DRAFT
FOR APPROVAL

UNIFORM CHILD WITNESS TESTIMONY
BY ALTERNATIVE METHOD ACT

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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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ON UNIFORM STATE LAWS

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# UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>SHORT TITLE</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>DEFINITIONS</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>APPLICABILITY</td>
<td>3</td>
</tr>
<tr>
<td>4</td>
<td>HEARING WHETHER TO ALLOW TESTIMONY BY ALTERNATIVE METHOD</td>
<td>4</td>
</tr>
<tr>
<td>5</td>
<td>STANDARDS FOR DETERMINING WHETHER CHILD WITNESS' TESTIMONY MAY BE PRESENTED BY ALTERNATIVE METHOD</td>
<td>6</td>
</tr>
<tr>
<td>6</td>
<td>FACTORS FOR DETERMINING WHETHER TO PERMIT ALTERNATIVE METHOD</td>
<td>9</td>
</tr>
<tr>
<td>7</td>
<td>ORDER REGARDING TESTIMONY BY ALTERNATIVE METHOD</td>
<td>10</td>
</tr>
<tr>
<td>8</td>
<td>RIGHT OF PARTIES TO EXAMINE CHILD WITNESS</td>
<td>11</td>
</tr>
<tr>
<td>9</td>
<td>SEVERABILITY CLAUSE</td>
<td>12</td>
</tr>
<tr>
<td>10</td>
<td>EFFECTIVE DATE</td>
<td>12</td>
</tr>
<tr>
<td>11</td>
<td>REPEALS</td>
<td>12</td>
</tr>
</tbody>
</table>
UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHOD ACT

Prefatory Note

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

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

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

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

This approach to alternative methods for taking the testimony of a child was presented to the Committee on Scope and Program. It then authorized the effort and, with the addition of new members, the Drafting Committee was continued as a Standby Committee to draft a Uniform Child Witness Testimony By Alternative Method Act. The following draft of the Act was approved by the Committee on March 23, 2002, at its meeting in St. Louis, Missouri, and is now submitted to the Conference, with appropriate Comments, for Final Reading at the Conference’s Annual Meeting in Tucson, Arizona, July 26 to August 2, 2002.
SECTION 1. SHORT TITLE. This [Act] may be cited as the Uniform Child Witness Testimony by Alternative Method Act.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Alternative method" means a method of presenting the testimony of a child witness other than by having the child appear in person, in an open forum, in the presence and full view of the finder of fact and the presiding officer, with the parties allowed 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 is competent to testify and either 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.

(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" contemplates both jury and non-jury actions. The section 2(3) definition includes quasi-criminal or equivalent proceedings before juvenile, family or similar courts. See In re Gault, 387
U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) and 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 proceedings; in family law proceedings subject to the provisions of Section 3; and in administrative hearings. 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 may be relevant in an administrative proceeding to revoke the license of a day care center. In such a proceeding the testimony of a child by an alternative method may be appropriate.

"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 approach 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), in Florida the age is under sixteen years (Fla. Stat. Ann. ch. 92.54), and in Maryland the age is under eighteen (Md. Ann. Code of 1957, art. 27, § 774). The approach in the Act is based upon a policy decision that the minimum 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] governs the testimony of child witnesses in all criminal and noncriminal proceedings. However, in a noncriminal
proceeding, the [Act] does not preclude other procedures permitted by law for presentation of the testimony of a child witness.

COMMENT

Section 3 provides that in noncriminal proceedings the Act does not preclude the use of other recognized state procedures in place for taking the testimony of a child by an alternative method. For example, in custody and visitation cases in Delaware 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. 3, § 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 comparable 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. Accordingly, the Act preserves the right to utilize other currently recognized alternative procedures in the adopting state for taking the testimony of a child, but, at the same time, does not prevent the use of the procedure set forth in the Act in any instance in any adopting state.

