Former Children’s Rights Committee Chair Scott Hollander Honored by American Bar Association

PBA Children’s Rights Committee member and former chair Scott Hollander, who earned the PBA Children’s Rights Committee’s 2004 Child Advocate of the Year Award, now has been honored with the American Bar Association Young Lawyers Division’s (ABA/YLD) 2004 Child Advocacy Award. Hollander was presented with the award at the ABA/YLD Annual Meeting Aug. 6 in Atlanta, Ga.

Hollander is the executive director of KidsVoice, a private, nonprofit organization in Pittsburgh that represents more than 5,000 abused, neglected or abandoned children each year. He has worked in Pennsylvania, Colorado, Michigan and Washington, representing children in class action and individual cases involving abuse, neglect, custody, adoption, personal injury, wrongful death, guardianship and educational rights. He developed the first program in the country to recruit, train and use volunteer attorneys to represent children in domestic violence cases involving restraining orders between parents. The National Council of Juvenile and Family Court Judges named that program as a “best practices” model in 1997.

Before joining KidsVoice in 1999, Hollander worked for the Pittsburgh law firm of Evans Ivory and was in private practice in Seattle, Wash. He previously served as the senior staff attorney and pro bono coordinator of the Rocky Mountain Children’s Law Center in Denver, Colo., and was an adjunct professor at the University of Denver College of Law. In 1995, the National Center for State Courts selected Hollander as one of six individuals in the country to study and evaluate custody decisions in domestic violence cases.

In 2002, Hollander testified before the Northern Ireland Assembly about potential reforms in

(Continued on Page 2)
By Joyce A. Hatfield-Wise

It has been a wild and wooly summer, one in which the hurricanes of the season have affected us all in some way. The effects of Hurricane Ivan threatened to destroy our family vacation. When I learned on the morning of Sept. 3 that the Orlando airport would be closing at noon and that our flight to Disney World had been cancelled, I had some choices to make. I could cancel everything. I could wait and see when the airports reopened and then join our “land and sea trip” in progress. Or I could consider other destinations. Disney was a special trip, one that we had been planning and talking about since before my mom died. We just had to go.

Quickly, my thoughts turned to California and to Disneyland. It was a whole different itinerary and a place we hadn’t previously considered. But we knew we would find that magical mouse there, too. So within four hours of learning our trip to Disney World couldn’t happen, we were scheduled for an alternative trip to Disneyland.

The experience was completely magical. It was as if we had planned it that way from the beginning. The California skies and weather were beautiful. We fulfilled our dream, and Mom knew that we were finally there.

The experience has reinforced for me what can happen when we allow ourselves to get beyond the disappointments of the moment and think out of the box. Wonderfully different things can happen.

We still want to make it to Disney World before the kids are much older, but our thirst has been quenched for now and the memories will stay with us for a lifetime.

Great things can come from bad. And we can play a role in helping to re-shape the disappointments and pain of the children who cross our path.

I will be participating in the Muscular Dystrophy Association “Lock Up” in October, to help provide wheelchairs, clinic visits and summer camp for families served by the association. Please consider a donation to the MDA, or I will spend the fall in a tiny jail cell where my memories of “It’s a Small World” will become all too real! Make your checks payable to the Muscular Dystrophy Association, and mail them to Washington County CYS, Attn: Joyce, 100 West Beau Street, Suite 502, Washington, PA 15301.

Copyright © 2004 by the PBA Children’s Rights Committee.

To Submit Articles

The Children’s Rights Committee newsletter invites members to submit articles or letters to the editor for publication in the newsletter. Please contact Maureen Grace at phone (724) 830-3305, or e-mail mgrace@co.westmoreland.pa.us.

We invite your comments and suggestions.
Since 1998, the Children’s Rights Committee has presented a Child Advocate of the Year award to an attorney or a judge in recognition of the highest degree of professional excellence and advancing the rights of children. Nominations are accepted each year for candidates that have made a commendable contribution to the practice of child advocacy. Forms will be made available in December, for selection and presentation of the award at the Spring Children’s Rights Committee CLE. We have a dedicated subcommittee that will review each application and meet via teleconference to select a recipient in early 2005. If you would like to serve on this subcommittee, please feel free to contact Andrea Marceca at andreamarceca@pacses.com.

The Juvenile Law Center (JLC) just released the fourth edition of the Pennsylvania Judicial Deskbook: A Guide to Statutes, Judicial Decisions and Recommended Practices for Cases Involving Dependent Children in Pennsylvania. The Deskbook is a 300-page revision of the guide that judges, child welfare workers and lawyers have used since 1986. It can be downloaded at no cost from www.jlc.org or purchased.

Drafted by JLC attorney Alisa Field, the Deskbook encompasses both Pennsylvania and federal law. It consists of four parts.

Part I analyzes federal and state child welfare legislation, providing an overview of the major laws governing the field. It also describes lawyers’ obligations to children.

Part II details the process of entering the child welfare system and the system’s goals: protecting children in their own residences or moving them into adoptive homes. It further examines the meaning of permanency for dependent children — reuniting kids with birth parents, terminating parental rights or providing adoption and adoption subsidies. In addition, the section analyzes kinship care and the rights of third parties such as grandparents and foster parents, and discusses how juvenile courts can create new services to meet the needs of the system’s abused and neglected children.

Part III is devoted to the rights of older youth who are in the foster care system, an area in which JLC has specialized. It provides an overview of the Foster Care Independence Act, details the effect of the Adoption and Safe Families Act on older youth, and suggests ways in which juvenile courts can ensure older youths’ well-being at permanency review hearings.

Part IV provides a detailed look at dependent children’s rights to physical and behavioral health care. It also includes a section on dependent children’s rights to education that was drafted by Education Law Center-PA.

