

No. 2004-87

AN ACT

SB 979

Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, further providing for declaration of policy; defining "contemporaneous alternative method"; repealing provisions relating to videotaped depositions by a child victim or child material witness; further providing for recorded testimony, for testimony by contemporaneous alternative methods, for admissibility of certain statements, for hearsay, for use of dolls, for child victims of sexual or physical abuse and for comparative negligence.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 5981 of Title 42 of the Pennsylvania Consolidated Statutes is amended to read:

§ 5981. Declaration of policy.

In order to promote the best interests of the children of this Commonwealth, especially those children who are material witnesses to or victims of crimes, **[and in order to implement the constitutional amendment adopted on November 7, 1995,]** the General Assembly declares its intent, in this subchapter, to provide these children, where necessity is shown, procedures which will protect them during their involvement with the criminal justice system. The General Assembly urges the news media to use significant restraint and caution in revealing the identity or address of children who are victims of or witnesses to crimes or other information that would reveal the name or address of the child victim or witness.

Section 2. Section 5982 of Title 42 is amended by adding a definition to read:

§ 5982. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

"Contemporaneous alternative method." Any method of capturing the visual images, oral communications and other information presented during a prosecution or adjudication involving a child victim or a child material witness and transmitting and receiving such images, communications and other information at or about the time of their creation, including, but not limited to, closed-circuit television, streaming image sent via the Internet or an intranet and any other devices or systems used to accomplish such ends.

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Section 3. Section 5984 of Title 42 is repealed.

Section 4. Sections 5984.1, 5985, 5985.1, 5986, 5987 and 5988 of Title 42 are amended to read:

§ 5984.1. **[Testimony by videotaped recording.] Recorded testimony.**

(a) **[Videotape] Recording.**—Subject to subsection (b), in any prosecution or adjudication involving a child victim or child material witness, the court may order **[the taking of] that** the child victim's or child material witness's testimony **[by videotaped recording.] be recorded for presentation in court by any method that accurately captures and preserves the visual images, oral communications and other information presented during such testimony.** The testimony shall be taken under oath or affirmation before the court in chambers or in a special facility designed for taking the **[videotaped] recorded** testimony of children. Only the attorneys for the defendant and for the Commonwealth, persons necessary to operate the equipment, a qualified shorthand reporter and any person whose presence would contribute to the welfare and well-being of the child *victim or child material witness*, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during testimony. The court shall permit the defendant to observe and hear the testimony of the child *victim or child material witness* but shall ensure that the child *victim or material witness* cannot hear or see the defendant. Examination and cross-examination of the child *victim or child material witness* shall proceed in the same manner as **[permitted at trial] normally permitted.** The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purpose of providing an effective defense.

(b) Determination.—Before the court orders the child victim or the child material witness to testify by **[videotaped recording] recorded testimony**, the court must determine, based on evidence presented to it, that testifying *either in an open forum in the presence and full view of the finder of fact or in the defendant's presence* will result in the child *victim or child material witness* suffering serious emotional distress **[such that the child victim] that would substantially impair the child victim's or child material [witness cannot reasonably] witness's ability to reasonably** communicate. In making this determination, the court may do any of the following:

(1) Observe and question the child victim or child material witness, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(c) Counsel and confrontation.—

(1) If the court observes or questions the child victim or child material witness under subsection (b)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.

(2) If the court hears testimony under subsection (b)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

[(d) Effect of order.—If the court orders the testimony of a child to be taken under subsection (a), the child may not be required to testify in court at the proceeding for which the testimony was taken.]

§ 5985. Testimony by **[closed-circuit television]** *contemporaneous alternative method*.

(a) **[Closed-circuit television]** *Contemporaneous alternative method*.—Subject to subsection (a.1), in any prosecution or adjudication involving a child victim or a child material witness, the court may order that the testimony of the child victim or child material witness be taken under oath or affirmation in a room other than the courtroom and **[televised by closed-circuit equipment to be viewed by the court and the finder of fact in the proceeding]** *transmitted by a contemporaneous alternative method*. Only the attorneys for the defendant and for the Commonwealth, the court reporter, the judge, persons necessary to operate the equipment and any person whose presence would contribute to the welfare and well-being of the child *victim or child material witness*, including persons designated under section 5983 (relating to rights and services), may be present in the room with the child during his testimony. The court shall permit the defendant to observe and hear the testimony of the child *victim or child material witness* but shall ensure that the child cannot hear or see the defendant. The court shall make certain that the defendant and defense counsel have adequate opportunity to communicate for the purposes of providing an effective defense. Examination and cross-examination of the child *victim or child material witness* shall proceed in the same manner as *normally* permitted **[at trial]**.

(a.1) Determination.—Before the court orders the child victim or the child material witness to testify by **[closed-circuit television]** *a contemporaneous alternative method*, the court must determine, based on evidence presented to it, that testifying *either in an open forum in the presence and full view of the finder of fact or* in the defendant's presence will result in the child *victim or child material witness* suffering serious emotional distress **[such that the child victim]** *that would substantially impair the child victim's* or child material **[witness cannot]** *witness's ability to* reasonably communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child victim or child material witness, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.

