 defendant.

7 (b) In a noncriminal proceeding, the presiding officer may order the
8 presentation of the testimony of a child witness by an alterative method if the presiding
9 officer finds by a preponderance of the evidence that presenting the testimony of the child
10 by an alternative method is necessary to protect the best interests of the child or enable the
11 child to communicate with the finder of fact. In making this finding, the presiding officer
12 shall consider:

- 13 (1) the nature of the proceeding;
- 14 (2) the age and maturity of the child;
- 15 (3) the relationship of the child to the parties in the proceeding;
- 16 (4) the nature and degree of trauma that the child may suffer in
17 testifying; and
- 18 (5) any other relevant factor.

19 **COMMENT**

20 Section 5 sets forth the three standards that must be applied by the presiding
21 officer in determining whether to present the testimony of a child by an alternative

1 method. Sections 5(a)(1) and (2) prescribe the standards that must be applied in a
2 criminal proceeding. Sections 5(a)(1) and (2) differentiate between the child whose
3 ability to communicate with the finder of fact is limited by trauma suffered simply by
4 exposure to the ambience of an open forum (i.e., the traditional open courtroom setting
5 with judge, jury, parties, lawyers, witnesses and observers) and the child whose ability to
6 communicate with the finder of fact is limited by trauma caused by face-to-face exposure
7 to the criminal defendant. The essential distinction between the two standards is that the
8 child who cannot testify in an open forum would need only to "suffer emotional trauma"
9 while the child who cannot testify face-to-face with the defendant would need to "suffer
10 *serious* emotional trauma."
11

12 In the case of face-to-face confrontation, the standard in Section 5(a)(2) comports
13 with the essence of the holding of the Supreme Court of the United States in Maryland v.
14 Craig, 497 U.S. 836, 857, 110 S. Ct. 3157, 3170, 111 L. Ed. 2d 666 (1990), that the taking
15 of the testimony by an alternative method is necessary to protect the welfare of the child
16 witness and that the child would suffer serious emotional stress and be traumatized to the
17 extent the child could not reasonably be expected to communicate in the courtroom or the
18 personal presence of a party. The Act does not attempt to define the method or methods
19 by which face-to-face confrontation may be avoided. Closed-circuit television projected
20 directly into the courtroom, video-taped testimony presented in the courtroom or room
21 arrangements or equipment that shield the witness from the defendant (or the finder of
22 fact in the case of section 5(a)(1)) have been used with varying degrees of approval by the
23 courts. See Maryland v. Craig, 497 U.S. 836 (1990); Coy v. Iowa, 487 U.S. 1012, 108 S.
24 Ct. 2798, 101 L. Ed. 2d 857 (1988).
25

26 Section 5(b) sets forth the standards that must be applied in noncriminal
27 proceedings to determine whether to permit an alternative method for taking the
28 testimony of a child. In these proceedings the Act sets forth the alternative standards of
29 "best interests of the child" or to "enable the child to communicate with the finder of
30 fact." However, unlike criminal proceedings, the standard of persuasion is only that the
31 presiding officer must find by a preponderance of the evidence (that it is more probably
32 true than not) "that presenting the testimony of the child by an alternative method is
33 necessary to protect the best interests of the child or enable the child to communicate with
34 the finder of fact." Sections 5(b)(1) through (5) set forth a non-exclusive list of factors
35 that the presiding officer may consider in making the determination.
36

37 Sections 5(a)(1) and (2) establish the standard of "clear and convincing evidence"
38 (highly probably true) as the standard that must be met in granting the taking of testimony
39 of a child by an alternative method. The standard of persuasion in criminal cases
40 currently varies throughout the several states. However, there are at least four states that

1 apply the clear and convincing evidence standard of persuasion in determining whether to
2 grant the taking of a child's testimony by an alternative method. These are: Alaska
3 (Reutter v. State, 886 P.2d 1298 (Alaska Ct. App. 1994)); Arkansas (Ark. Code Ann. 16-
4 43-1001); California (Ca. Penal Code § 1347); Connecticut (Conn. Gen. Stat. § 54-86g);
5 and New York (N.Y. Crim. Proc. Law § 65.10). Of these, the Alaska decision in Reutter
6 seems most persuasive because of the court's reliance on Maryland v. Craig. In Craig, the
7 Supreme Court did not address the issue other than to require specific evidence and an
8 express finding that the probable effect of the defendant's presence on the child witness
9 would significantly impair the ability of the child to testify accurately. 497 U.S. at 855-
10 56, 110 S. Ct. at 3169. In Reutter, the court held that the preponderance of evidence
11 standard was insufficient to meet the requirements of Craig. 886 P.2d at 1308.
12 Therefore, given the criminal nature of the proceeding under Sections 5(a)(1) and (2) and
13 the persuasiveness of Reutter, it seems appropriate that any state adopting the Act should
14 conform to the clear and convincing evidence standard of persuasion even though there
15 are at least two jurisdictions which follow the preponderance of evidence standard of
16 persuasion. See Thomas v. People, 803 P.2d 144 (Colo. 1990); United States v. Carrier, 9
17 F.3d 867 (10th Cir. 1993).