Laval S. Miller-Wilson is a senior attorney with the Juvenile Law Center in Pittsburgh. He can be reached at (215) 625-0551 ext. 108, or lwilson@jlc.org.
LegisAct Report

By Eleanor Bush

LegisAct began the 2004-05 year with a brief organizational conference call at the end of July. This year, we expect to focus our efforts as follows:

- continue to track and report on legislation affecting children
- develop positions on pending legislation that we consider particularly important to children’s interests for consideration and adoption by the PBA Board of Governors and House of Delegates
- continue to build our relationships with key legislators and legislative staff members to enhance our effectiveness at developing our positions and recommendations early enough to influence the legislative process
- continue to contribute a “Legislative Update” segment to the spring child advocacy CLE program (assuming that the General Assembly enacts any relevant legislation by that time).

We expect to hold quarterly meetings by conference call, with additional meetings scheduled as needed. Our fall conference call meeting will take place on Oct. 25 at noon. The focus for the fall conference call will be Senate Bill 1134, Senator Greenleaf’s new version of a comprehensive re-write of the Adoption Act. I will report whatever I have learned about likely prospects for this legislation, and we will discuss and determine what efforts we will make to analyze it and to develop recommendations regarding it. We will also discuss SB 985, regarding abolition of common law marriage.

We will use this newsletter, as well as our subcommittee conference calls, to report to our colleagues regarding legislative action that we consider of interest. That said, here is our “kick-off” report:

Act 87 of 2004 (SB 979) — Testimony by Child Victims and Witnesses — SB 979 was enacted over the summer and became effective immediately. Please see committee member Rob Hawn’s excellent article (on Page 10) for a full discussion regarding this act.

Act 21 of 2004 (HB 1423) — Consents to Adoption — While the more comprehensive efforts to revise Pennsylvania’s adoption statute seem to get mired in controversy, this bill, making some narrow, but important changes, was enacted in March and became effective on May 23. The act amended certain provisions of the Adoption Act related to consent to adoption. The act shortens and makes definite the time frame for a birth parent to revoke a consent or to challenge the validity of a consent. Further, the act establishes requirements regarding challenges to the validity of a consent.

Under Act 21, a birth parent’s written consent to adoption becomes irrevocable within 30 days of execution, or, in the case of a birth father who has executed a consent prior to the birth of the child, within 30 days after the birth of the child. Under prior law, a birth parent could revoke a written consent at any time until a court entered a decree terminating the parent’s rights or an adoption decree. Adoption advocates and child advocates had criticized the prior law for allowing an indefinite (and potentially quite lengthy) revocation period. Act 21 also sets a deadline for challenging the validity of a signed consent — limiting challenges to within 60 days of the execution of the consent (or birth of the child if the consent was signed prior to birth) or 30 days after the entry of an adoption decree, whichever of these occurs earlier. Permissible reasons for challenging the validity of a consent are limited to fraud and duress.

This act should provide additional security to children and pre-adoptive parents who are moving through the adoption process.

HB 2172 — Foster Parent Bill of Rights — Last spring, LegisAct discussed the then-current version of this bill. Committee members expressed varying (but mostly strongly-held!) views on the wisdom and likely impact of this proposed legislation. Ultimately, the committee decided that although some aspects of the bill were deeply troubling to some members, the bill was not likely to make a large enough impact on the child welfare system or foster parents’ place within it to merit devoting PBA resources to attempting to influence it.

Since the committee’s discussion last spring, HB 2172 has been amended and has moved further along in the legislative process. The House of Representatives amended and passed the bill on May 26. In the Senate, the bill was referred to the Judiciary Committee. The bill was further amended and reported as amended on Sept. 21. Because the bill has been amended by the Senate Judiciary Committee, if it passes the Senate, it will return to the House.

In its current version, the bill has moderated some of the provisions that troubled LegisAct members. For example, it still promises confidentiality to foster families, but explicitly limits that to matters that do not affect the safety of foster children within the home. The provisions of the bill have been expanded to recognize the responsibilities and

(Continued on Page 5)
obligations of private agencies that supervise foster parents, rather than referring only to county children and youth agencies as the responsible entities.

SB 985 — Abolition of Common Law Marriage — Last spring, LegisAct decided to endorse a resolution of the Workers’ Compensation Section to oppose efforts to abolish common law marriage. The Workers’ Compensation Section subsequently withdrew that resolution. Meanwhile, SB 985 has moved forward in the legislative process, although it has been amended significantly.

In its initial version, SB 985 “abolished” and “prohibited” common law marriage, but established an alternative procedure for a “declaration of marriage without solemnization.” In their discussion of the bill last spring, LegisAct members felt that this alternative procedure did not amount to an improvement in law. The amended version of SB 985, which passed the Senate on May 10, eliminated the alternative procedure. The current version of the bill simply abolishes common law marriage, beginning in Jan. 1, 2005. The bill explicitly protects common law marriages contracted before Jan. 1, 2005.

SB 985 was referred to the House Judiciary Committee on May 11. As of Sept. 30, the bill had not been the subject of any action in the House.

We will discuss SB 985 in our fall conference call. Anyone interested in further background reading on the subject may wish to read PNC Bank Corp. v. WCAB, 831 A.2d 1269 (Pa. Commw. 2003), in which the Commonwealth Court prospectively “abolished” common law marriage — at least for purposes of workers’ compensation appeals.

We’re looking forward to a busy, engaging year. Please feel free to join the subcommittee at any time.

Eleanor Bush is the chair of the Children’s Rights Committee Legislative Subcommittee. She can be reached at elbush@earthlink.net.

Cozen O’Connor Launches Pro Bono Program in Child Advocacy

By Rob Hawn

Cozen O’Connor’s Montgomery County office has launched its “Signature Pro Bono Program in Child Advocacy.” This program reflects the office’s primary (though, not exclusive) commitment to provide pro bono publico legal services to needy citizens of the county and beyond. The initiative, which is designed to meet an acute need for volunteer court-appointed child advocates within the local jurisdiction, is unique among Montgomery County law firms.

