

1 **H. B. 2824**

2
3 (By Delegates Lawrence, L. Phillips, Stowers,
4 Marcum, Shott, Sobonya, Moore, Skaff, Poore,
5 Barrett and Manchin)

6 [Introduced March 5, 2013; referred to the
7 Committee on the Judiciary.]

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10 A BILL to repeal §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of
11 West Virginia, 1931, as amended; to amend said code by adding
12 thereto four new sections, designated §48-1-308, §48-1-309,
13 §48-1-310 and §48-1-311; to amend said code by adding thereto
14 a new article, designated §49-1A-1 and §49-1A-2; and to amend
15 said code by adding thereto four new sections, designated
16 §61-11-27, §61-11-28, §61-11-29 and §61-11-30, all relating to
17 procedures and protections for child witnesses in domestic
18 relations, child abuse and neglect and criminal proceedings;
19 setting forth the rights of child witnesses; establishing the
20 procedure and safeguards to be used when taking testimony of
21 a child witness; permitting a court in certain instances to
22 permit a child witness to give testimony by closed-circuit
23 television; establishing the procedure to be used when taking
24 testimony of a child witness by closed-circuit television;
25 protecting recordings made of statements by child witnesses;

1 providing for confidentiality; providing for instances when
2 the child witness may also be a victim; and permitting a
3 support person for a child witness.

4 *Be it enacted by the Legislature of West Virginia:*

5 That §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West
6 Virginia, 1931, as amended, be repealed; that said code be amended
7 by adding thereto four news sections, designated §48-1-308,
8 §48-1-309, §48-1-310 and §48-1-311; that said code be amended by
9 adding thereto a new article, designated §49-1A-1 and §49-1A-2; and
10 that said code be amended by adding thereto four new sections,
11 designated §61-11-27, §61-11-28, §61-11-29 and §61-11-30, all to
12 read as follows:

13 **CHAPTER 48. DOMESTIC RELATIONS.**

14 **ARTICLE 1. GENERAL PROVISIONS; DEFINITIONS.**

15 **§48-1-308. Rights of child witnesses in proceedings held pursuant**
16 **to this chapter.**

17 (a) Persons who are under the age of eighteen years at the
18 time of their testimony may have the following accommodations
19 granted to them, if the child's testimony is sought for any stage
20 of a proceeding held pursuant to this chapter:

21 (1) In the court's discretion, the taking of testimony from a
22 child may be limited in duration and/or set at a time that
23 accommodates the child's school and activity schedule. The court

1 may order temporary breaks in the proceedings when the energy,
2 comfort, or attention span of the child warrants;

3 (2) Upon motion made by the child, his or her representative,
4 or any party to the proceeding, the court may allow the child to
5 have a toy, blanket or similar item in his or her possession while
6 testifying.

7 (3) Upon motion made by the child, his or her representative,
8 or any party to the judicial proceeding, the court may designate a
9 support person, who shall be present in the courtroom, in view of
10 the child witness. The court may allow the support person to
11 remain in close proximity to the child during the child's
12 testimony, but that action may only be allowed if:

13 (A) All parties agree; or

14 (B) If the movant shows the court by a preponderance of
15 evidence that:

16 (I) The child in question cannot reliably testify without the
17 support person in his or her possession; and

18 (ii) Allowing the support person is not likely to prejudice
19 the trier of fact in hearing and evaluating the child's testimony.

20 (C) The support person may not obscure the child from the view
21 of the parties or the trier of fact. The support person may not
22 provide the child with an answer to any question directed to the
23 child during the course of the child's testimony or otherwise
24 prompt the child or otherwise influence the testimony of the child.

1 (D) If the support person attempts to influence or affect in
2 any manner the testimony of the child at any time the court shall
3 exclude that support person.

4 (4) Upon motion by any party to the proceeding or upon its own
5 motion, the court may order such accommodations as are appropriate
6 under the circumstances to ensure the comfort of a child witness,
7 including, but not limited to, the following measures:

8 (A) Adjusting the layout of the courtroom or hearing room;

9 (B) Conducting the proceedings outside the normal courtroom;

10 (C) Relaxing the formalities of the proceedings;

11 (D) Permitting properly-trained facility animals to be present
12 in the hearing; or

13 (E) Permitting the use of a properly constructed screen, which
14 would permit the persons in the courtroom or hearing room to see
15 the child but would obscure the child's view of the parties.