18
19 Section 5(b) requires only the preponderance of evidence (more probably true than
20 not) standard of persuasion in determining whether to take the testimony of a child
21 witness by an alternative method. However, given the civil nature of these proceedings
22 and the fact that the preponderance of evidence standard generally applies to civil
23 proceedings, this lesser standard of persuasion is appropriate for noncriminal
24 proceedings.

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26
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28 **SECTION 6. FACTORS FOR DETERMINING WHETHER TO PERMIT**
29 **ALTERNATIVE METHOD.** If the presiding officer determines that a standard under
30 Section 5 has been met, the presiding officer shall determine whether to allow the
31 presentation of the testimony of a child witness by an alternative method and in doing so
32 shall consider:

- 33 (1) alternative methods reasonably available;

- 1 (2) available means for protecting the interests of or reducing emotional
- 2 trauma to the child without resort to an alternative method;
- 3 (3) the relative rights of the parties;
- 4 (4) the importance of the proposed testimony of the child;
- 5 (5) the nature and degree of emotional trauma that the child may suffer if an
- 6 alternative method is not used; and
- 7 (6) any other relevant factor.

8 **COMMENT**

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

13
14
15
16 **SECTION 7. ORDER REGARDING TESTIMONY BY ALTERNATIVE**

17 **METHOD.**

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

21 (b) An order allowing the presentation of the testimony of a child witness
22 by an alternative method must state:

- 23 (1) the method by which the testimony is to be presented;

1 (2) a list, individually or by category, of the persons either allowed to
2 be present or required to be excluded during the taking of the testimony of the child;

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

5 (4) any condition or limitation upon the participation of persons
6 present during the taking of the testimony of the child; and

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

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

12 **COMMENT**

13 Section 7 provides expressly for the issuance of an order either allowing or
14 disallowing the taking of the testimony of a child witness by an alternative method. First,
15 Section 7(a) requires a statement of the findings of fact and conclusions of law that
16 support the presiding officer's determination. Second, Section 7(b) specifies the
17 conditions under which the testimony is to be taken if an alternative method is ordered.
18 Third, Section 7(c) requires that the alternative method be no more restrictive of the rights
19 of the parties than is necessary to serve the purposes of taking the testimony by an
20 alternative method.

21
22
23 **SECTION 8. RIGHT OF PARTIES TO EXAMINE CHILD WITNESS.** An
24 alternative method ordered by the presiding officer must permit a full and fair opportunity
25 for examination and cross-examination of the child witness.
26

1 **COMMENT**

2 Section 8 ensures that the requirements of the Sixth Amendment right of
3 confrontation will be met in criminal proceedings and, when applicable, preserves the
4 right of examination and cross-examination of the child witness in noncriminal
5 proceedings. However, Section 8 does not impact other state noncriminal proceedings
6 where limitations are placed upon the right to examine or cross-examine the child witness
7 through the interviewing of a child in chambers, or some other recognized *in camera*
8 examination of the child witness. See Section 3 Comment, *supra*. When the testimony
9 of a child is presented by an alternative method as permitted under this Act, such
10 testimony becomes part of the trial or hearing record like any other evidence presented to
11 the trier of fact.
12
13
14

15 **[SECTION 9. SEVERABILITY CLAUSE.** If any provision of this [Act] or the
16 application to any person or circumstance is held invalid, the invalidity does not affect
17 other provisions or applications of this [Act] which can be given effect without the
18 invalid provision or application, and to this end the provisions of this [Act] are severable.]

19 **COMMENT**

20 Because most states have generally applicable severability laws, the Conference
21 often omits a severability clause in individual acts. We have included severability
22 language in this Act, but in brackets to indicate that the clause should be omitted when
23 unnecessary.
24
25
26

27 **SECTION 10. EFFECTIVE DATE.** This [Act] takes effect [].
28

29 **SECTION 11. REPEALS.** The following acts and parts of acts are repealed:
30

(1) . . .

1

(2) ...