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FOR DISCUSSION ONLY

UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT

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ON UNIFORM STATE LAWS

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UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT

WITH PREFATORY NOTE AND REPORTER'S NOTES

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NATIONAL CONFERENCE OF COMMISSIONERS
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**UNIFORM CHILD WITNESS TESTIMONY
BY ALTERNATIVE METHODS 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 also eliminated the provisions in Subdivision (d) providing for alternative methods for taking the testimony of a child victim or witness. Basically, there were two 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 purusant to an applicable state procedure for the giving of testimony by a child]." The Uniform Rules thus recognize that the statement may be introduced through an alternative method recognized under an applicable state procedure without unduly complicating the 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 a noticeable lack of uniformity. The Committee on Scope and Program authorized such an effort and the Drafting Committee, with the addition of new members, was continued as a Standby Committee to draft a Uniform Child Witness Testimony by Alternative Methods Act.

The accompanying Draft is the Committee's initial effort to fulfill this assignment and it looks forward to the comments of the Commissioners at this First Reading of the Proposed Act.

UNIFORM CHILD WITNESS TESTIMONY BY ALTERNATIVE METHODS ACT

SECTION 1. DEFINITIONS. In this [Act]:

(1) "Alternative method" means the taking of the testimony of a child witness in a proceeding closed to the public, in chambers, or by deposition, audio visual recording, closed circuit television, or by another method that permits the parties and the trier of fact to accurately view and hear the testimony.

(2) "Child witness" means an individual under the age of [18] whose testimony is material to an issue in any criminal or non-criminal proceeding and who has been found competent to testify.

(3) "Support individual" means a parent, guardian, conservator, relative, or other individual selected by the court to be present with the child witness during the taking of child witness's testimony.

SECTION 2. HEARING TO DETERMINE METHOD OF TAKING TESTIMONY.

(1) The court, upon its own motion, or the motion of a party, after reasonable notice to all parties, shall conduct a hearing on the record to determine whether it is necessary to take the testimony of a child witness by an alternative method in either a criminal or non-criminal proceeding.

(2) In a criminal proceeding there must be a finding of necessity in which the court determines that the taking of the testimony by an alternative method is

necessary to protect the welfare of the particular child witness, that the child would suffer serious emotional trauma and that the trauma is such that the child could not reasonably be expected to communicate in the personal presence of a party.

(3) In a non-criminal proceeding there must be a finding of necessity in which the court determines that the taking of the testimony by an alternative method is necessary to protect the best interests of the child witness.

(4) In making its determination under subdivisions (2) and (3), the court shall consider the following factors:

(a) the nature of the proceeding;

(b) the availability of the child witness;

(c) the age, relative maturity and testimonial capacity of the child witness;

(d) the relationship, if any, of the child witness to the parties in the proceeding;

(e) the importance of preserving the anonymity of the child witness;

(f) the rights of the parties in the taking of the testimony of the child witness;

(g) the public interest in taking the testimony of the child witness in a public hearing; and

(h) any other factors which the court deems necessary to protect the interests of justice.

1 **SECTION 3. METHOD FOR TAKING TESTIMONY.** Upon notice and
2 hearing as provided in Section 2, the Court may order that a child witness's
3 testimony be taken by an alternative method under oath and with a full opportunity
4 for cross-examination by the party against whom the testimony is proffered, unless
5 otherwise provided by the Constitution of the United States or the Constitution or
6 Statute of this State, or waived or agreed upon by the parties.

7 **SECTION 4. ORDER FOR TAKING TESTIMONY.** The court shall enter
8 an order stating its findings on the taking of testimony of the child witness by an
9 alternative method. If the court determines that the testimony of the child witness is
10 to be taken by an alternative method, the court shall list in its order the persons
11 required to be present, the conditions of their participation, and any other
12 appropriate conditions for the taking of the testimony.

13 **SECTION 5. PERSONS PRESENT DURING TAKING OF**
14 **TESTIMONY.** Only the judge, court personnel necessary for taking the testimony,
15 persons necessary to operate required equipment, members of the jury, if applicable,
16 attorneys for the parties, a support individual and a party or person whose presence
17 is required due to the nature of the proceeding may be present under conditions
18 required by law during the taking of the child witness's testimony.

19 **Reporter's Notes**

20 The overwhelming majority of the States have statutory provisions
21 governing the taking of the testimony of children by alternative methods. However,

1 with only a few exceptions, the statutes apply only in criminal proceedings involving
2 physical or sexual abuse, to the taking the testimony of children of varying minimal
3 ages and where a child's participation in a public hearing would suffer serious
4 emotional distress such that the child could not be expected to communicate
5 effectively.