To sustain this initiative, more than one-half of the office’s resident attorneys have volunteered to become members of Cozen O’Connor’s Child Advocacy Team in West Conshohocken. As such, each volunteer has committed to accept at least one judicial appointment to serve as a child advocate annually. Members of the team have been encouraged to organize into working partnerships, enabling members to assist one another with their respective child advocacy case assignments. Individually, they have also been given a comprehensive “Child Advocacy Reference Binder,” specifically created to provide guidance in child advocacy practice and procedure before Montgomery County judges.

In support of this program, representatives of the Montgomery Bar Association and the Montgomery Child Advocacy Project presented a one-day child advocacy training seminar for the volunteer Cozen O’Connor attorneys and other interested attorneys from Montgomery County on Sept. 21. During the seminar, the volunteers heard from recognized experts on the legal, medical and social services issues underlying the legal representation of children in Montgomery County. Judge Susan Gantman of the Superior Court of Pennsylvania and Judge Paul Tressler of the Montgomery County Court of Common Pleas also addressed the seminar participants.

Between the firm’s Philadelphia and West Conshohocken offices, more than 40 Cozen O’Connor attorneys now serve as volunteer child advocates in the greater Philadelphia area.
The Big Four: Federal Laws for Family Members With Disabilities

By Brian K. Wiley

When Maureen Grace, the committee’s newsletter editor, approached members of the Children’s Rights Committee for articles on this topic, I quickly thought back to the birth of my son Brian Jonathan Keenan Wiley. The day that my son was born was a day of happiness. But shortly after his birth, he was diagnosed with Hemophilia, a hereditary bleeding disorder.

Since that time, my experiences as a practicing attorney in the area of civil rights and employment law have provided me with a great deal of experience with the laws affecting families with a member with a disability. What follows is a brief synopsis of the major federal laws affecting those families.

The Big Four

There are four primary federal laws that families with a member with a disability can expect to encounter at some point in their lives. Either when their children are young, or when their children grow up and become working adults, families are likely to encounter The Americans With Disabilities Act (42 U.S.C., § 12101 et seq.), The Family Medical Leave Act (29 U.S.C. § 2601 et seq.), The Individuals with Disabilities in Education Act (20 U.S.C., § 1401 et seq.) and the Health Insurance Portability and Accountability Act (42 U.S.C., § 300 et seq.) (otherwise know as HIPAA).

Because all of these laws interact with each other, families are recommended to seek counsel and guidance whenever an area of their life might involve one of these four federal statutes.

I. The Americans With Disabilities Act

In 1990, Congress passed a law that created new and affirmative duties for employers of people who have disabilities, and/or are perceived as having disabilities. (See HR Conf. Rep. No. 101-596101 1st, 100st, Congress 2nd Session, 56-819-1990.)

For families of disabled workers, the Americans with Disabilities Act provides new protections in the workplace. The Americans with Disabilities Act requires that employers with 50 or more employees treat disabled but qualified employees differently than nondisabled employees by “reasonably accommodating” these employees. Specifically, the employer must engage in an “interactive process” with the employee to determine whether or not a reasonable accommodation can be created at the job without imposing an undue hardship on the employer.

The employer is required to solicit information and explore alternatives that do not pose an undue hardship for the work site, before flatly rejecting the employee’s request for an accommodation.

For employees with disabilities, these alternatives may include a “flex schedule,” alternative work duties and possibly limitations on the duties of the traditional job position. For parents with disabled children, this may also mean the employer creating new and creative ways to accommodate the working parent. In no event, may an employer flatly reject a request for accommodation or otherwise fail to engage in the mandatory duty of interactive process. (See Deane’ vs. Pocono Medical Center, 142 F 3rd, 138 3rd Circuit 199.)

II. The Family Medical Leave Act

For families with a member with a disability, perhaps no law is more important than the Family Medical Leave Act of 1993. The Family Medical Leave Act requires that employers with covered employees, (i.e. those employers with employees who have worked at least 1,250 hours in the past 12 consecutive months) guarantee the return to employment at the same terms and conditions (and/or comparable position) for any employee who takes time off to care for themselves or an immediate family member with an illness and/or disability for up to 12 weeks.

This law specifically prevents an employer from disciplining or otherwise changing any of the terms and conditions of employment for any employee who exercises either the 12-week block of time and/or seeks approved intermittent leave. For children with disabilities, FMLA continues the protection of health insurance while the leave is taken. (29 C.F.R. § 825.215.)

Families with a member with a disability should be aware that certain notice provisions are required before an employee may invoke the protections of this federal law. Ragsdale v. Worldwide Inc., 535 U.S. 81 122 S. Ct. 1155 (2002).

Additionally, the Family Medical Leave Act requires that a “serious health condition” be involved. For people with disabled children, FMLA offers the working mother or father a certain measure of job security that simply did not exist before the passing of FMLA. Lastly, the FMLA also provides leave to the parents of a newborn or a recently adopted child.

III. HIPAA

The newest law impacting families with a member with a disability is HIPAA. HIPAA stands for the Health Insurance Portability and Accountability Act, of 1996. HIPAA limits an insurance company from denying insurance coverage for pre-existing medical conditions or disabilities.

(Continued on Page 7)
(Continued from Page 6)

Employer-sponsored health insurance plans may only exclude an illness from coverage if it was diagnosed or treated within six months prior to enrollment. The exclusion may not apply if the employees’ family members were covered by another health plan.

HIPAA also involves the protection of confidential medical information called “Protected Health Information” that could identify an individual by name, date of birth, diagnosis and/or other specific medical information to third parties. HIPAA’s privacy rule applies to physicians, hospitals and any “covered entity.” HIPAA specifically requires that health care providers notify patients in writing of their privacy rights and implement specific privacy procedures.