16 (5) In circumstances where a party has chosen to proceed
17 without counsel, the court may appoint stand-by counsel for that
18 party and may order stand-by counsel to question a child witness on
19 behalf of the pro se party, if the court finds that there is a
20 substantial likelihood that emotional harm would come to the child
21 if the pro se party were allowed to question the child directly.

22 (6) The court shall encourage and permit the use of
23 age-appropriate and developmentally-appropriate language, both in
24 questions to the child witness and also in explanations of the

1 court process for the child witness.

2 (7) If the child is also a victim, the court shall ensure that
3 all steps necessary to secure the physical safety of the child,
4 both in the courtroom and during periods of time that the child may
5 spend waiting in court, have been taken.

6 (8) The court shall take all steps necessary to ensure that
7 any sensitive information, including address or physical location
8 of the child witness, child witness and/or the immediate family of
9 the child witness, remains confidential.

10 (9) For any case in which the child witness is alleged to have
11 been emotionally, sexually and/or physically abused, the child
12 shall be given notice of pretrial discovery motions, with that
13 notice being required to be given in sufficient time to allow the
14 guardian ad litem or counsel for the child to file any pleadings
15 deemed appropriate to the situation.

16 **§48-1-309. Findings of fact required for taking testimony of a**
17 **child witness by closed-circuit television;**
18 **considerations for the court.**

19 (a) Upon a written motion filed by a movant, counsel for
20 either party, the child's attorney or the child's guardian ad
21 litem, if applicable, and upon findings of fact determined pursuant
22 to subsection (b) of this section, a court may order that the
23 testimony of a child witness may be taken at any hearing through
24 the use of live, closed-circuit television.

1 (b) Prior to ordering that the testimony of a child witness
2 may be taken through the use of live, closed-circuit television,
3 the court must find by clear and convincing evidence, after
4 conducting an evidentiary hearing on this issue, that:

5 (1) The child is an otherwise competent witness;

6 (2) The use of live, closed-circuit television is necessary to
7 protect the welfare of the child witness; and

8 (3) The child witness is unable to testify because:

9 (A) The fear of doing so in the physical presence of a party;

10 (B) The child witness would be harmed by testifying in the
11 physical presence of a party; or

12 (C) Conduct by the party or his or her counsel causes the
13 child witness to be unable to testify.

14 **§48-1-310. Procedure to be used in the taking of testimony of a**
15 **child witness by closed-circuit television.**

16 (a) If the court determines that the use of live,
17 closed-circuit testimony is necessary and orders its use, either
18 party may, at any time prior to the child witness being called,
19 elect to absent himself or herself from the courtroom during the
20 child witness' testimony. If the party elects to do so, the child
21 may be required to testify in the courtroom.

22 (b) If live, closed-circuit television is used in the
23 testimony of a child witness, the child witness will be televised
24 live by closed-circuit equipment to the view of the parties,

1 counsel, and the court. The attorneys for each party in the case,
2 including counsel for the child or guardians ad litem for the child
3 or children involved in the case, if applicable, and the operator
4 of the equipment shall be present in the room with the child during
5 the testimony. The only other persons permitted to be physically
6 present in the room with the child are the judicial officer, a
7 forensic interviewer appointed by the court to act as a resource
8 for the court, and a support person for the child witness.

9 (c) Only the court, the attorneys for the parties, the
10 guardians ad litem, if applicable, and the forensic interviewer, if
11 one is appointed by the court to act as a resource for the court,
12 may question the child.

13 (d) The court shall permit the excluded party or parties to
14 observe and hear the testimony of the child witness contemporaneous
15 with the taking of the testimony. The court shall provide
16 electronic means for the party or parties to confer confidentially
17 during the taking of the testimony, either by the taking of breaks
18 or by the use of a computer or telephone.

19 **§48-1-311. Protection of recordings made of statements of child**
20 **witnesses.**

21 (a) Upon the filing of an action pursuant to this chapter, any
22 videotape or other type of recording of a statement of a child
23 witness concerning matters that are the subject of that court
24 proceeding is the property of the court for the purpose of

1 protecting the privacy of the child. Those recordings shall be
2 made available to counsel and the parties for viewing purposes, but
3 may not be duplicated without an order of the court which specifies
4 to whom the duplicate records are to be given and the purpose of
5 the use of the recording by that individual. The order shall also
6 prohibit the recording from being shown to unauthorized
7 individuals, prohibit the recording from being duplicated and
8 require the return to the court of all copies of the recording at
9 the conclusion of the stated purpose.

