

1 HOUSE BILL 173

2 **56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023**

3 INTRODUCED BY

4 Tara Jaramillo and Meredith A. Dixon and Jason C. Harper  
5 and Andrea Reeb  
6  
7  
8  
9

10 AN ACT

11 RELATING TO TRIAL PROCEDURE; CHANGING THE NAME OF THE UNIFORM  
12 CHILD WITNESS PROTECTIVE MEASURES ACT TO THE CHILD AND  
13 ADJUDICATED INCAPACITATED ADULT WITNESS PROTECTIVE MEASURES  
14 ACT; ALLOWING A VICTIM THE RIGHT TO DENY A PRETRIAL STATEMENT  
15 OR PRETRIAL INTERVIEW PURSUANT TO THE CHILD AND ADJUDICATED  
16 INCAPACITATED ADULT WITNESS PROTECTIVE MEASURES ACT; PROVIDING  
17 FOR THE ADMISSIBILITY OF A CHILD'S OR ADJUDICATED INCAPACITATED  
18 ADULT'S FORENSIC INTERVIEW IN CERTAIN CIRCUMSTANCES; AMENDING  
19 THE UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT TO INCLUDE  
20 ADJUDICATED INCAPACITATED ADULTS; AMENDING, REPEALING AND  
21 ENACTING SECTIONS OF THE NMSA 1978.  
22

23 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

24 SECTION 1. Section 38-6A-1 NMSA 1978 (being Laws 2011,  
25 Chapter 98, Section 1) is amended to read:

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1           "38-6A-1. SHORT TITLE.--~~[This act]~~ Chapter 38, Article 6A  
2 NMSA 1978 may be cited as the "~~[Uniform]~~ Child and Adjudicated  
3 Incapacitated Adult Witness Protective Measures Act."

4           **SECTION 2.** Section 38-6A-2 NMSA 1978 (being Laws 2011,  
5 Chapter 98, Section 2) is amended to read:

6           "38-6A-2. DEFINITIONS.--As used in the ~~[Uniform]~~ Child  
7 and Adjudicated Incapacitated Adult Witness Protective Measures  
8 Act:

9                   A. "adjudicated incapacitated adult witness" means  
10 a person sixteen years of age or older who has been determined  
11 by a court to have demonstrated partial or complete impairment  
12 by reason of mental illness, mental deficiency, physical  
13 illness or disability or chronic use of drugs or alcohol to the  
14 extent that the person is unable to manage personal or  
15 financial affairs or unable to manage the person's estate and  
16 who has been or will be called to testify in a noncriminal or  
17 criminal proceeding;

18                   ~~[A.]~~ B. "alternative method" means:

19                           (1) in a criminal proceeding in which a child  
20 witness or an adjudicated incapacitated adult witness does not  
21 give testimony in an open forum in full view of the finder of  
22 fact, a videotaped deposition of the child witness or  
23 adjudicated incapacitated adult witness that complies with the  
24 following requirements:

25                                   (a) the deposition was presided over by

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1 a district judge;

2 (b) the defendant was represented by  
3 counsel at the deposition or waived counsel;

4 (c) the defendant was present at the  
5 deposition; and

6 (d) the defendant was given an adequate  
7 opportunity to cross-examine the child witness or adjudicated  
8 incapacitated adult witness, subject to such protection of the  
9 child witness or adjudicated incapacitated adult witness as the  
10 judge deemed necessary;

11 (2) in a criminal proceeding in which a child  
12 witness or an adjudicated incapacitated adult witness does not  
13 give testimony face-to-face with the defendant, a videotaped  
14 deposition of the child witness or adjudicated incapacitated  
15 adult witness that complies with the following requirements:

16 (a) the deposition was presided over by  
17 a district judge;

18 (b) the defendant was represented by  
19 counsel at the deposition or waived counsel;

20 (c) the defendant was able to view the  
21 deposition, including the child witness or adjudicated  
22 incapacitated adult witness, through closed-circuit television  
23 or equivalent technology, and the defendant and counsel were  
24 able to communicate with each other during the deposition  
25 through headsets and microphones or equivalent technology; and

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1 (d) the defendant was given an adequate  
2 opportunity to cross-examine the child witness or adjudicated  
3 incapacitated adult witness, subject to such protection of the  
4 child witness or adjudicated incapacitated adult witness as the  
5 judge deemed necessary; or