Moreover, this law requires that the health care provider train employees so that they understand HIPAA’s mandatory privacy procedures, and designate a specific administrator and/or individual to make sure that the privacy rights of a family member with a disability is not violated. While HIPAA does not apply to all types of entities (such as pharmaceutical companies), if family members have questions regarding their privacy rights and medical information, they should contact an attorney in this area of law to determine whether or not the employer invokes the proper authorization procedures before disclosing medical information. (See 45, CFR, Section 164.530). Thus, even if an employee has requested FMLA leave to care for an ill or disabled child, the employer must still obtain the HIPAA authorization from the requesting parent employee.

IV. THE IDEA

For families with children who are disabled, the Individual Disabilities in Education Act is also an important law. This law requires public school districts to provide a free appropriate public education (FAPE) for specially identified students who need supplemental services to maximize their “educational opportunities.” (See 20, USC, 1401 et seq.)

The IDEA works in conjunction with local and state laws to ensure that the public school district implements a multi-disciplinary evaluation process to create an individualized educational program — otherwise know as an IEP — for any covered child. The IEP is at the school district’s expense, and may include actual tuition reimbursement and/or other educational, therapeutic or rehabilitative services provided at no cost to the family.

Moreover, before a school district may deny a child’s rights under the IDEA, most state laws require substantive due process, including notice and opportunity to be heard, before the school district can decline to offer services to maximize educational opportunity to the disabled child student.

The above provides a short summary of some of the federal laws available to families of children with disabilities. Families are strongly encouraged to contact attorneys familiar with, and experienced in, areas of law affecting children’s rights.

Brian Wiley is an associate at Dessen, Moses and Sheinoff in Willow Grove. He can be reached via e-mail at bwiley@dms-lawyer.com.
The PBA Children’s Rights Committee presents

Family Group Decision Making
A Process for Strengthening Families

In times of tight budgets and increased hardships for American families, agencies are in a crunch to do more with less. Family Group Decision Making (FGDM) is a respectful process that invites family, extended family, community, caseworkers and service providers to join together to increase safety and stability for children. Based upon the belief that families are underused resources in child protection work and that children are best protected by a unified family, it offers a simple and powerful alternative for achieving this unity.

This program offers an overview to FGDM: the values and beliefs about children, families and helping; the steps to bringing all the parties together; and the follow-up after the meeting. You will learn the advantages that FGDM offers caseworkers, children and their families in planning for safety and stability. FGDM poses challenges, too, in child welfare practices, and this program will explore those challenges and offer some practical solutions to overcoming them. You will also examine how FGDM can be used as an alternative to or even eliminate court intervention.

Jim Nice walks you through FGDM, exploring:

The Foundation
- The values and beliefs behind FGDM
- Understanding our own family view

Understanding what FGDM is
- Unique features
- The process
- Embracing the “family gathering” concept
- Accepting family as the primary decision maker

The Advantages and Challenges behind FGDM
- Why does it work?
- Its effect on standard child and family welfare practices

The Process under a Microscope
- The preparation, gathering, and follow-up

Ethical Questions Raised by FGDM

Course Materials
One copy of the course materials is included in your registration. These materials are not available for separate purchase.

Tuition
(INCLUDES LUNCHEON)
$169 Member — Pa., or any co. bar assn.
$149 Member admitted after 1/1/00
$189 Nonmember
$99 Paralegals attending with an attorney
$129 Paralegals attending alone
$85 Judges and judicial law clerks
$75 Judges and judicial law clerks (admitted after 1/1/00)

Maximum CLE credits: 6

Date & Location
Mechanicsburg • Thurs., Nov. 11, 2004
PBI Conference Center
5080 Ritter Rd., Rossmoyne Exit, Rt. 15
8:30 am to 4:00 pm; registration begins at 8:00 am

Meet Jim Nice
Join us for a special networking luncheon, and say hello to Jim Nice! Turn off your cell phone and unplug your laptop: here are 60 minutes of quality time to make lasting professional contacts over great food and stimulating conversation.

Comments from Past Registrants

This is the first encouraging sign I have seen during the seven month ordeal my family has been involved with CSD. This is the most positive change to come to your agency in years.

(A mother, Portland, Oregon)

It is gratifying to know how well these concepts ring true for so many practitioners. You affirmed what we all know, down deep, to be true.

(Attendee from Minnesota)

Course Presenter

Jim Nice
A family therapist, teacher, parent educator, and Child Protective Services caseworker, Jim Nice has introduced and taught Family Group Decision Making since 1989 to audiences in 169 counties in thirty states. Director of the Family Unit Project in Sheridan, Oregon, he has been a consultant to a host of organizations, including the Child Welfare League of America, the National Council of Family and Juvenile Court Judges, and social services agencies in 30 states. He co-authored the book, The Family Unit Model: An Option for Strengthening Families, published in 1998. He received his B.A. in social science from Maryknoll Seminary in Illinois; his M.A. in counseling from San Francisco State University; his NCAST Certification from the University of Washington; and has invested over 10,000 hours in Intensive Family Services training.

Meet Jim Nice
Join us for a special networking luncheon, and say hello to Jim Nice! Turn off your cell phone and unplug your laptop: here are 60 minutes of quality time to make lasting professional contacts over great food and stimulating conversation.

5 SUBSTANTIVE/1 ETHICS*

*This program has been approved by the Pennsylvania Continuing Legal Education Board for 5 hours of CLE credit in substantive law and 1 credit in ethics. One hour of ethics discussion is integrated into the program. If you attend less than the full time of this program, you will receive only substantive credits for the time of your attendance.

PBI is pleased to cosponsor this program with the PBA Children’s Rights Committee.
Q: What is your educational background?
I graduated from the University of Pittsburgh in 1987 with a dual degree in psychology and communications. Graduate studies took me to the University of Pennsylvania in Philadelphia. I learned a lot while I was there in that beautifully urban and historic location. (Mostly that limos were a bit excessive for picking up dirty laundry!) There in 1988, I earned a master’s in psychological services and intended to return a second year for further study at the Philadelphia Child Guidance Center. (My summer job noted below would serve as a deterrent to that plan).

