UNIFORM CHILD WITNESS TESTIMONY

BY ALTERNATIVE METHODS ACT

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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.

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

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

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:

(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.

refusing to provide an interpreter for defendant who had no difficulty in expressing himself to the court in English, and had standby counsel to allay his concern with legal terminology. State v. Drobel, 815 P.2d 724 (Utah Ct. App.), cert. denied, 836 P.2d 1383 (Utah 1991).

COLLATERAL REFERENCES

C.J.S. — 23 C.J.S. Criminal Law § 1076 et seq.

A.L.R. — Right of accused to have evidence or court proceedings interpreted, 36 A.L.R.3d 276.

Admissibility of hypnotic evidence at criminal trial, 92 A.L.R.3d 442.

Right of indigent defendant in state criminal case to assistance of ballistics experts, 71 A.L.R.4th 638.

Right of indigent defendant in state criminal case to assistance of fingerprint expert, 72 A.L.R.4th 874.

Right of indigent defendant in state criminal case to assistance of expert in social attitudes, 74 A.L.R.4th 330.

Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis, 74 A.L.R.4th 388.

Admissibility of hypnotically refreshed or enhanced testimony, 77 A.L.R.4th 927.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of foreign language speaking defendant, 79 A.L.R.4th 1102.

Right of indigent defendant in state criminal case to assistance of investigators, 81 A.L.R.4th 259.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist, 85 A.L.R.4th 19.

Ineffective assistance of counsel: use or nonuse of interpreter at prosecution of hearing-impaired defendant, 86 A.L.R.4th 698.

Right of accused to have evidence or court proceedings interpreted, because accused or other participant in proceedings is not proficient in the language used, 32 A.L.R.5th 149.

Right of indigent defendant in state criminal prosecution to ex parte in camera hearing on request for state-funded expert witness, 83 A.L.R.5th 541.

Rule 15.5. Visual recording of statement or testimony of child victim or witness of sexual or physical abuse — Conditions of admissibility.

(1) In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or witness younger than 14 years of age may be recorded prior to the filing of an information or indictment, and upon motion and for good cause shown is admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

(1)(a) no attorney for either party is in the child's presence when the statement is recorded;

(1)(b) the recording is visual and aural and is recorded on film or videotape or by other electronic means;

(1)(c) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and the recording is accurate and has not been altered;

(1)(d) each voice in the recording is identified;

(1)(e) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;

(1)(f) the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury;

(1)(g) the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence; and

(1)(h) the child is available to testify and to be cross-examined at trial, either in person or as provided by Subsection (2) or (3), or the court determines that the child is unavailable as a witness to testify at trial under the Utah Rules of Evidence. For purposes of this subsection "unavailable" includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or mental strain if required to testify at trial.

(2) In any case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of the prosecution and for

Rule 27A. Admissibility of statements given by minors.

(a) If a minor is in custody for the alleged commission of an offense that would be a crime if committed by an adult, any statement given by a minor in response to questions asked by a police officer is inadmissible unless the police officer informed the minor of the minor's rights before questioning begins.

(a)(1) If the minor is under 14 years of age, the minor is presumed not adequately mature and experienced to knowingly and voluntarily waive or understand a minor's rights unless a parent, guardian, or legal custodian is present during waiver.

(a)(2) If the minor is 14 years of age or older, the minor is presumed capable of knowingly and voluntarily waiving the minor's rights without the benefit of having a parent, guardian, or legal custodian present during questioning.

(b) The presumptions outlined in paragraphs (a)(1) and (a)(2) may be overcome by a preponderance of the evidence showing the ability or inability of a minor to comprehend and waive the minor's rights.

(Added effective November 1, 2000.)

Advisory Committee Note. — This rule is intended to recognize the right to counsel, and the right against self-incrimination as established by statute, constitution, or caselaw.

Rule 28. Scheduling of minors' cases.

(a) Proceedings concerning alleged violations of law shall be scheduled and conducted separately for each minor except as provided hereafter.

(b) Where more than one minor is involved in the same law violation or criminal episode, and all such minors are apprehended and charged at or about the same time, proceedings may be consolidated and heard together before the same judge. However, if any party objects to consolidation on the record or in writing, remaining proceedings shall be heard separately as to the objecting minor. The court may, for good cause shown, order that any such separate hearings be held with respect to disposition whether requested or not.

(c) Proceedings with respect to minors in the same family or household, even when they do not involve allegations of the same law violations or criminal episode, may be consolidated unless objected to by any party. In that event, the court shall schedule separate hearings to protect the interest of the objecting party as appears appropriate.

(d) Where a minor is named in a petition which alleges violations of the law and in a separate petition alleging other grounds for jurisdiction, such as dependency or neglect, the petitions may be consolidated.

Rule 29. Multiple county offenses.

(a) When a minor is charged in a petition with the commission of offenses in more than one county, all proceedings except the trial may take place on all charges in the county in which the petition is filed.