10 (b) Upon return of the recording to the court, the recording
11 shall be placed in a sealed file within the court's official file.

12 **CHAPTER 49. CHILD WELFARE.**

13 **ARTICLE 1A. PROCEDURES FOR TESTIMONY OF CHILDREN.**

14 **§49-1A-1. Rights of child witnesses in proceedings held pursuant to**
15 **this chapter.**

16 (a) Persons who are under the age of eighteen years at the
17 time of their testimony may have the following accommodations
18 granted to them, if the child's testimony is sought for any stage
19 of a proceeding held pursuant to this chapter:

20 (1) In the court's discretion, the taking of testimony from a
21 child may be limited in duration and/or set at a time that
22 accommodates the child's school and activity schedule. The court
23 may order temporary breaks in the proceedings when the energy,

1 comfort or attention span of the child warrants;

2 (2) Upon motion made by the child, his or her representative,
3 or any party to the proceeding, the court may allow the child to
4 have a toy, blanket or similar item in his or her possession while
5 testifying.

6 (3) Upon motion made by the child, his or her representative,
7 or any party to the judicial proceeding, the court may designate a
8 support person, who shall be present in the courtroom, in view of
9 the child witness. The court may allow the support person to
10 remain in close proximity to the child during the child's
11 testimony, but such action may only be allowed if:

12 (A) All parties agree; or

13 (B) If the movant shows the court by a preponderance of
14 evidence that:

15 (I) The child in question cannot reliably testify without the
16 support person in his or her possession; and

17 (ii) Allowing the support person is not likely to prejudice
18 the trier of fact in hearing and evaluating the child's testimony.

19 (C) The support person may not obscure the child from the view
20 of the parties or the trier of fact. The support person may not
21 provide the child with an answer to any question directed to the
22 child during the course of the child's testimony or otherwise
23 prompt the child or otherwise influence the testimony of the child.

24 (D) If the support person attempts to influence or affect in

1 any manner the testimony of the child at any time the court shall
2 exclude that support person.

3 (4) Upon motion by any party to the proceeding or upon its own
4 motion, the court may order such accommodations as are appropriate
5 under the circumstances to ensure the comfort of a child witness,
6 including, but not limited to, the following measures:

7 (A) Adjusting the layout of the courtroom or hearing room;

8 (B) Conducting the proceedings outside the normal courtroom;

9 (C) Relaxing the formalities of the proceedings;

10 (D) Permitting properly-trained facility animals to be present
11 in the hearing; or

12 (E) Permitting the use of a properly constructed screen, which
13 would permit the persons in the courtroom or hearing room to see
14 the child but would obscure the child's view of the parties.

15 (5) In circumstances where a party has chosen to proceed
16 without counsel, the court may appoint stand-by counsel for that
17 party and may order stand-by counsel to question a child witness on
18 behalf of the pro se party, if the court finds that there is a
19 substantial likelihood that emotional harm would come to the child
20 if the pro se party were allowed to question the child directly.

21 (6) The court shall encourage and permit the use of
22 age-appropriate and developmentally-appropriate language, both in
23 questions to the child witness and also in explanations of the
24 court process for the child witness.

1 (7) If the child is also an alleged victim of physical abuse,
2 sexual abuse or neglect, the court shall ensure that all steps
3 necessary to secure the physical safety of the child, both in the
4 courtroom and during periods of time that the child may spend
5 waiting in court, have been taken.

6 (8) The court shall take all steps necessary to ensure that
7 any sensitive information, including address or physical location
8 of the child witness and/or the immediate family of the child
9 witness, remains confidential.

10 (9) For any case in which the child witness is alleged to have
11 been emotionally, sexually and/or physically abused, the child
12 shall be given notice of pretrial discovery motions, with such
13 notice being required to be given in sufficient time to allow the
14 guardian ad litem or counsel for the child to file any pleadings
15 deemed appropriate to the situation.