Always thirsting for new learning, I began post-graduate studies at the University of Pittsburgh. I earned a post-graduate certificate in family therapy from the Graduate School of Social Work in 1991. I attended at night and worked full-time during the day, a pattern which would serve me well in the future. During my tenure as a family therapist, I was examined and certified by the National Board of Certified Counselors and a member of the American Association of Marriage and Family Therapists. Soon thereafter, during my work with court-mandated delinquent youth, I fell in love with the courtroom.

I begin law school at night. In 1997, I graduated cum laude from Duquesne University School of Law. On Jan. 8, 1998, on my 33rd birthday, I was sworn in before the Pennsylvania Supreme Court. Judge Debbie O’ Dell Seneca personally moved for my admission. My son, then age 10 months, was in attendance. He had been born during my final year of study. In April 2004, I was sworn in before the United States Supreme Court.

Q: What jobs did you have before you became an attorney?
I begin working in March of my senior year of high school. I thought I had better put some money away for college which would begin just five months later. My first job was at McDonald’s. To this day, I wonder just where I would be if I had stayed. I often think I could be managing (or owning) the Maui McD’s and no doubt earning more. It was a good first experience.

After graduate school, I took a “summer job” that lasted seven+ years. I started as a family counselor and was soon directing and supervising the same program. It was a non-profit organization which introduced me to the legal world and ultimately my love for the courtroom. I began law school at night and continued to work there.

In 1995, I completed a summer internship with Washington County’s first woman judge. I would soon thereafter be invited to join her staff. I clerked there for the next two years while I finished the four-year night program at Duquesne University School of Law.

Within two weeks of being sworn into practice, I became the county’s first full-time in-house CYS solicitor. It has been a rough and rocky road, but one I wouldn’t trade.

Q: Which job was your favorite and why?
My current job is my favorite. The work is good and the reward is seen in happy re-beginnings every day.

Q: What is the most humorous thing that has happened to you as an attorney?
Attending a CLE on humor at the CCBL! In my line of work, which at this point is primarily terminations, not much is funny. Notwithstanding that, I look for and cherish the fun(ny) times.

Q: What qualities do you admire most in attorneys whom you admire?
Sincerity, respect, and genuine concern for others.

Q: What qualities do you admire in judges whom you admire?
Integrity, humility, and timeliness.

Q: What is your favorite vacation location?
Hawaii. We have been there twice. I have always said that the third time I wouldn’t come back. I have actually inquired about the Hawaii State Bar exam and it remains on my “things to do” list.

Q: Whom do you admire most?
Lots of real people for lots of different reasons. I most want to be like others who have a firm foundation in their faith and who actively and intentionally strive to serve God every day.

(Continued on Page 16)
Did We Get It Right This Time?
Act 87 & Pa.’s Quest for a Constitutional Means to Present Testimony of Children by Alternative Methods

By Rob Hawn

As many advocates will attest, and undoubtedly all would agree, whenever children are called upon to testify, particularly in criminal proceedings, they are imperiled. Buffeted by gales of courtroom formality and legal abstraction, drenched by torrents of baffling terminology and perplexing concepts, perhaps nakedly exposed to a wrong-doer’s intimidating countenance, children already awash with anguish and anxiety can flounder as they testify. Some children, overcome by fear, may ultimately lose an already tenuous grip on self-composure, surrender themselves to the elements of a hostile environment, and drown.

Forty-five days ago, not long after Act 87 was passed, I assured my editor that I would submit this article within 30 days. (In contemporary law practice, “close” surely “counts.”) Anyway, having previously written on the subject, I was confident that when I eventually focused on Act 87, I would be able to dash off a brief, celebratory comment on Pennsylvania’s new, constitutionally-sound statutory provision for alternative methods of testimony by children.

After all, in March, I had seen the underlying legislation, Pennsylvania Senate Bill 979 (Session of 2003), and liked what I thought to be a level, well-considered piece of lawmaking. Not that the bill could be judged flawless, of course. Still, SB 979 struck me as a worthy prize of an uncommonly difficult legislative quest. Over the course of a passing generation, the General Assembly repeatedly navigated shifting currents of constitutional law, along uninviting coastlines of criminal proceedings, in search of safe-harbors for testifying children.

Manifesting the shared dedication of so many who labored together so long to give us this much, SB 979 was destined, I believed, to enjoy universal acclaim in the General Assembly. Hence, my presumption: Surely, in deference to this legacy, no one would dare to mess with SB 979.

Ah, but someone did.

So here I brood, deep into a clement late-summer night, forlornly unraveling entangled draft legislation steeped in a confusion of “insert” underscoring and “omit” brackets. As I reflect upon the disarray, a do-over seems inevitable. And, I wonder: After all these years, is it possible that we’ll never get it right?

When enacted, 42 Pa. C.S.A. §5981, et seq. was remarkable for its progressive adoption of alternative methods to present the testimony of children during criminal proceedings.

Since 1986, testimony rendered in criminal proceedings by children who are victims or material witnesses of crime has been regulated in varying degrees by 42 Pa. C.S.A. §5981, et seq. When enacted, this statute was remarkable for its progressive adoption of alternative methods to present the testimony of children during criminal proceedings involving sexual assault charges. Acting sua sponte or upon motion under the statute, courts could permit a child not yet 16 years old to testify outside the defendant’s immediate presence by videotaped deposition, videotaped recording or closed-circuit television, for viewing by the judge and jury.