(b) If a minor denies some or all of the charges for those offenses committed outside the county in which the arraignment takes place, the court may enter such denial and set the matter for a pre-trial conference, or refer such charges to the prosecuting attorney for the county in which the offenses are alleged to have occurred. If the offenses are alleged to have occurred in a county which is within the same judicial district, the arraigning court may order that the matter be scheduled for trial in that county.

(c) Out of county charges may be included in a proposed pleas agreement as provided in Rule 25. Such charges shall not be dismissed by the court except on motion of the prosecuting attorney for the county where the offenses are alleged to have occurred, or on the court's own motion as part of a plea agreement approved by the court.

in any manner the occurrence of the sexual offense involving the child is sufficient corroboration of the admission or the confession regardless of whether or not the child is available to testify regarding the offense.

(2) A child, for purposes of Subsection (1), is a person under the age of 14. 1983

76-5-410. Child victim of sexual abuse as competent witness.

A child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony. 1985

76-5-411. Admissibility of out-of-court statement of child victim of sexual abuse.

(1) Notwithstanding any rule of evidence, a child victim's out-of-court statement regarding sexual abuse of that child is admissible as evidence although it does not qualify under an existing hearsay exception, if:

(a) the child is available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure;

(b) if the child is not available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure, there is other corroborative evidence of the abuse; or

(c) the statement qualifies for admission under Rule 15.5(1), Utah Rules of Criminal Procedure.

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.

(3) A statement admitted under this section shall be made available to the adverse party sufficiently in advance of the trial or proceeding, to provide him with an opportunity to prepare to meet it.

(4) For purposes of this section, a child is a person under the age of 14 years. 1989

76-5-412. Custodial sexual relations — Custodial sexual misconduct — Definitions — Penalties — Defenses.

(1) As used in this section:

(a) "Actor" means:

(i) a correctional officer, as defined in Section 53-13-104;

(ii) a law enforcement officer, as defined in Section 53-13-103; or

(iii) an employee of, or private provider or contractor for, the Department of Corrections or a county jail.

(b) "Person in custody" means a person, either an adult 18 years of age or older, or a minor younger than 18 years of age, who is:

(i) a prisoner, as defined in Section 76-5-101, and includes a prisoner who is in the custody of the Department of Corrections created under Section 64-13-2, but who is being housed at the Utah State Hospital established under Section 62A-12-201 or other medical facility;

(ii) under correctional supervision, such as at a work release facility or as a parolee or probationer; or

(iii) under lawful or unlawful arrest, either with or without a warrant.

(c) "Private provider or contractor" means any person or entity that contracts with the Department of Corrections or with a county jail to provide services or functions that are part of the operation of the Department of Corrections or a county jail under state or local law.

(2) (a) An actor commits custodial sexual relations if the actor commits any of the acts under Subsection (3):

(i) under circumstances not amounting to commission of, or an attempt to commit, an offense under Subsection (6); and

(ii) (A) the actor knows that the individual is a person in custody; or

(B) a reasonable person in the actor's position should have known under the circumstances that the individual was a person in custody.

(b) A violation of Subsection (2)(a) is a third degree felony, but if the person in custody is younger than 18 years of age, a violation of Subsection (2)(a) is a second degree felony.

(c) If the act committed under this Subsection (2) amounts to an offense subject to a greater penalty under another provision of state law than is provided under this Subsection (2), this Subsection (2) does not prohibit prosecution and sentencing for the more serious offense.

(3) Acts referred to in Subsection (2)(a) are:

(a) having sexual intercourse with a person in custody;

(b) engaging in any sexual act with a person in custody involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant; or

(c) causing the penetration, however slight, of the genital or anal opening of a person in custody by any foreign object, substance, instrument, or device, including a part of the human body, with the intent to cause substantial emotional or bodily pain to any person, regardless of the sex of any participant.

(4) (a) An actor commits custodial sexual misconduct if the actor commits any of the acts under Subsection (5):

(i) under circumstances not amounting to commission of, or an attempt to commit, an offense under Subsection (6); and

(ii) (A) the actor knows that the individual is a person in custody; or

(B) a reasonable person in the actor's position should have known under the circumstances that the individual was a person in custody.

(b) A violation of Subsection (4)(a) is a class A misdemeanor, but if the person in custody is younger than 18 years of age, a violation of Subsection (4)(a) is a third degree felony.

(c) If the act committed under this Subsection (4) amounts to an offense subject to a greater penalty under another provision of state law than is provided under this Subsection (4), this Subsection (4) does not prohibit prosecution and sentencing for the more serious offense.

(5) Acts referred to in Subsection (4)(a) are the following acts when committed with the intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, regardless of the sex of any participant:

(a) touching the anus, buttocks, or any part of the genitals of a person in custody;

(b) touching the breast of a female person in custody;

(c) otherwise taking indecent liberties with a person in custody; or

(d) causing a person in custody to take indecent liberties with the actor or another person.

(6) The offenses referred to in Subsections (2)(a)(i) and (4)(a)(i) are:

(a) Section 76-5-401, unlawful sexual activity with a minor;

(b) Section 76-5-402, rape;