16 **§49-1A-2. Protection of recordings made of statements of child**
17 **witnesses.**

18 (a) Upon the filing of an action pursuant to this chapter, any
19 videotape or other type of recording of a statement of a child
20 witness concerning matters that are the subject of this court
21 proceeding is the property of the court for the purpose of
22 protecting the privacy of the child. The recordings shall be made
23 available to counsel and the parties for viewing purposes, but may
24 not be duplicated without an order of the court which specifies to

1 whom the duplicate records are to be given, the purpose of the use
2 of the recording by that individual. The order shall also prohibit
3 the recording from being shown to unauthorized individuals,
4 prohibit the recording from being duplicated and require the return
5 to the court of all copies of the recording at the conclusion of
6 the stated purpose.

7 (b) Upon return of the recording to the court, the recording
8 shall be placed in a sealed file within the court's official file.

9 **CHAPTER 61. CRIMES AND THEIR PUNISHMENT.**

10 **ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.**

11 **§61-11-27. Rights of child witnesses in proceedings held pursuant** 12 **to this chapter.**

13 (a) Persons who are under the age of eighteen years at the
14 time of their testimony may have the following accommodations
15 granted to them, if the child's testimony is sought for any stage
16 of a proceeding held pursuant to this chapter:

17 (1) In the court's discretion, the taking of testimony from a
18 child may be limited in duration and/or set at a time that
19 accommodates the child's school and activity schedule. The court
20 may order temporary breaks in the proceedings when the energy,
21 comfort or attention span of the child warrants;

22 (2) Upon motion made by the child, his or her representative,
23 or any party to the proceeding, the court may allow the child to

1 have a toy, blanket, or similar item in his or her possession while
2 testifying.

3 (3) Upon motion made by the child, his or her representative,
4 or any party to the judicial proceeding, the court may designate a
5 support person, who shall be present in the courtroom, in view of
6 the child witness. The court may allow the support person to
7 remain in close proximity to the child during the child's
8 testimony, but that action may only be allowed if:

9 (A) All parties agree; or

10 (B) If the movant shows the court by a preponderance of
11 evidence that:

12 (I) The child in question cannot reliably testify without the
13 support person in his or her possession; and

14 (ii) Allowing the support person is not likely to prejudice
15 the trier of fact in hearing and evaluating the child's testimony.

16 (C) The support person may not obscure the child from the view
17 of the parties or the trier of fact. The support person may not
18 provide the child with an answer to any question directed to the
19 child during the course of the child's testimony or otherwise
20 prompt the child or otherwise influence the testimony of the child.

21 (D) If the support person attempts to influence or affect in
22 any manner the testimony of the child at any time the court shall
23 exclude that support person.

24 (4) Upon motion by any party to the proceeding or upon its own

1 motion, the court may order such accommodations as are appropriate
2 under the circumstances to ensure the comfort of a child witness,
3 including, but not limited to, the following measures:

4 (A) Adjusting the layout of the courtroom or hearing room;

5 (B) Conducting the proceedings outside the normal courtroom;

6 (C) Relaxing the formalities of the proceedings;

7 (D) Permitting properly-trained facility animals to be present
8 in the hearing; or

9 (E) Permitting the use of a properly constructed screen, which
10 would permit the persons in the courtroom or hearing room to see
11 the child but would obscure the child's view of the parties.

12 (5) In circumstances where a party has chosen to proceed
13 without counsel, the court may appoint stand-by counsel for that
14 party and may order stand-by counsel to question a child witness on
15 behalf of the pro se party, if the court finds that there is a
16 substantial likelihood that emotional harm would come to the child
17 if the pro se party were allowed to question the child directly.

18 (6) The court shall encourage and permit the use of
19 age-appropriate and developmentally-appropriate language, both in
20 questions to the child witness and also in explanations of the
21 court process for the child witness.

22 (7) If the child is also an alleged victim of physical abuse,
23 sexual abuse, or neglect, the court shall ensure that all steps
24 necessary to secure the physical safety of the child, both in the

1 courtroom and during periods of time that the child may spend
2 waiting in court, have been taken.

3 (8) The court shall take all steps necessary to ensure that
4 any sensitive information, including address or physical location
5 of the child witness and the immediate family of the child witness,
6 remains confidential.

7 (9) For any case in which the child witness is alleged to have
8 been emotionally, sexually and/or physically abused, the child
9 shall be given notice of pretrial discovery motions, with such
10 notice being required to be given in sufficient time to allow the
11 guardian ad litem or counsel for the child to file any pleadings
12 deemed appropriate to the situation.

