

Senate Bill No. 461

(By Senators Cookman, Beach, Fitzsimmons, D. Hall, Jenkins,
Laird, Williams, Unger, Kessler (Mr. President), Stollings,
Chafin, Miller, Snyder, Plymale and Palumbo)

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

A BILL to repeal §62-6B-2, §62-6B-3 and §62-6B-4 of the Code of
West Virginia, 1931, as amended; to amend said code by adding
thereto four new sections, designated §48-1-308, §48-1-309,
§48-1-310 and §48-1-311; to amend said code by adding thereto
a new article, designated §49-1A-1 and §49-1A-2; and to amend
said code by adding thereto four new sections, designated
§61-11-27, §61-11-28, §61-11-29 and §61-11-30, all relating to
procedures and protections for child witnesses in domestic
relations, child abuse and neglect and criminal proceedings;
setting forth the rights of child witnesses; establishing the
procedure and safeguards to be used when taking testimony of
a child witness; permitting a court in certain instances to
permit a child witness to give testimony by closed-circuit
television; establishing the procedure to be used when taking
testimony of a child witness by closed-circuit television;
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6 Virginia, 1931, as amended, be repealed; that said code be amended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 new 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
24 may order temporary breaks in the proceedings when the energy,
25 comfort, or attention span of the child warrants;

26 (2) Upon motion made by the child, his or her representative,

1 or any party to the proceeding, the court may allow the child to
2 have a toy, blanket or similar item in his or her possession while
3 testifying.

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

10 (A) All parties agree; or

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

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

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

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

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

25 (4) Upon motion by any party to the proceeding or upon its own
26 motion, the court may order such accommodations as are appropriate

1 under the circumstances to ensure the comfort of a child witness,
2 including, but not limited to, the following measures:

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

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

5 (C) Relaxing the formalities of the proceedings;

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

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

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

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

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

25 (8) The court shall take all steps necessary to ensure that
26 any sensitive information, including address or physical location

1 of the child witness, child witness and/or the immediate family of
2 the child witness, remains confidential.

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

9 **§48-1-309. Findings of fact required for taking testimony of a**
10 **child witness by closed-circuit television;**
11 **considerations for the court.**

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

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

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

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

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

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

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

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

5 **§48-1-310. Procedure to be used in the taking of testimony of a**
6 **child witness by closed-circuit television.**

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

13 (b) If live, closed-circuit television is used in the
14 testimony of a child witness, the child witness will be televised
15 live by closed-circuit equipment to the view of the parties,
16 counsel, and the court. The attorneys for each party in the case,
17 including counsel for the child or guardians ad litem for the child
18 or children involved in the case, if applicable, and the operator
19 of the equipment shall be present in the room with the child during
20 the testimony. The only other persons permitted to be physically
21 present in the room with the child are the judicial officer, a
22 forensic interviewer appointed by the court to act as a resource
23 for the court, and a support person for the child witness.

24 (c) Only the court, the attorneys for the parties, the
25 guardians ad litem, if applicable, and the forensic interviewer, if
26 one is appointed by the court to act as a resource for the court,

1 may question the child.

2 (d) The court shall permit the excluded party or parties to
3 observe and hear the testimony of the child witness contemporaneous
4 with the taking of the testimony. The court shall provide
5 electronic means for the party or parties to confer confidentially
6 during the taking of the testimony, either by the taking of breaks
7 or by the use of a computer or telephone.

8 **§48-1-311. Protection of recordings made of statements of child**
9 **witnesses.**

10 (a) Upon the filing of an action pursuant to this chapter, any
11 videotape or other type of recording of a statement of a child
12 witness concerning matters that are the subject of that court
13 proceeding is the property of the court for the purpose of
14 protecting the privacy of the child. Those recordings shall be
15 made available to counsel and the parties for viewing purposes, but
16 may not be duplicated without an order of the court which specifies
17 to whom the duplicate records are to be given and the purpose of
18 the use of the recording by that individual. The order shall also
19 prohibit the recording from being shown to unauthorized
20 individuals, prohibit the recording from being duplicated and
21 require the return to the court of all copies of the recording at
22 the conclusion of the stated purpose.

