

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Introduced

Senate Bill 52

BY SENATOR FERNS

[Introduced January 13, 2016;

Referred to the Committee on the Judiciary.]

1 A BILL to amend and reenact §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia,
 2 1931, as amended, all relating to modifying requirements that allow a child witness to
 3 testify by closed circuit television.

Be it enacted by the Legislature of West Virginia:

1 That §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia, 1931, as amended,
 2 be amended and reenacted, all to read as follows:

**ARTICLE 6B. PROTECTION AND PRESERVATION OF STATEMENTS AND
 TESTIMONY OF CHILD WITNESS.**

§62-6B-2. Definitions.

1 For the purposes of this article, the words or terms defined in this section, and any variation
 2 of those words or terms required by the context, have the meanings ascribed to them in this
 3 section. These definitions are applicable unless a different meaning clearly appears from the
 4 context.

5 (1) "Child witness" means:

6 (A) A person under the age of sixteen years of age who is or will be called to testify in a
 7 criminal matter concerning an alleged violation of the provisions of sections three, four, five and
 8 seven, article eight-b, chapter sixty-one of this code in which the child is the alleged victim; or,

9 (B) A witness with an intellectual disability that causes them to function similarly to
 10 someone under the age of sixteen, as establish by competent expert testimony.

11 (2) "Live, closed-circuit television" means a simultaneous transmission, by closed-circuit
 12 television or other electronic means, between the courtroom and the testimonial room, such that
 13 the witness is visible on monitors in the courtroom, but the courtroom and the defendant are not
 14 visible to the witness in the testimonial room.

15 (3) "Operator" means the individual authorized by the court to operate the closed-circuit
 16 television equipment used in accordance with the provisions of this article.

17 (4) "Testimonial room" means a room within the courthouse other than the courtroom from
 18 which the testimony of a child witness ~~or the defendant~~ is transmitted to the courtroom by means
 19 of live, closed-circuit television.

§62-6B-3. Findings of fact required for taking testimony of child witness by closed-circuit television; considerations for court.

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

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

8 (1) ~~The child is an otherwise competent witness~~ is otherwise competent to testify;

9 ~~(2) That, absent the use of live, closed-circuit television the child witness will be unable to~~
 10 ~~testify due solely to being required to be in the physical presence of the defendant while testifying;~~

11 (2) The use of live, closed circuit television is necessary to protect the welfare of the
 12 particular child witness who seeks to testify;

13 ~~(3) The child witness can only testify if live, two-way closed-circuit television is used in the~~
 14 ~~trial; and~~

15 ~~(4) That the state's ability to proceed against the defendant without the child witness' live~~
 16 ~~testimony would be substantially impaired or precluded.~~

17 (3) Requiring the child witness to testify in the physical presence of the defendant would
 18 result in substantial emotional distress to the child which would impair the ability of the child
 19 witness to truthful and effectively communicate; and

20 (4) The emotional distress which would be suffered by the child witness in the presence
21 of the defendant is more than nervousness, excitement, or general reluctance to testify.

22 ~~(c) The court shall consider the following factors in determining the necessity of allowing~~
23 ~~a child witness to testify by the use of live, closed-circuit television:~~

24 ~~(1) The age and maturity of the child witness;~~

25 ~~(2) The facts and circumstances of the alleged offense;~~

26 ~~(3) The necessity of the child's live testimony to the prosecution's ability to proceed as well~~
27 ~~as any prejudice to the defendant by allowing testimony through closed-circuit television;~~

28 ~~(4) Whether or not the facts of the case involve the alleged infliction of bodily injury to the~~
29 ~~child witness or the threat of bodily injury to the child or another; and~~