Additionally, courts were empowered in limited circumstances to admit as evidence a child’s out-of-court statement “describing acts and attempted acts of indecent contact, sexual intercourse or deviate sexual intercourse performed with or on the child by another.” In 1989, provision was made for the admissibility, in criminal and civil proceedings, of a child’s out-of-court statements describing physical abuse, indecent contact or sexual offenses, if the child was less than 13 years old when the statements were made. Also remarkable was the statute’s provision for the appointment of a child advocate to assist the child in understanding, as well as to serve the court in determining whether or not remote testimony of the child was warranted.

Also remarkable was the statute’s provision for the appointment of a child advocate to assist the child in understanding, as well as to serve the court in determining whether or not remote testimony of the child was warranted.

Of course, as noted (see n.4, supra.), this progressiveness came at the price of controversy, as the statute quickly became the focus of criminal defense counsel, constitutional scholars and courts across the commonwealth and beyond. Consequently, by Nov. 2003, these statutory provisions obviously needed legal and technological overhauling. To that end, SB 979 proposed a comprehensive revision and reorganization of the exist-

(Continued on Page 11)
Did We Get It Right This Time? Act 87 & Pa.’s Quest for a Constitutional Means to Present Testimony of Children by Alternative Methods

(Continued from Page 10)

The prompt, unanimous Senate concurrence with the House amendments is equally mystifying. Generally, Act 87 amended all of the remaining provisions of the statute, presumably to achieve two objectives. One obvious goal was to enhance the statute’s accommodation of current and future technological methods of presenting children’s testimony, using newly defined and revised terminology. The second goal, it seems, was to reduce the statute’s susceptibility to constitutional challenge by making discrete substantive changes to key provisions. Despite the ultimate rejection of SB 979’s prophylactic provisions, Act 87’s incorporation of selected SB 979 language into key clauses of the existing statute supports this assumption. For example, evidence of such incorporation may be found in changes to the statute’s several provisions regulating judicial determination for the necessity of testimony by alternative methods, similar to these boldly-printed “bracketed” admissions and “underscored” insertions applied to § 5985:

(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’s ability to reasonably communicate. …

(Continued on Page 12)
Did We Get It Right This Time? Act 87 & Pa.’s Quest for a Constitutional Means to Present Testimony of Children by Alternative Methods

(Continued from Page 11)

Compare the revision of § 5985, which reflects current law, with this SB 979-proposed language:

The court may order the presentation of the testimony of a child victim or material witness by an alternative method only if the court finds that testifying either in an open forum in the presence and full view of the finder of fact or in a face-to-face confrontation between the child victim or material witness and a defendant would cause the child victim or material witness to suffer serious emotional distress that would substantially impair the child victim or material witness’s ability to communicate with the finder of fact.27

The General Assembly should be credited for incorporating some key SB 979 language into current law. It should be recognized for expanding the scope of admissible out-of-court statements under § 5985.1, which now includes statements “describing any of the offenses enumerated in 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), ...”28 In general, Act 87 represents a significant improvement in the law regarding testifying children. Still, deficiencies persist. Among them, in my judgment, is the General Assembly’s failure to adopt the SB 979 provisions specifying the factors to be considered in a court’s determination of the need for alternative methods of child testimony, and specifying the elements of associated court orders.29 Had these provisions been adopted, I’m convinced the law would have been better for it.

I’m also troubled by an ambiguity arising from the General Assembly’s failure to include the child advocate with the prosecutor and defense counsel as individuals who, as a matter of right, must be present whenever the court decides to observe and question a child, or otherwise hear a child’s testimony in camera before deciding if alternative methods of testimony are warranted.30 Frankly, unless an advocate is present in these circumstances, I doubt those services specified in §5983 can be fully and adequately provided to a testifying child.

Further, with respect to attorneys who are appointed in related criminal and civil proceedings to serve both as a child’s advocate pursuant to §5983(a) and as the child’s guardian ad litem pursuant to 42 Pa. C.S.A. §6311, I believe they are duty-bound to be present in any circumstance of their child-client’s appearance before judges, counsel or other officers of the court. Perhaps, with this assertion, I embarrass myself by making a point considered obvious and undisputed. On the other hand, our colleagues of the criminal defense bar may consider obvious and undisputed. I suggest that prudent advocates will prepare themselves to argue the point and, if necessary, demand their inclusion whenever a testifying child is brought before court and counsel.

This is not the article I expected to write. Act 87 is not the law I expected to encounter. I believe SB 979, as passed by the Senate last March, was better legislation. And, I’m convinced that Pennsylvania’s child-witness statute is destined to undergo yet further revision. Still, by virtue of Act 87’s promulgation, the commonwealth’s children may now testify by alternative methods, pursuant to a law enhanced by its technological adaptability and strengthened in its constitutionality.

I’m convinced that Pennsylvania’s child-witness statute is destined to undergo yet further revision.

Footnotes:

1 Act 87 of 2004 was signed in the Pennsylvania Senate and House of Representatives on July 4, 2004, and approved by the governor on July 15, 2004. Hereafter, referred to as “Act 87.”


3 An Act Amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidate Statutes, further defining child or children; repealing provisions relating to testimony by child victim or material witness; and providing for child victim or material witness testimony by alternative methods (introduced Dec., 18, 2003, by Greenleaf, et al. [PN 1330], as amended March 16, 2004 [PN 1439]). Hereafter, referred to as “SB 979.”

4 A detailed recitation of this legislative history is the delicious stuff of righteous legal criticism, best left to another commentator for another time. I resist the urge to dabble in it now, except to observe that since the mid-1980s, legislation imposing pro-
Did We Get It Right This Time? Act 87 & Pa.’s Quest for a Constitutional Means to Present Testimony of Children by Alternative Methods

(Continued from Page 12)

Phylactic measures on behalf of testifying children in criminal proceedings has been judicially scrutinized repeatedly, prompting substantial revision for the sake of passing constitutional muster. It has also inspired two separate plebiscites seeking approval by popular vote of proposed amendments to the Pennsylvania Constitution’s “face-to-face” confrontation clause, allowing for the testimony of children by alternative means. See Pa. Senate Legis. J. (03/17/04), at 1499 (comments of Greenleaf). Ultimately, on Nov. 4, 2003, Pennsylvania’s electorate authorized the ultimate passage of SB 979, as amended to become Act 87, by overwhelming approving the General Assembly’s joint resolution seeking this constitutional amendment. See SB 55 (Session of 2003) (as endorsed by the Pennsylvania Senate and House of Representatives, respectively, on June 24-25, 2003).