13 **§61-11-28. Findings of fact required for taking testimony of a**
14 **child witness by closed-circuit television;**
15 **considerations for the court.**

16 (a) Upon a written motion filed by the prosecuting attorney,
17 the child's attorney or the child's guardian ad litem, and upon
18 findings of fact determined pursuant to subsection (b) of this
19 section, a circuit court may order that the testimony of a child
20 witness may be taken at a pretrial proceeding or at trial through
21 the use of live, closed-circuit television.

22 (b) Prior to ordering that the testimony of a child witness
23 may be taken through the use of live, closed-circuit television,
24 the circuit court must find by clear and convincing evidence, after

1 conducting an evidentiary hearing on this issue, that:

2 (1) The child is an otherwise competent witness;

3 (2) The use of live, closed-circuit television is necessary to
4 protect the welfare of the child witness; and

5 (3) The child witness is unable to testify because:

6 (A) The fear of doing so in the physical presence of the
7 defendant;

8 (B) The child witness would be harmed by testifying in the
9 physical presence of the defendant; or

10 (C) Conduct by the defendant or defense counsel causes the
11 child witness to be unable to testify.

12 **§61-11-29. Procedure to be used in the taking of testimony of a**
13 **child witness by closed-circuit television.**

14 (a) If the court determines that the use of live,
15 closed-circuit testimony is necessary and orders its use, the
16 defendant or defendants or respondents may, at any time prior to
17 the child witness being called, elect to absent himself or herself
18 from the courtroom during the child witness' testimony. If the
19 party elects to do so, the child may be required to testify in the
20 courtroom.

21 (b) If live, closed-circuit television is used in the
22 testimony of a child witness, the child witness will be televised
23 live by closed-circuit equipment to the view of the defendant,
24 counsel and the court. The prosecuting attorney, the attorneys for

1 each party in the case, including counsel for the child or
2 guardians ad litem for the child or children involved in this case,
3 and the operator of the equipment shall be present in the room with
4 the child during the testimony. The only other persons permitted
5 to be physically present in the room with the child are the
6 judicial officer, a forensic interviewer appointed by the court to
7 act as a resource for the court, and a support person for the child
8 witness.

9 (c) Only the court, the prosecuting attorney, the attorneys
10 for the parties, the guardians ad litem, and the forensic
11 interviewer, if one is appointed by the court to act as a resource
12 for the court, may question the child.

13 (d) The court shall permit the excluded party or parties to
14 observe and hear the testimony of the child witness contemporaneous
15 with the taking of the testimony. The court shall provide
16 electronic means for the party or parties to confer confidentially
17 during the taking of the testimony, either by the taking of breaks
18 or by the use of a computer or telephone.

19 **§61-11-30. Protection of recordings made of statements of child**
20 **witnesses.**

21 (a) Upon the filing of an action pursuant to this chapter, any
22 videotape or other type of recording of a statement of a child
23 witness concerning matters that are the subject of this court
24 proceeding is the property of the court for the purpose of

1 protecting the privacy of the child. The recordings shall be made
2 available to counsel and the parties for viewing purposes, but may
3 not be duplicated without an order of the court which specifies to
4 whom the duplicate records are to be given, the purpose of the use
5 of the recording by that individual. The order shall also prohibit
6 the recording from being shown to unauthorized individuals,
7 prohibit the recording from being duplicated and require the return
8 to the court of all copies of the recording at the conclusion of
9 the stated purpose.

10 (b) Upon return of the recording to the court, the recording
11 shall be placed in a sealed file within the court's official file.

NOTE: The purpose of this bill is to procedures and protections for child witnesses in domestic relations, child abuse and neglect and criminal proceedings. The bill sets forth the rights of child witnesses. The bill establishes the procedure and safeguards to be used when taking testimony of a child witness. The bill permits a court in certain instances to permit a child witness to give testimony by closed-circuit television. The bill establishes the procedure to be used when taking testimony of a child witness by closed-circuit television. The bill protects recordings made of statements by child witnesses. The bill provides for confidentiality. The bill provides for instances when the child witness is also a victim. The bill permits a support person for a child witness.

The bill repeals §62-6B-2, §62-6B-3 and §62-6B-4.

§48-1-308, §48-1-309, §48-1-310, §48-1-311, §49-1A-1, §49-1A-2, §61-11-27, §61-11-28, §61-11-29 and §61-11-30 are new; therefore, they have been completely underscored.