6 The statutes vary greatly in the types of alternative methods that may be
7 employed in the taking of child testimony. The most commonly recognized are
8 closed-circuit television, videotaped depositions or testimony and the child
9 statement exception to the hearsay rule. See, for example, Md. Ann. Code, art. 27
10 § 774 (Supp. 1998) and *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111
11 L.Ed.2d 666 (1990), holding Maryland's statute authorizing closed-circuit television
12 of a child's testimony constitutional. See also, Cal. Penal Code § 1346 (West Supp.
13 2000), authorizing the admissibility of videotaped depositions or testimony in
14 criminal proceedings. See further, Ma. Stat. Ann. 233 § 81, for an example of a
15 child witness' statement exception to the hearsay rule.

16 At the federal level, closed-circuit television and videotaped depositions or
17 testimony are also recognized as alternative methods to in-court child witness
18 testimony. See 18 U.S.C.A. § 3509(b) (West Supp. 2000) and 18 U.S.C.A.
19 § 3509(b)(2) (West Supp. 2000), respectively.

20 There are also considerable differences in the degree of specificity in the
21 procedural rules governing the taking of a child's testimony by alternative methods.
22 This includes the age of the child, the factors to be considered by the court, the
23 support persons authorized to be present and the types of alternative methods to be
24 employed.

25 Limiting the use of alternative methods for taking the testimony of children
26 to criminal proceedings only, the application of the procedure generally to
27 proceedings for only physical and sexual abuse, the limited types of alternative
28 methods through which the testimony may be taken and the differences among the
29 several States with respect to the applicable procedural rules all suggest that it is
30 appropriate for the NCCUSL to consider the promulgation of a Uniform Act for
31 consideration by the several States.

32 There are at least five general common denominators to be found in the
33 statutes of the several States. These are: the taking of the testimony of children; the
34 risk that courtroom testimony will result in serious emotional harm to the child; that
35 the trauma of a courtroom appearance will affect the ability of the child to
36 communicate; the persons who may be present during the taking of the testimony by
37 an alternative method; and one, or the other, of alternative methods that may be
38 employed in taking and preserving the testimony.

The present draft embodies these common elements among the several state statutes providing for alternative methods for the taking of testimony of children at risk through requiring their live testimony in the courtroom. At the same time, the draft differs in several respects.

First, the draft is broadened to include both criminal and non-criminal proceedings. In non-criminal proceedings the procedure could be invoked in civil cases generally, in juvenile proceedings, in family law cases and in administrative hearings. The risks, for example, to children testifying in the courtroom in civil cases for damages, in juvenile proceedings and in family law proceedings generally are potentially as real as in criminal prosecutions in the narrower context of physical or sexual abuse. Similarly, the testimony of a child may be relevant in an administrative proceeding to revoke the license of a day care center in which the taking of the testimony of a child by alternative methods would be appropriate.

Second, the draft differs to some extent with existing legislation by creating a definitions section and broadening the definitions applicable in the interpretation of the Act. As to the definitions, Section 1(1) of the draft defines "alternative method" to mean not only methods currently recognized in the several States for taking the testimony of children other than in the courtroom, but the definition is broadened to embrace hearings in chambers, audiovisual recordings and methods through technology yet to be developed or recognized which might become applicable in the future. This provides greater flexibility in determining the most appropriate alternative means for taking the testimony of children than is currently recognized in the statutes of the several States.

Section 1(2) defines a "child witness" to include an individual under the age of a bracketed [18]. The suggested bracketed age of eighteen thereby accommodates a diverse approach in the several States with regard to the age of children for authorizing the taking of testimony by alternative methods. For example, while in Georgia the taking of testimony by closed circuit television applies to children ten years of age or younger (Ga. Code Ann. § 17-8-55 (1997), in Florida the age is under sixteen years (Fla. Stat. Ann. ch. 92.54 (Harrison 1996) and in Maryland the age is under eighteen (Md. Ann. Code, art. 27 § 774 (Supp. 1998). The approach in the current draft takes the position, although bracketed, that the should be eighteen with discretion left in the court to consider age as a factor in determining whether to authorize the taking of the testimony by an alternative method. See, in this connection, Section 2(4)(c) and the Reporter's Note, *infra*.

In addition to age, a "child witness" is also defined in Section 1(2) to mean an individual whose testimony is material in any criminal or non-criminal proceeding and who has been found competent to testify. These are fundamental requisites to any testimonial evidence whether in a public hearing or by an alternative method.

In Section 1(3) "Support individual" is broadly defined to embrace all persons who might legally be authorized to serve as support persons in the several States. Unlike the statutory provisions in some States, it is broadened to include not only persons standing in a legal relationship to the child witness, but other individuals as well when it is considered appropriate in the discretion of the trial court.

Third, in Section 2 the draft provides, upon reasonable notice, for a hearing on the record to determine whether it is necessary to take the testimony of a child witness by an alternative method. Since the current draft is drafted to apply to all types of proceedings, criminal or non-criminal, two separate standards are set forth in Sections 2(2) and 2(3) for determining whether to authorize the taking of a child's testimony by an alternative method.