6 (3) in a noncriminal proceeding, testimony by  
7 closed-circuit television, deposition, testimony in a closed  
8 forum or any other method of testimony that does not include  
9 one or more of the following:

10 (a) having the child witness or  
11 adjudicated incapacitated adult witness testify in person in an  
12 open forum;

13 (b) having the child witness or  
14 adjudicated incapacitated adult witness testify in the presence  
15 and full view of the finder of fact and presiding officer; and

16 (c) allowing all of the parties to be  
17 present, to participate and to view and be viewed by the child  
18 witness or adjudicated incapacitated adult witness;

19 [B.] C. "child witness" means:

20 (1) an individual under the age of sixteen who  
21 has been or will be called to testify in a noncriminal  
22 proceeding; or

23 (2) an alleged victim under the age of sixteen  
24 who has been or will be called to testify in a criminal  
25 proceeding;

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1           ~~[G.]~~ D. "criminal proceeding" means a trial or  
2 hearing before a court in a prosecution of a person charged  
3 with violating a criminal law of New Mexico or a delinquency  
4 proceeding pursuant to the Delinquency Act involving conduct  
5 that if engaged in by an adult would constitute a violation of  
6 a criminal law of New Mexico;

7           ~~[D.]~~ E. "forensic interview" means a  
8 developmentally sensitive and legally sound method of gathering  
9 factual information regarding allegations of abuse or exposure  
10 to violence that is conducted by a competently trained, neutral  
11 professional utilizing research and practice-informed  
12 techniques as part of a larger investigative process and that  
13 is recorded;

14           F. "noncriminal proceeding" means a trial or  
15 hearing before a court or an administrative agency of New  
16 Mexico having judicial or quasi-judicial powers in a civil  
17 case, an administrative proceeding or any other case or  
18 proceeding other than a criminal proceeding; and

19           ~~[E.]~~ G. "presiding officer" means the person under  
20 whose supervision and jurisdiction the proceeding is being  
21 conducted. "Presiding officer" includes a judge in whose court  
22 a case is being heard, a quasi-judicial officer or an  
23 administrative law judge or hearing officer."

24           SECTION 3. A new section of the Child and Adjudicated  
25 Incapacitated Adult Witness Protective Measures Act is enacted  
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1 to read:

2 "[NEW MATERIAL] RIGHT TO REFUSE INTERVIEW.--A victim who  
3 is a child witness or an adjudicated incapacitated adult  
4 witness who has previously given a recorded statement as part  
5 of a forensic interview or in-court testimony regarding a  
6 criminal or noncriminal offense shall not be compelled to give  
7 a pretrial statement or pretrial interview."

8 SECTION 4. A new section of the Child and Adjudicated  
9 Incapacitated Adult Witness Protective Measures Act is enacted  
10 to read:

11 "[NEW MATERIAL] ADMISSIBILITY OF A CHILD WITNESS'S OR  
12 ADJUDICATED INCAPACITATED ADULT WITNESS'S PREVIOUS  
13 STATEMENTS.--

14 A. When a child witness or an adjudicated  
15 incapacitated adult witness testifies at a court proceeding as  
16 a victim in a criminal or noncriminal proceeding and is subject  
17 to cross-examination, a forensic interview by the child witness  
18 or adjudicated incapacitated adult witness may be admitted as  
19 evidence if the court finds that the forensic interview bears  
20 adequate circumstantial guarantees of trustworthiness. In  
21 determining the trustworthiness of the forensic interview, the  
22 court shall consider the timing of the forensic interview, the  
23 content of the forensic interview and the context in which the  
24 forensic interview was conducted.

25 B. A previous statement of material fact by a child

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1 witness or an adjudicated incapacitated adult witness may be  
2 admitted as evidence at trial or a preliminary hearing if the  
3 court finds that the statement is nontestimonial and the  
4 statement bears adequate circumstantial guarantees of  
5 trustworthiness.

6 C. Absent a showing of good cause, a proponent  
7 seeking admission of a previous statement or forensic interview  
8 of a child witness or an adjudicated incapacitated adult  
9 witness shall provide notice of intent to introduce such  
10 statement or forensic interview at least five days before a  
11 preliminary hearing or at least twenty days before trial.