For example, the statute contained the following declaration of policy by the General Assembly, which is still relatively uncommon to provisions bearing upon criminal procedure:

In order to promote the best interests of the children of this commonwealth and in recognition of the necessity of affording to children who are material witnesses to or victims of crimes additional consideration and different treatment from adults, the General Assembly declares its intent, in this subchapter, to provide these children with additional rights and protections during their involvement with the criminal justice system. The General Assembly urges the news media to use restraint in revealing the identity or address of children who are victims of or witnesses to crimes.

42 Pa. C.S.A. §5981 (as promulgated Feb. 21, 1986, P, L, 41, No 14 § 1). Though amended, this provision has appeared in every iteration of this statute, including Act 87, and was also incorporated into the provisions proposed in SB 979. Significantly, both to this discussion and in general, four other original provisions of the statute were either incorporated substantively or preserved intact both by SB 979 and Act 87. They are §5983 (the child advocate provision), §5986 (the hearsay provision), §5987 (the provision for the use of dolls) and §5988 (the provision prohibiting disclosure of a testifying child’s identity).

The salient provisions of SB 979 are reproduced here, in their entirety, to accommodate a comparison of this proposed language with the provisions of Act 87, now current law, which are reproduced later in the text.

§ 5995. Hearing on testimony by alternative method.

(a) General rule. The court in a criminal proceeding may order a hearing to determine whether to allow presentation of the testimony of a child victim or material witness by an alternative method. The court, for good cause shown, shall order the hearing upon motion of a party, a child victim or material witness and a court reporter. In all circumstances, the defendant was permitted to hear and observe the child’s testimony, so long as the child could not hear or see the defendant, and provided opportunity to confer with defense counsel during the course of testimony.

(b) Hearing requirements. A hearing to determine whether to allow presentation of the testimony of a child victim or material witness by an alternative method must be conducted on the record after reasonable notice to all parties, any non-party movant and any other person the court specifies. The presence of the child victim or material witness is not required at the hearing unless ordered by the court. However, when the presence of a child is so ordered, the court shall conduct the hearing under this subsection in camera.

(Continued on Page 14)
§ 5996. Standard for when testimony may be presented by alternative method.
The court may order the presentation of the testimony of a child victim or material witness by an alternative method only if the court finds that testifying either in an open forum in the presence and full view of the finder of fact or in a face-to-face confrontation between the child victim or material witness and a defendant would cause the child victim or material witness to suffer serious emotional distress that would substantially impair the child victim or material witness’s ability to communicate with the finder of fact.

§ 5997. Factors for determining the method of alternative testimony.
If the court determines that the requirements of Section 5996 (relating to when testimony may be presented by alternative method) have been met, the court shall determine the method for the presentation of the testimony of a child victim or material witness by an alternative method and in doing so shall consider:

1. The available methods of alternative testimony;
2. Available means for protecting the interests of or reducing emotional distress to the child victim or material witness without resorting to the alternative methods;
3. The nature of the case;
4. The relative rights of the parties;
5. The importance of the proposed testimony of the child victim or material witness;
6. The nature and degree of emotional distress that the child victim or material witness may suffer if an alternative method is not used; and
7. Any other relevant factor.

§ 5998. Order regarding testimony by alternative method.
(a) General rule. An order allowing or disallowing the presentation of the testimony of a child victim or material witness by an alternative method shall state the findings of fact and conclusions of law that support the determination of the court.

(b) Required items. An order allowing the presentation of the testimony of a child victim or material witness by an alternative method shall state the following:
1. The method by which the testimony is to be presented.
2. A list, individually or by category, of the persons either allowed to be present or required to be excluded during the taking of the testimony of the child victim or material witness.
3. Any special conditions necessary to facilitate the right of a party to examine or cross-examine the child victim or material witness.
4. Any condition or limitation upon the participation of persons present during the taking of the testimony of the child victim or material witness.
5. Any other condition necessary for taking or presenting the testimony.
6. Limit on restrictiveness. The alternative method ordered shall not be more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order.

§ 5999. Right of parties to examine the child victim or material witness.
An alternative method ordered by the presiding officer must permit a full and fair opportunity for examination and cross-examination of the child victim or material witness.

16 “Child” or “children.” An individual or individuals under 13 years of age. Id., § 5982.

“Child victim or material witness.” An individual under 13 years of age who has been or will be called to testify in a criminal proceeding. Id., § 5993.

17 “[SB 979] is based on the Uniform Act that was adopted by the Commissioners of the United States Uniform Act. It is very similar to that act. That act was also approved by the American Bar Association at their summer meeting in 2002. Thirty-five other states have legislation such as this, and the United States Supreme Court, in [Maryland v. Craig, 497 U.S. 836 (1990)], has indicated that it meets constitutional requirements, as well.” Comments of Sen. Greenleaf; Pa. Senate Legis. J. (03/17/04), at 1499.

18 See Pa. Senate Legis. J. (03/17/04), at 1499 (reflecting Senate passage of SB 979; by 50-0 vote).

19 At this writing, representatives’ remarks regarding the legislation, recorded in the House Journal on July 2-3, 2004, have not been published.