(a.2) Counsel and confrontation.—

(1) If the court observes or questions the child victim or child material witness under subsection (a.1)(1), the attorney for the defendant and the attorney for the Commonwealth have the right to be present, but the court shall not permit the defendant to be present.

(2) If the court hears testimony under subsection (a.1)(2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

[(b) Effect of order.—If the court orders the testimony of a child to be taken under subsection (a), the child may not be required to testify in court at the proceeding for which the testimony was taken.]

§ 5985.1. Admissibility of certain statements.

(a) General rule.—An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing **[physical abuse, indecent contact or]** any of the offenses enumerated in **[18 Pa.C.S. Ch. 31 (relating to sexual offenses) performed with or on the child by another,] 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery)**, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is unavailable as a witness.

(a.1) Emotional distress.—**[Before the court makes a finding under subsection (a)(2)(ii),] In order to make a finding under subsection (a)(2)(ii) that the child is unavailable as a witness**, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress **[such that the child cannot reasonably] that would substantially impair the child's ability to reasonably** communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child **[victim or child material witness]**, either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child **[victim or child material witness]** in a medical or therapeutic setting.

(a.2) Counsel and confrontation.—If the court hears testimony in connection with making a finding under subsection (a)(2)(ii), all of the following apply:

(1) Except as provided in paragraph (2), the defendant, the attorney for the defendant and the attorney for the Commonwealth or, in the case

of a civil proceeding, the attorney for the plaintiff has the right to be present.

(2) If the court observes or questions the child, the court shall not permit the defendant to be present.

(b) Notice required.—A statement otherwise admissible under subsection (a) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

§ 5986. Hearsay.

(a) General rule.—A statement made by a child describing acts and attempted acts of indecent contact, sexual intercourse or deviate sexual intercourse performed with or on the child by another, not otherwise admissible by statute or court ruling, is admissible in evidence in a dependency proceeding initiated under Chapter 63 (relating to juvenile matters), involving that child or other members of that child's family, if:

(1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(i) testifies at the proceeding; or

(ii) is found by the court to be unavailable as a witness.

(b) Emotional distress.—In order to make a finding under subsection (a)(2)(ii) that the child is unavailable as a witness, the court must determine, based on evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress [**such that the child cannot reasonably**] *that would substantially impair the child's ability to reasonably* communicate. In making this determination, the court may do all of the following:

(1) Observe and question the child [**victim or child material witness**], either inside or outside the courtroom.

(2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child [**victim or child material witness**] in a medical or therapeutic setting.

(c) Counsel and confrontation.—If the court hears testimony in connection with making a finding under subsection (a)(2)(ii), all of the following apply:

(1) Except as provided in paragraph (2), the defendant, the attorney for the defendant and the attorney for the Commonwealth have the right to be present.

(2) If the court observes or questions the child, the court shall not permit the defendant to be present.

§ 5987. Use of dolls.

In any criminal proceeding charging physical abuse, indecent contact or any of the offenses enumerated in 18 Pa.C.S. Ch. 31 (relating to sexual offenses), the court shall permit the use of anatomically correct dolls or mannequins to assist **[an alleged victim] a child** in testifying on direct examination and cross-examination.

§ 5988. Victims of sexual or physical abuse.

(a) Release of name prohibited.—**[In] *Notwithstanding any other provision of law to the contrary, in*** a prosecution involving a child victim of sexual or physical abuse, unless the court otherwise orders, the name of the child victim shall not be disclosed by officers or employees of the court to the public, and any records revealing the name of the child victim will not be open to public inspection.

(b) Penalty.—Any person who violates this section commits a misdemeanor of the third degree.

Section 5. Section 7102(d) of Title 42 is amended and the section is amended by adding a subsection to read:

§ 7102. Comparative negligence.

* * *

(b.3) *Off-road vehicle riding.*—

(1) *Off-road vehicle riding area operators shall have no duty to protect riders from common, frequent, expected and nonnegligent risks inherent to the activity, including collisions with riders or objects.*

(2) *The doctrine of knowing voluntary assumption of risk shall apply to all actions to recover damages for negligence resulting in death or injury to person or property brought against any off-road vehicle riding area operator.*

(3) *Nothing in this subsection shall be construed in any way to abolish or modify a cause of action against a potentially responsible party other than an off-road vehicle riding area operator.*

* * *

(d) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

“Defendant or defendants.” Includes impleaded defendants.

“***Off-road vehicle.***” ***A motorized vehicle that is used off-road for sport or recreation. The term includes snowmobiles, all-terrain vehicles, motorcycles and four-wheel drive vehicles.***

“***Off-road vehicle riding area.***” ***Any area or facility providing recreational activities for off-road vehicles.***

“***Off-road vehicle riding area operator.***” ***A person or organization owning or having operational responsibility for any off-road vehicle riding area. The term includes:***

(1) *Agencies and political subdivisions of this Commonwealth.*

(2) *Authorities created by political subdivisions.*

(3) *Private companies.*

“Plaintiff.” Includes counter claimants and cross-claimants.

Section 6. This act shall take effect immediately.

APPROVED—The 15th day of July, A.D. 2004.

EDWARD G. RENDELL