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

(a) The presiding officer of a criminal or noncriminal proceeding may order a hearing to determine whether to allow presentation of the testimony of a child witness 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 presentation of the testimony of a child witness 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 for 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 motion in limine held to determine only whether the

testimony of the child should be taken by an alternative method. See also Unif. R. Evid.

104(d) and Fed. R. Evid. 104(c). It 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 referred to in this section, 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 Federal Rules of Evidence and Rule 104(a) of the Uniform Rules of Evidence (1999). 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 taking of the testimony of the child is to be granted 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 and protectible information. 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' TESTIMONY MAY BE PRESENTED BY ALTERNATIVE METHOD.

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

(1) A child witness' testimony may be taken 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 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) A child witness' testimony may be taken other than in a face-to-face confrontation between the child and a defendant against whom the child's testimony is offered 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 order the presentation of the testimony of a child witness by an alternative method if the presiding officer finds by a preponderance of the evidence that presenting the testimony of the child 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. 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 trauma that the child may suffer in testifying; and

(5) any other relevant factor.

COMMENT

Section 5 sets forth the three standards that must be applied by the presiding officer in determining whether to present the testimony of a child by an alternative
method. Sections 5(a)(1) and (2) prescribe the standards that must be applied in a
criminal proceeding. Sections 5(a)(1) and (2) differentiate between the child whose
ability to communicate with the finder of fact is limited by trauma suffered simply by
exposure to the ambience of an open forum (i.e., the traditional open courtroom setting
with judge, jury, parties, lawyers, witnesses and observers) and the child whose ability to
communicate with the finder of fact is limited by trauma caused by face-to-face exposure
to the criminal defendant. The essential distinction between the two standards is that the
child who cannot testify in an open forum would need only to "suffer emotional trauma"
while the child who cannot testify face-to-face with the defendant would need to "suffer
serious emotional trauma."

In the case of face-to-face confrontation, the standard in 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, 857, 110 S. Ct. 3157, 3170, 111 L. Ed. 2d 666 (1990), that the taking
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 (1990); Coy v. Iowa, 487 U.S. 1012, 108 S.

Section 5(b) sets forth the standards that must be applied in noncriminal
proceedings to determine whether to permit an alternative method for taking 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 (that it is more probably
true than not) "that presenting the testimony of the child 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." Sections 5(b)(1) through (5) set forth a non-exclusive list of factors
that the presiding officer may consider in making the determination.

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 granting the taking 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
grant the taking of a child's testimony by an alternative method. These are: Alaska
43-1001); California (Ca. 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. 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. 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. 886 P.2d at 1308.
Therefore, given the criminal nature of the proceeding 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) requires only the preponderance of evidence (more probably true than
not) standard of persuasion in determining whether to take the testimony of a child
witness by an alternative method. However, 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.

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 the
presentation of the testimony of a child witness 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 relative rights of the parties;

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

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

(6) any other relevant factor.

COMMENT

If the presiding officer determines under Section 5 that the standards for granting an alternative method for taking 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 the presentation of the testimony of a child witness 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 the presentation of the testimony of a child witness by an alternative method must state:

(1) the method by which the testimony is to be presented;
(2) a list, individually or by category, of the persons either allowed to
be present or required to be excluded during the taking of the testimony of the child;
(3) any special conditions necessary to facilitate a party's right to
examine or cross-examine the child;
(4) any condition or limitation upon the participation of persons
present during the taking of the testimony of the child; and
(5) any other condition necessary for taking or presenting the
testimony.

(c) The alternative method ordered by the presiding officer must 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 taking 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 taken if an alternative method is 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 taking the testimony by an
alternative method.

SECTION 8. RIGHT OF PARTIES TO EXAMINE CHILD WITNESS. An
alternative method ordered by the presiding officer must permit a full and fair opportunity
for examination and cross-examination of the child witness.
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 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 Section 3 Comment, supra. When the testimony of a child 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 trier of fact.

[SECTION 9. 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.]

COMMENT

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

SECTION 10. EFFECTIVE DATE. This [Act] takes effect [    ].

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

(1) . . .
1 (2)...