30 ~~(5) Any mental or physical handicap of the child witness.~~

31 ~~(d) (c)~~ In determining whether to allow a child witness to testify through live, closed-circuit
32 television the court shall may appoint a psychiatrist, or a licensed psychologist with at least five
33 years clinical experience ~~who shall serve as an advisor or friend of the court to provide the court~~
34 ~~with an expert opinion as to whether, to a reasonable degree of professional certainty, the child~~
35 ~~witness will suffer severe emotional harm, be unable to testify based solely on being in the~~
36 ~~physical presence of the defendant while testifying and that the child witness does not evidence~~
37 ~~signs of being subjected to undue influence or coercion. The opinion of the psychiatrist or licensed~~
38 ~~psychologist shall be filed with the circuit court at least thirty days prior to the final hearing on the~~
39 ~~use of live, closed-circuit television and the defendant shall be allowed to review the opinion and~~
40 ~~present evidence on the issue by the use of an expert or experts or otherwise or a licensed clinical~~
41 ~~social worker with at least five years of significant clinical experience in the treatment and~~
42 ~~evaluation of children for the purpose of providing the court with an expert opinion regarding the~~
43 ~~factors set forth in subsection (b) above.~~

§62-6B-4. Procedures required for taking testimony of child witness by closed-circuit television; election of defendant; jury instruction; sanction for failure to follow procedures; additional accommodation options; recordings and confidentiality.

1 (a) If live, closed-circuit television is used in the testimony of the child witness, he or she
2 shall be taken into the testimonial room and be televised live, by closed-circuit equipment to the
3 view of the defendant, counsel, the court and, if applicable, the jury. The live, closed circuit
4 television testimony shall be presented to the jury such that the jury has a clear image of the
5 witness and all counsel present in the testimonial room. The prosecuting attorney, the attorney
6 for the defendant, the attorney for the child and the operator of the equipment may be present in
7 the room with the child witness during testimony.

8 (b) Only the court, the prosecuting attorney and the attorney for the defendant may
9 question the child. In proceedings where the defendant has elected to proceed prose, the court
10 shall appoint an attorney to represent the defendant for the limited purpose of questioning the
11 child witness. The court shall permit the defendant to observe and hear the testimony of the child
12 witness contemporaneous with the taking of the testimony. The court shall provide electronic
13 means for the defendant and the attorney for the defendant to confer confidentially during the
14 taking of the testimony.

15 (c) In every case where the provisions of the article are used, the jury, at a minimum, shall
16 be instructed, unless such instruction is waived by the defendant, that the use of live, closed-
17 circuit television is being used solely for the child's convenience, that the use of the medium
18 cannot as a matter of law and fact be considered as anything other than being for the convenience
19 of the child witness and that to infer anything else would constitute a violation of the oath taken
20 by the jurors. Counsel shall be prohibited from commenting in the presence of the jury upon the
21 decision to utilize closed circuit television.

22 (d) If the child is a victim, the court shall ensure that all steps necessary to secure the
23 physical safety of the child while in the courtroom, the testimonial room, and during periods of
24 time that the child may spend waiting prior or subsequent to testifying have been taken.

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

28 (f) The court may, upon motion made by the child's representative or any party to the
29 proceeding and upon a finding by the court that the accommodation will assist the child witness
30 in testifying effectively and that the accommodation will not cause unfair prejudice, grant the
31 following accommodations to a child witness who testifies in court rather than by live, closed circuit
32 television;

33 (1) The court may allow the child witness to have a toy, blanket or similar item in his or her
34 possession while testifying; and

35 (2) The court may designate a support person, who shall be seated in the courtroom, in
36 view of the child witness either at one of the counsel tables, in the first row of seating for the
37 general public or in some other similar seating location. The support person may not provide the
38 child with an answer to any question directed to the child witness during the course of the child's
39 testimony or otherwise prompt the child or influence the testimony of the child witness. If the
40 support person attempts to influence the testimony of the child witness at any time the court may
41 exclude that support person. If the support person does not obscure the child witness from the
42 view of the parties, the judge or the jury, the court may allow the support person to remain in close
43 proximity to the child witness during the child's testimony if:

44 (A) All the parties agree; or

45 (B) The movant proves by clear and convincing evidence that:

46 (l) The child witness in question cannot reliably testify without the support person in his or
47 her presence;

48 (ii) No other alternative to having the support person in his or her presence would allow
49 the child witness to reliably testify; and

50 (iii) The presence of the support person is not likely to prejudice the trier of fact in hearing
51 and evaluating the child witness's testimony.

NOTE: The purpose of this bill is to clarify the procedure for a child witness to provide testimony in a criminal action where the child is a victim and when his or her testimony cannot be reliably obtained in the presence of the defendant.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

Section 62-6B-4 has been completely rewritten; therefore, it has been completely underscored.