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

25 **CHAPTER 49. CHILD WELFARE.**

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

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

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

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

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

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

22 (A) All parties agree; or

23 (B) If the movant shows the court by a preponderance of
24 evidence that:

25 (i) The child in question cannot reliably testify without the
26 support person in his or her possession; and

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

3 (C) The support person may not obscure the child from the view
4 of the parties or the trier of fact. The support person may not
5 provide the child with an answer to any question directed to the
6 child during the course of the child's testimony or otherwise
7 prompt the child or otherwise influence the testimony of the child.

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

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

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

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

17 (C) Relaxing the formalities of the proceedings;

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

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

23 (5) In circumstances where a party has chosen to proceed
24 without counsel, the court may appoint stand-by counsel for that
25 party and may order stand-by counsel to question a child witness on
26 behalf of the pro se party, if the court finds that there is a

1 substantial likelihood that emotional harm would come to the child
2 if the pro se party were allowed to question the child directly.

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

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

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

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

22 **§49-1A-2. Protection of recordings made of statements of child**
23 **witnesses.**

24 (a) Upon the filing of an action pursuant to this chapter, any
25 videotape or other type of recording of a statement of a child
26 witness concerning matters that are the subject of this court

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

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

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

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

15 **§61-11-27. 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
24 may order temporary breaks in the proceedings when the energy,
25 comfort or attention span of the child warrants;

26 (2) Upon motion made by the child, his or her representative,

1 or any party to the proceeding, the court may allow the child to
2 have a toy, blanket, or similar item in his or her possession while
3 testifying.

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

10 (A) All parties agree; or

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

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

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

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

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

25 (4) Upon motion by any party to the proceeding or upon its own
26 motion, the court may order such accommodations as are appropriate

1 under the circumstances to ensure the comfort of a child witness,
2 including, but not limited to, the following measures:

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

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

5 (C) Relaxing the formalities of the proceedings;

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

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

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

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

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

26 (8) The court shall take all steps necessary to ensure that

1 any sensitive information, including address or physical location
2 of the child witness and the immediate family of the child witness,
3 remains confidential.

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

10 **§61-11-28. Findings of fact required for taking testimony of a**
11 **child witness by closed-circuit television;**
12 **considerations for the court.**

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

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

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

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

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

1 (A) The fear of doing so in the physical presence of the
2 defendant;

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

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

7 **§61-11-29. Procedure to be used in the taking of testimony of a**
8 **child witness by closed-circuit television.**

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

16 (b) If live, closed-circuit television is used in the
17 testimony of a child witness, the child witness will be televised
18 live by closed-circuit equipment to the view of the defendant,
19 counsel and the court. The prosecuting attorney, the attorneys for
20 each party in the case, including counsel for the child or
21 guardians ad litem for the child or children involved in this case,
22 and the operator of the equipment shall be present in the room with
23 the child during the testimony. The only other persons permitted
24 to be physically present in the room with the child are the
25 judicial officer, a forensic interviewer appointed by the court to
26 act as a resource for the court, and a support person for the child

1 witness.

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

6 (d) The court shall permit the excluded party or parties to
7 observe and hear the testimony of the child witness contemporaneous
8 with the taking of the testimony. The court shall provide
9 electronic means for the party or parties to confer confidentially
10 during the taking of the testimony, either by the taking of breaks
11 or by the use of a computer or telephone.

12 **§61-11-30. Protection of recordings made of statements of child**
13 **witnesses.**

14 (a) Upon the filing of an action pursuant to this chapter, any
15 videotape or other type of recording of a statement of a child
16 witness concerning matters that are the subject of this court
17 proceeding is the property of the court for the purpose of
18 protecting the privacy of the child. The recordings shall be made
19 available to counsel and the parties for viewing purposes, but may
20 not be duplicated without an order of the court which specifies to
21 whom the duplicate records are to be given, the purpose of the use
22 of the recording by that individual. The order shall also prohibit
23 the recording from being shown to unauthorized individuals,
24 prohibit the recording from being duplicated and require the return
25 to the court of all copies of the recording at the conclusion of
26 the stated purpose.

1 (b) Upon return of the recording to the court, the recording
2 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, strike-throughs and underscoring have been omitted.