21 See n.13, supra.

22 See Appendix to this article, infra.

23 Id. Act 87 also preserves the definition of “qualified shorthand reporter.”
Did We Get It Right This Time? Act 87 & Pa.’s Quest for a Constitutional Means to Present Testimony of Children by Alternative Methods

(Continued from Page 14)

21 Formerly, § 5984. This was the only provision repealed by Act 87.

22 For example, § 5984.1 (formerly “Testimony by videotaped recording”) is now captioned as “Recorded testimony.” In the text of this provision, the clause “by videotaped recording” is substantially replaced with “... by any method that accurately captures and preserves the visual images, oral communications and other information presented ...”

23 See also §§ 5984.1(b), 5985.1(a.1), & 5986(b).

24 SB 979, § 5996. Standard for when testimony may be presented by alternative method.

25 As a personal aside, considering the regrettably high number of young kids who typically witness the whole panoply of street crimes, I can’t help but wonder why this scope wasn’t further extended to cover, for example, crimes relating to arson, extortion, terroristic threats and witness intimidation.

26 See also §§ 5984.1(c), 5985.1(a.2), & 5986(c).

27 SB 979, §§ 5997 & 5998. See n.15, supra.

30 See, e.g., § 5985(a.2), which provides, in pertinent part:
(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.

Rob Hawn is a senior member of Cozen O’Connor. Previously, he served as a prosecutor with the Philadelphia District Attorney’s Office and as a police officer. He has also served, pro bono publico, as a child advocate and guardian ad litem in the Philadelphia County Court of Common Pleas. In 1999, he was recognized as a Distinguished Advocate by Philadelphia’s Support Center for Child Advocates.

EDITOR’S NOTE: See Appendix to this article on Page 16.

Part of a Series of Interviews with Committee Members and Leadership

Interviews With the Children’s Rights Committee: Chair Joyce A. Hatfield-Wise

(Continued from Page 9)

Q: What is your idea of perfect contentment?

At home with family and a glass of iced tea (or more recently a cup of hot coffee). No work. No worries. No cleaning!

Q: What annoys you the most?

Dishonesty.

Q: What talent/skill/ability would you most like to have?

To know where all the books of the Bible are actually located in the Bible and to able to better understand and apply its teachings.

There are also countless other things I would love to do, like play the piano, ski dive, para-sail, scuba dive, you name it.

Q: What do you most value in your friends?

Genuineness. Loyalty and love are sure helpful, too!

Q: What saying or motto helps to motivate you?

“You never know that God is all you need, until God is all you’ve got.” from A Purpose Driven Life.


• Search more than 60,000 lawyers licensed to practice in Pennsylvania, and more.
• Available in two formats: the traditional “phone book” and an online version.
• Online version updated biweekly.
• Keep in touch with legal organizations, law libraries, state and local bar associations, law schools, and paralegal and legal secretarial associations.
• Includes federal, state and local courts.

A one-year license to use the online Directory is $45, plus tax, for PBA members and must be ordered via the PBA Store at www.pabar.org.

(Open ordering, a subscriber will be issued an individual password to use the electronic database for one year.)

The book version of the Directory can be ordered by calling the PBA Member Service Center at (800) 932-0311, or through the PBA store at www.pabar.org.
APPENDIX TO:
Did We Get It Right This Time? Act 87 & Pa.’s Quest for a Constitutional Means to Present Testimony of Children by Alternative Methods (Pages 10-15)

EDITOR’S NOTE: This appendix has been prepared solely for the reader’s convenience. Please do not rely upon the accuracy of its content, except in reference to the accompanying text on Pages 10 -15.

Pennsylvania Consolidated Statutes
Title 42. Judiciary and Judicial Procedure
Part VI. Actions, Proceedings and Other Matters Generally
Chapter 59. Depositions and Witnesses
Subchapter D. Child Victims and Witnesses
(As Amended July 15, 2004)

§ 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, 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.

§ 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:

“Child” or “children.” An individual or individuals under 16 years of age.

“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.

“Qualified shorthand reporter.” An individual engaged in the active practice of general shorthand reporting who is skilled in the art of verbatim reporting by the use of a written shorthand system, whether manual or machine; or any individual who is an official court or legislative reporter; or any individual who is the holder of a certified shorthand reporter certificate mandated by state or federal law.

§ 5983. Rights and services
(a) Designation of persons to act on behalf of children. — Courts of common pleas may designate one or more persons as a child advocate to provide the following services on behalf of children who are involved in criminal proceedings as victims or material witnesses:

(1) To explain, in language understood by the child, all legal proceedings in which the child will be involved.

(2) As a friend of the court, to advise the judge, whenever appropriate, of the child’s ability to understand and cooperate with any court proceedings.

(3) To assist or secure assistance for the child and the child’s family in coping with the emotional impact of the crime and subsequent criminal proceedings in which the child is involved.

(b) Qualifications. — Persons designated under subsection (a) may be attorneys at law or other persons who, by virtue of service as rape crisis or domestic violence counselors or by virtue of membership in a community service organization or of other experience acceptable to the court, possess education, experience or training in child or sexual abuse and a basic understanding of the criminal justice system.

§ 5984. Videotaped depositions [REPEALED]

§ 5984.1. Recorded testimony
(a) Recording. — Subject to subsection (b), in any prosecution or adjudication involving a child victim or child material witness, the court may order that the child victim’s or child material witness’s testimony 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 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

(Continued on Page 17)
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 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 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 that would substantially impair the child victim’s or child material 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.

§ 5985. Testimony by contemporaneous alternative method

(a) 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 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.

(a.1) Determination. — Before the court orders the child victim or the child material witness to testify by 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 that would substantially impair the child victim’s or child material 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.

§ 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 any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to...
APPENDIX TO: Did We Get It Right This Time? Act 87 & Pa.’s Quest for a Constitutional Means to Present Testimony of Children by Alternative Methods (Pages 10-15)

(Continued from Page 17)

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. — 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 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, 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 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 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.

(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 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, 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 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 a child in testifying on direct examination and cross-examination.

§ 5988. Victims of sexual or physical abuse
(a) Release of name prohibited. — 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.