12 D. This section shall not be construed to limit the  
13 admissibility of evidence that is otherwise admissible."

14 SECTION 5. Section 38-6A-3 NMSA 1978 (being Laws 2011,  
15 Chapter 98, Section 3) is amended to read:

16 "38-6A-3. APPLICABILITY.--

17 A. The ~~[Uniform]~~ Child and Adjudicated  
18 Incapacitated Adult Witness Protective Measures Act applies to  
19 the testimony, pretrial statement or pretrial interview of a  
20 child witness or an adjudicated incapacitated adult witness in  
21 a criminal or noncriminal proceeding. However, the ~~[Uniform]~~  
22 Child and Adjudicated Incapacitated Adult Witness Protective  
23 Measures Act does not preclude, in a criminal or noncriminal  
24 proceeding, any other procedure permitted by law:

25 (1) for a child witness or an adjudicated

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1 incapacitated adult witness to testify by an alternative  
2 method, however denominated; or

3 (2) for protecting the interests of or  
4 reducing mental or emotional harm to a child witness or an  
5 adjudicated incapacitated adult witness.

6 B. The supreme court may adopt rules of procedure  
7 and evidence to implement the provisions of the [~~Uniform~~] Child  
8 and Adjudicated Incapacitated Adult Witness Protective Measures  
9 Act."

10 SECTION 6. Section 38-6A-4 NMSA 1978 (being Laws 2011,  
11 Chapter 98, Section 4) is amended to read:

12 "38-6A-4. HEARING WHETHER TO ALLOW TESTIMONY BY  
13 ALTERNATIVE METHOD.--

14 A. The presiding officer in a criminal or  
15 noncriminal proceeding may order a hearing to determine whether  
16 to allow a child witness or an adjudicated incapacitated adult  
17 witness to testify by an alternative method. The presiding  
18 officer, for good cause shown, shall order the hearing upon  
19 motion of a party, a child witness or an adjudicated  
20 incapacitated adult witness or an individual determined by the  
21 presiding officer to have sufficient standing to act on behalf  
22 of the child witness or adjudicated incapacitated adult  
23 witness.

24 B. A hearing to determine whether to allow a child  
25 witness or an adjudicated incapacitated adult witness to

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1 testify by an alternative method shall be conducted [~~on the~~  
2 ~~record~~] after reasonable notice to all parties, to any nonparty  
3 movant and to any other person the presiding officer specifies.  
4 The [~~child's~~] child witness's or adjudicated incapacitated  
5 adult witness's presence is not required at the hearing unless  
6 ordered by the presiding officer."

7 SECTION 7. Section 38-6A-5 NMSA 1978 (being Laws 2011,  
8 Chapter 98, Section 5) is amended to read:

9 "38-6A-5. STANDARDS FOR DETERMINING WHETHER A CHILD  
10 WITNESS OR ADJUDICATED INCAPACITATED ADULT WITNESS MAY TESTIFY  
11 BY ALTERNATIVE METHOD.--

12 A. In a criminal proceeding, the presiding officer  
13 may allow a child witness or an adjudicated incapacitated adult  
14 witness to testify by an alternative method in the following  
15 situations:

16 (1) the child witness or adjudicated  
17 incapacitated adult witness may testify otherwise than in an  
18 open forum in the presence and full view of the finder of fact  
19 upon a showing that the child witness or adjudicated  
20 incapacitated adult witness may be unable to testify without  
21 suffering unreasonable and unnecessary mental or emotional  
22 harm; and

23 (2) the child witness or adjudicated  
24 incapacitated adult witness may testify other than face-to-face  
25 with the defendant if the presiding officer makes specific

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1 findings that the child witness or adjudicated incapacitated  
2 adult witness would be unable to testify face-to-face with the  
3 defendant without suffering unreasonable and unnecessary mental  
4 or emotional harm.

5 B. In a noncriminal proceeding, the presiding  
6 officer may allow a child witness or an adjudicated  
7 incapacitated adult witness to testify by an alternative method  
8 if the presiding officer finds that allowing the child witness  
9 or adjudicated incapacitated adult witness to testify by an  
10 alternative method is necessary to serve the best interests of  
11 the child witness or adjudicated incapacitated adult witness or  
12 enable the child witness or adjudicated incapacitated adult  
13 witness to communicate with the finder of fact. In making this  
14 finding, the presiding officer shall consider:

15 (1) the nature of the proceeding;

16 (2) the age and maturity of the child witness  
17 or adjudicated incapacitated adult witness;

18 (3) the relationship of the child witness or  
19 adjudicated incapacitated adult witness to the parties in the  
20 proceeding;

21 (4) the nature and degree of mental or  
22 emotional harm that the child witness or adjudicated  
23 incapacitated adult witness may suffer in testifying; and

24 (5) any other relevant factor."

