

D R A F T
FOR DISCUSSION ONLY

UNIFORM ACT FOR TAKING THE TESTIMONY OF
INCAPACITATED PERSONS BY ALTERNATIVE METHODS

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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WITH REPORTER'S NOTES

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**UNIFORM ACT FOR TAKING THE TESTIMONY OF INCAPACITATED
PERSONS BY ALTERNATIVE METHODS**

Section 1. Definitions. As used in this Uniform Act:

(a) "Incapacitated person" means any child witness under eighteen (18) years of age or any adult over eighteen (18) years of age who, by reason of mental or physical illness or disability, is unable to receive, evaluate and communicate information effectively.

(b) "Support person" means a parent, guardian, conservator, relative or next friend selected by the court to be present with the incapacitated person in the court proceedings.

(c) "Witness" means an "incapacitated person" who is a material witness and has been found to be a competent witness to give testimony in the court proceedings.

Section 2. Methods for the Taking of Testimony. In any proceeding in which an incapacitated person is a witness, upon notice and hearing as provided in Section 4, the incapacitated person's testimony may be taken in proceedings closed to the public, in chambers, or by deposition, audio recording, audio visual recording, or closed circuit television. The testimony of the witness shall be taken under oath through direct examination with a full opportunity for cross-examination by the party against whom the testimony is being admitted.

Section 3. Persons Present During the Taking of Testimony. Only the judge, court personnel as may be necessary for the taking of the testimony, persons necessary to operate the required equipment, members of the jury, if appropriate, attorneys for the parties, a support person and a party or person whose presence is required due to the nature of the proceeding may be present under such conditions as may be required by law during the taking of the incapacitated person's testimony.

Section 4. Hearing to Determine the Taking of the Testimony by Alternative

Methods. The court, upon its own motion, or the motion of counsel, after the giving of reasonable notice, shall conduct a case-specific hearing to determine whether it is necessary to take the testimony of an incapacitated person by alternative methods as provided in Section 2.

In making its findings, the court shall consider the following factors:

- (a) nature of the proceeding;
- (b) age and relative incapacity of the witness;
- (c) risk of emotional, mental, or physical harm to the witness;
- (d) relationship, if any, of the witness to the parties in the proceedings;
- (e) importance of preserving the anonymity of the witness;
- (f) the rights of the parties in the taking of the testimony of the witness;
- (g) overriding public interest in taking the testimony of the witness in a public

hearing; and

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

Section 5. Order Stating Findings, the Alternative Method for the Taking of Testimony and the Persons Who May Be Present. The court shall enter an order stating its findings on the taking of the testimony of the witness by an alternative method. If the court determines that the testimony of the witness shall be taken by an alternative method authorized by Section 2, the court shall establish in its order the persons required to be present, the conditions under which they shall participate and any other appropriate conditions for the taking of the testimony by an alternative method.

Reporter's Notes

All of the states have statutory provisions governing the taking of testimony by alternative methods. With only a few exceptions, the statutes apply only in criminal proceedings involving physical or sexual abuse, to the taking the testimony of children of varying minimal ages and where a child's participation in a public hearing would result in the likelihood of emotional, mental or physical harm to the child. The statutes vary greatly both in the types of alternative methods which may be employed in the taking of the testimony and in the degree of specificity of the procedural rules governing the taking of the testimony. However, there are at least four general common denominators to be found in the statutes of the several states. These are: the taking of the testimony of children; the risk that courtroom testimony will result in serious emotional, mental or physical harm to the child; the persons who may be present during the taking of the testimony by an alternative method to testimony in the courtroom; and one, or the other, of several types of methods that may be 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 witnesses at risk through requiring their live testimony in the courtroom. At the same time, the Draft differs in several respects.

First, as to the Definitions, Section 1(a) of the Draft is broadened to apply not only to children under eighteen years of age, but to persons who, by reason of mental or physical illness or disability, are unable to receive, evaluate and communicate information effectively and who may be as equally at risk as children in suffering serious emotional, mental, or physical harm by testifying in public courtroom proceedings. The suggested minimal age of children under the age of eighteen differs from the age requirements in many of the existing state statutes, for example, as in Georgia providing for the taking of the testimony of children under the age of ten by closed circuit television. See *17 Code of Georgia § 17-8-55 (1997)*. The approach in the current draft takes the position that the minimum age 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.

"Support person" in Section 1(b) is broadly defined to embrace all persons who might legally be authorized to serve as support persons in the several states.

"Witness" in Section 1(c) requires that the child or incapacitated adult be both a material witness and one found to be competent to testify in the court proceedings.

Second, in Section 2 the Draft provides for the taking of testimony by alternative methods in all types of proceedings, civil and criminal. The risks, for example, to children testifying in the courtroom in custody proceedings are as real as in criminal prosecutions for physical or sexual abuse.

At the same time, as provided in Section 3, the Draft is intended to protect broadly the

rights of defendants in criminal proceedings, such as the right of confrontation, by requiring the presence of a party or person whose presence is required due to the nature of the proceeding and affording in Section 2 that party or person a full opportunity for cross-examination. See, in this connection, *Maryland v. Craig*, 497 U.S. 836 (1990). See also, Section 5 vesting discretion in the court to determine the persons that must be present and establish the conditions under which the testimony is to be taken.

Third, unlike most of the state statutes which address only one of several alternatives to the taking of testimony in public in the courtroom, Section 2 provides for a range of alternatives to the taking of testimony in the courtroom. This provides greater flexibility in determining the most appropriate alternative means for taking the testimony of an incapacitated person.

Finally, in Section 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 witness. These, it is believed, is a useful distillation of different factors contained in the several state statutes for determining whether to authorize an alternative method for taking the testimony of a witness within the meaning of the proposed Uniform 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 incapacitated person of testifying in a public hearing on the issues that may be involved in a sensitive proceeding.