

COMMITTEE SUBSTITUTE

for

H. B. 2828

(BY DELEGATE(S) COWLES, STORCH,
MILLER, BORDER, SHOTT AND UPSON)

(Originating in the House Committee on the Judiciary)

[February 24, 2015]

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

Be it enacted by the Legislature of West Virginia:

That §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of West Virginia, 1931, as amended, 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
2 in this section, and any variation of those words or terms
3 required by the context, have the meanings ascribed to them in
4 this section. These definitions are applicable unless a different
5 meaning clearly appears from the context.

6 (1) “Child witness” means a person under the age of sixteen
7 years of age, or who has an intellectual disability that causes the
8 person to function under the age of sixteen, who is or will be
9 called to testify in a criminal matter concerning an alleged
10 violation of the provisions of ~~sections three, four, five and seven,~~
11 article eight-b, article eight-c, or article eight-d of chapter
12 sixty-one of this code in which the child is the alleged victim.

13 (2) “Live, closed-circuit television” means a simultaneous
14 transmission, by one-way closed-circuit television or other
15 electronic means, between the courtroom and the testimonial
16 room, such that the witness is visible on monitors in the
17 courtroom, but the courtroom and the defendant are not visible
18 to the witness in the testimonial room.

19 (3) “Operator” means the individual authorized by the court
20 to operate the closed-circuit television equipment used in
21 accordance with the provisions of this article.

22 (4) “Testimonial room” means a room within the courthouse
23 other than the courtroom from which the testimony of a child
24 witness ~~or the defendant~~ is transmitted to the courtroom by
25 means 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~~ of the prosecuting
2 attorney, the child’s attorney or the child’s guardian ad litem,
3 and upon findings of fact determined pursuant to subsection (b)
4 of this section, a circuit court may order that the testimony of a
5 child witness may be taken at a pretrial proceeding or at trial
6 through the use of live, closed-circuit television.

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

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

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

17 The use of live, closed circuit television is necessary to
18 protect the welfare of the particular child witness who seeks to
19 testify;

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

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

25 (3) Requiring the child witness to testify in the physical
26 presence of the defendant would result in substantial emotional
27 distress to the child which would impair the ability of the child
28 witness to truthfully and effectively communicate; and

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

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

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

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

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

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

44 ~~(5)~~ (3) Any mental or physical handicap of the child witness.

45 (d) In determining whether to allow a child witness to testify
46 through live, closed-circuit television the court ~~shall~~ may appoint
47 a psychiatrist, ~~or~~ a licensed psychologist with at least five years
48 clinical experience ~~who shall serve as an advisor or friend of the~~
49 ~~court to provide the court with an expert opinion as to whether,~~
50 ~~to a reasonable degree of professional certainty, the child witness~~
51 ~~will suffer severe emotional harm, be unable to testify based~~

52 solely on being in the physical presence of the defendant while
53 testifying and that the child witness does not evidence signs of
54 being subjected to undue influence or coercion. The opinion of
55 the psychiatrist or licensed psychologist shall be filed with the
56 circuit court at least thirty days prior to the final hearing on the
57 use of live, closed-circuit television and the defendant shall be
58 allowed to review the opinion and present evidence on the issue
59 by the use of an expert or experts or otherwise or a licensed
60 clinical social worker with at least five years of significant
61 clinical experience in the treatment and evaluation of children
62 for the purpose of providing the court with an expert opinion
63 regarding the factors set forth in subsection (b) and (c) above.

64 (d) (e) Not less than thirty days prior to the evidentiary
65 hearing provided for in subsection (b) above, the expert witness
66 appointed by the court shall file with the court a written report
67 outlining the substance of the facts and opinions to which such
68 expert intends to testify, together with a summary of the grounds
69 for each opinion. Failure to file such report within the time
70 provided for does not constitute grounds for a denial of the
71 motion for taking the testimony of the child witness by closed-

72 circuit television, but may, in the discretion of the court,
73 constitute grounds for a continuance of the evidentiary hearing.

§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
2 of the child witness, he or she shall be taken into the testimonial
3 room and be televised live, by closed-circuit equipment to the
4 view of the defendant, counsel, the court and, if applicable, the
5 jury. The live, closed circuit television testimony shall be
6 presented to the jury such that the jury has a clear image of the
7 witness and all counsel present in the testimonial room. The
8 prosecuting attorney, the attorney for the defendant, the attorney
9 for the child and the operator of the equipment may be present
10 in the room with the child witness during testimony. The court
11 may authorize the presence of other persons in the testimonial
12 room upon good cause shown.

13 (b) Only the court, the prosecuting attorney and the attorney
14 for the defendant may question the child. In proceedings where
15 the defendant has elected to proceed *pro se*, the court shall

16 appoint an attorney to represent the defendant for the limited
17 purpose of questioning the child witness. The court shall permit
18 the defendant to observe and hear the testimony of the child
19 witness contemporaneous with the taking of the testimony. The
20 court shall provide electronic means for the defendant and the
21 attorney for the defendant to confer confidentially during the
22 taking of the testimony.

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

33 (d) If the child is a victim, the court shall ensure that all
34 steps necessary to secure the physical safety of the child while
35 in the courtroom, the testimonial room, and during periods of

36 time that the child may spend waiting prior or subsequent to
37 testifying have been taken.

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

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

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

52 (2) The court may designate a support person, who shall be
53 seated in the courtroom, in view of the child witness either at one
54 of the counsel tables, in the first row of seating for the general
55 public or in some other similar seating location. The support

56 person may not provide the child with an answer to any question
57 directed to the child witness during the course of the child's
58 testimony or otherwise prompt the child or influence the
59 testimony of the child witness. If the support person attempts to
60 influence the testimony of the child witness at any time the court
61 may exclude that support person. If the support person does not
62 obscure the child witness from the view of the parties, the judge
63 or the jury, the court may allow the support person to remain in
64 close proximity to the child witness during the child's testimony
65 if:

66 (A) All the parties agree; or

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

69 (i) The child witness in question cannot reliably testify
70 without the support person in his or her presence;

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

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