25 SECTION 8. Section 38-6A-6 NMSA 1978 (being Laws 2011,

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1 Chapter 98, Section 6) is amended to read:

2 "38-6A-6. FACTORS FOR DETERMINING WHETHER TO PERMIT  
3 ALTERNATIVE METHOD.--If the presiding officer determines that a  
4 standard pursuant to Section [~~5 of the Uniform Child Witness~~  
5 ~~Protective Measures Act~~] 38-6A-5 NMSA 1978 has been met, the  
6 presiding officer [~~shall determine whether to~~] may allow a  
7 child witness or an adjudicated incapacitated adult witness to  
8 testify by an alternative method [~~and in doing so shall~~  
9 ~~consider:~~

10 A. ~~alternative methods reasonably available for~~  
11 ~~protecting the interests of or reducing mental or emotional~~  
12 ~~harm to the child;~~

13 B. ~~available means for protecting the interests of~~  
14 ~~or reducing mental or emotional harm to the child without~~  
15 ~~resort to an alternative method;~~

16 C. ~~the nature of the case;~~

17 D. ~~the relative rights of the parties;~~

18 E. ~~the importance of the proposed testimony of the~~  
19 ~~child;~~

20 F. ~~the nature and degree of mental or emotional~~  
21 ~~harm that the child may suffer if an alternative method is not~~  
22 ~~used; and~~

23 G. ~~any other relevant factor]."~~

24 SECTION 9. Section 38-6A-7 NMSA 1978 (being Laws 2011,  
25 Chapter 98, Section 7) is amended to read:

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1 "38-6A-7. ORDER REGARDING TESTIMONY BY ALTERNATIVE  
2 METHOD.--

3 A. An order allowing or disallowing a child witness  
4 or an adjudicated incapacitated adult witness to testify by an  
5 alternative method shall state the findings of fact and  
6 conclusions of law that support the presiding officer's  
7 determination.

8 B. An order allowing a child witness or an  
9 adjudicated incapacitated adult witness to testify by an  
10 alternative method shall:

11 (1) state the method by which the child  
12 witness or adjudicated incapacitated adult witness is to  
13 testify;

14 (2) list any individual or category of  
15 individuals allowed to be in, or required to be excluded from,  
16 the presence of the child witness or adjudicated incapacitated  
17 adult witness during the testimony;

18 (3) state any special conditions necessary to  
19 facilitate a party's right to examine or cross-examine the  
20 child witness or adjudicated incapacitated adult witness;

21 (4) state any condition or limitation upon the  
22 participation of individuals present during the testimony of  
23 the child witness or adjudicated incapacitated adult witness;  
24 and

25 (5) state any other condition necessary for

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1 taking or presenting the testimony.

2 C. The alternative method ordered by the presiding  
3 officer shall be no more restrictive of the rights of the  
4 parties than is necessary under the circumstances to serve the  
5 purposes of the order and shall be subject to the other  
6 provisions of the [~~Uniform~~] Child and Adjudicated Incapacitated  
7 Adult Witness Protective Measures Act."

8 SECTION 10. Section 38-6A-8 NMSA 1978 (being Laws 2011,  
9 Chapter 98, Section 8) is amended to read:

10 "38-6A-8. RIGHT OF PARTY TO EXAMINE CHILD WITNESS OR  
11 ADJUDICATED INCAPACITATED ADULT WITNESS.--An alternative method  
12 ordered by the presiding officer shall permit a full and fair  
13 opportunity for examination or cross-examination of the child  
14 witness or adjudicated incapacitated adult witness by each  
15 party, subject to such protection of the child witness or  
16 adjudicated incapacitated adult witness as the presiding  
17 officer deems necessary."

18 SECTION 11. REPEAL.--Section 38-6A-9 NMSA 1978 (being  
19 Laws 2011, Chapter 98, Section 9) is repealed.