Subdivision (2) of Section 2 provides for the standard to be applied in criminal proceedings. It literally provides that the court must determine "that the taking of testimony by an alternative method is necessary to protect the welfare of the particular child witness, that the child would suffer serious emotional trauma and that the trauma is such that the child could not reasonably be expected to communicate in the personal presence of a party." For confrontational reasons this standard is expected to comply with the Supreme Court's current holding in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), dealing with the admissibility of the testimony of a child witness through one-way closed circuit television. The essence of the holding in the majority opinion is as follows:

> The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television is necessary to protect the welfare of the child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant.
>
> . . . Finally, the trial court must find that the emotional stress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than "mere nervousness or excitement or some reluctance to testify."
>
> . . . [A finding] . . . that the child witness will suffer 'serious emotional distress such that the child cannot reasonably communicate' . . . clearly suffices to meet constitutional standards. [Citations Omitted] *Id.* at 497 U.S. 857, 110 S.Ct. 3169.

The Supreme Court concluded as follows:

> In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit the use of a procedure that, despite the absence of face-to-face confrontation ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. *Id.* at 497 U.S. 857, 110 S.Ct. 3170.

Section 2(3) sets forth "the best interests of the child witness" standard to be applied in non-criminal proceedings. Confrontational concerns are not present in non-criminal proceedings and it is believed that greater flexibility should be granted to the courts in determining whether an alternative method should be applied and what type of method should be employed. See, in this connection, the Reporter's Note to Section 3, *infra*.

Finally, in Section 2(4), several factors are identified which are deemed appropriate for the court to consider in determining whether to authorize an alternative method for the taking of the testimony of a child witness. These, it is believed, constitute a useful distillation of the different factors contained in the several state statutes for determining whether to authorize an alternative method for taking the testimony of a child witness within the meaning of the proposed Act. In identifying the importance of preserving the anonymity of the witness in Section 4(e) as a factor to consider, the draft recognizes the potential risk to the child of testifying in a public hearing on issues that may be involved in a sensitive proceeding, not only in physical or sexual abuse criminal cases, but in non-criminal cases as well.

The factors set forth in Section 2(4) are not intended to necessarily be exclusive, since in subdivision (4)(h), it is provided that "any other factors may be considered which the court deems necessary to protect the interests of justice."

Fourth, Section 3 provides for the manner in which the testimony of the child is to be taken, namely, "under oath and with a full opportunity for cross-examination by the party against whom the testimony is admitted." This ensures that the requirements for confrontation will be met in criminal proceedings, while at the same time providing for a relaxation of the standard in non-criminal proceedings, such as custody and visitation proceedings. However, in non-criminal proceedings the oath and cross-examination requirements are inapplicable if the method for taking the testimony of a child witness is otherwise provided for "by the Constitution of the United States or the Constitution or Statute of this State, or waived or agreed upon by the parties . . . ." For example, as to the oath, in Florida, "[i]n the court's discretion, a child may testify without taking the oath if the court

1 determines the child understands the duty to tell the truth or the duty not to lie."
2 See, Fla. Stat. Ann. § 90.605 (1997). Also, as to testifying, in Florida, "[n]o minor
3 child . . . shall appear as a witness . . . without prior court order of court based on
4 good cause shown unless in an emergency situation." See, Fla. Family Law Rules
5 12. 407. This statutory rule would also be preserved under the exclusionary
6 provision of Section 3.

7 Also, in Delaware, by statute, "[t]he Court may interview the child in
8 chambers to ascertain the child's wishes as to his or her custodian and may permit
9 counsel to be present at the interview. The Court shall, at the request of a party,
10 cause a record of the interview to be made and it shall be made a part of the record
11 in the case." See, Del. Stat. Tit. 13 § 724. The exclusionary provision of Section 3
12 would preserve Delaware's procedure to secure the testimonial evidence of children
13 under this statute as well.

14 Similarly, in other state jurisdictions in non-criminal proceedings the
15 exclusionary provision in Section 3 would preserve any statutory rights for securing
16 the testimony of children without requiring the oath or a full opportunity for cross-
17 examination.

18 Section 4 simply provides straightforwardly for the entering of an order for
19 the taking of testimony by an alternative method and the conditions under which the
20 testimony of the child witness shall be taken. It thus accommodates varying
21 procedures in the several States for the taking of the testimony of a child witness by
22 alternative methods. See the discussion of illustrative state procedures in the
23 Reporter's Note to Section 3, *supra*.

24 Fifth, Section 5 provides for the persons who may be present during the
25 taking of the testimony. It is drawn to give the court flexibility with respect to the
26 persons who may be authorized to be present within the varying conditions under
27 which the testimony of the child witness may be taken.