

HOUSE BILL REPORT

HB 2126

As Reported by House Committee On: Judiciary

Title: An act relating to providing accommodations to dependent persons who are victims and witnesses.

Brief Description: Providing accommodations to dependent persons who are victims and witnesses.

Sponsors: Representatives Lantz, Kenney, Kessler, Rodne, Linville, Hankins, Grant, Takko, Newhouse, Williams, Flannigan, Sells, Ormsby, Chase and Serben.

Brief History:

Committee Activity:

Judiciary: 3/1/05, 3/2/05 [DPS].

Brief Summary of Substitute Bill

- Creates certain rights for dependent persons who are victims and witnesses of crimes;
- Allows for videotape depositions of dependent persons; and
- Establishes procedures for using closed-circuit television testimony of dependent persons.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Lantz, Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell, Kirby, Serben, Springer and Wood.

Staff: Trudes Tango Hutcheson (786-7384).

Background:

Definitions of Dependent Persons and Vulnerable Adults

There are various statutes making it a crime to mistreat a dependent person. A "dependent person" is defined in the criminal mistreatment laws as a person who, because of physical or mental disability or because of extreme advanced age, is dependent upon another for the basic

necessities of life. The basic necessities of life means food, water, shelter, clothing, and medically necessary health care. A vulnerable adult, resident of a nursing home, or resident of an adult family home is presumed to be a dependent person. A person is a "vulnerable adult" if the person: (a) is 60 years old or older who has the functional, mental, or physical inability to care for him or herself; (b) is found incapacitated under the guardianship laws; (c) has a developmental disability; (d) is admitted to any residential care facility that is required to be licensed by the state; or (e) is receiving services from home health, hospice, or home care agencies or an individual provider.

Rights of Victims and Witnesses

In 1981, the Legislature enacted statutes establishing certain rights for victims and witnesses of crimes. Those rights generally address issues around keeping the victim informed and making it easier for the victim to participate in court proceedings.

In 1985, the Legislature enacted similar statutes establishing rights for child victims and witnesses. In addition to the general rights that apply to victims, child victims and witnesses have the following additional rights: (a) to have proceedings explained in language easily understood by the child; (b) for sex or violent crimes or child abuse, to have a victim advocate present at proceedings if practical and if it would not cause any unnecessary delay; (c) to not have the name, address, and photograph of a living child victim disclosed by law enforcement agencies to anyone other than other law enforcement agencies without the permission of the child, parent, or legal guardian; (d) to allow an advocate to make recommendations to the prosecuting attorney about the ability of the child to cooperate and the potential effects on the child; (e) to allow an advocate to provide information to the court concerning the child's ability to understand the proceedings; (f) to be provided information or referrals to social service agencies; (g) to provide information to the court regarding the need for supportive persons at the court proceedings while the child testifies; (h) to allow law enforcement agencies the opportunity to enlist other professionals trained in child interviews; and (i) for child victims of violent or sex crimes or child abuse, to receive a written statement of these rights and contact information of local victim programs.

The failure to provide notice of these rights shall not result in civil liability as long as the failure to notify was in good faith and without gross negligence. The rights enumerated shall not be construed to create substantive rights and duties, and in an individual case, the rights are subject to the discretion of the law enforcement agency, prosecutor, or judge.

Testimony by Closed-Circuit Television

Testimony of child witnesses may be taken outside the presence of the defendant or jury, or both, via closed-circuit television under certain circumstances. Use of closed-circuit television for child victim testimony is available if the child is under the age of 10, the case involves sexual or physical abuse of the child, and the court finds that requiring the child to testify in front of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial.

In addition, a number of other requirements must be met in order for the court to allow a child to testify via closed-circuit television. The court must find that the prosecutor made all

reasonable efforts to prepare the child for testifying, such as counseling, court tours, and explaining the trial process. The court must balance the strength of the state's case without the testimony of the child against the defendant's constitutional rights. The court must also determine if a less restrictive alternative exists to protect the child from the emotional distress of testifying.

The court must conduct a hearing before trial to determine whether the presence of the defendant or the jury is the source of the trauma and must limit the use of the closed-circuit television at trial accordingly. If prior to this hearing, the prosecutor alleges and the court concurs that the defendant's presence is probably the source of the trauma, then at the hearing the court may conduct the examination of the child outside the presence of the defendant by using the closed-circuit television.

If the court allows child testimony via closed-circuit television, the prosecutor, defense attorney, and a neutral and trained victim's advocate must always be in the room with the child when closed-circuit television is used. The court may decide to remain in the room with the child or to preside over the courtroom. The defendant must be able to communicate constantly with the defense attorney during the testimony and has the right to recesses in order to consult with the defense attorney. All the parties in the room with the child must be on television if possible, otherwise the court must describe for the viewers the location of the parties in relation to the child.

This option of using closed-circuit television is not available in cases where the defendant is acting as his or her own attorney or when identification of the defendant is an issue. The state bears the costs of the closed-circuit television procedure.

The Washington Supreme Court has upheld the constitutionality of the child victim closed-circuit television testimony statute in light of the defendant's constitutional right to confrontation.

Depositions

Court rules, statutes, and case law allow the taking of a witness's deposition in criminal trials. Under the court rule, upon a showing that the witness may be unable to attend a hearing or refuses to discuss the case with counsel, the court may allow a deposition if the witness's testimony is material and necessary to prevent a failure of justice. The party taking the deposition must notify the other party in writing of the time and place, and the party receiving notice may ask the court to adjust the time and place. A deposition may not be used against a defendant who has not had notice of and an opportunity to participate in or be present at the deposition. The deposition may be used by any party to contradict or impeach the testimony of the witness who was deposed. Court rules and case law allow depositions to be recorded by video tape.

Summary of Substitute Bill:

A new chapter is created to: (a) provide rights to dependent persons who are victims and witnesses of crimes; (b) allow for videotape depositions of dependent persons; and (c) establish procedures for using closed-circuit television testimony of dependent persons.

The definition of a dependent person is the same as that term as used in the criminal mistreatment laws, and it includes the presumption that a vulnerable adult, resident of a nursing home, or resident of an adult family home is a dependent person.

Rights of Victims and Witnesses Who Are Dependent Persons

A list of rights are enumerated for dependent persons who are victims or witnesses of crimes. The rights are the same as those listed for victims and witnesses and child victims and witnesses, except for the right regarding disclosure of information. The dependent person has the right to not have identifying information disclosed by criminal justice agencies except to other criminal justice agencies if disclosure would harm the dependent person's reputation. If such information is disclosed to a party other than another criminal justice agency, the disclosing party must request a written agreement that the recipient will not further disseminate the information without the dependent person's consent. The rights listed are not to be construed as creating substantive rights and duties, and each case is subject to the discretion of law enforcement, the prosecutor, or the judge.

Testimony by Closed-Circuit Television

Procedures are established to allow a dependent person to testify via closed-circuit television outside the presence of the defendant or jury. The procedures and requirements are essentially the same as those applicable to child victims of sexual assaults. However, the use of closed-circuit television testimony for dependent persons is not limited to a particular type of crime.

Depositions

Prior to the commencement of the trial, the court may allow the prosecutor to take a videotape deposition of the dependent person if it is likely that the person will be unavailable to testify at trial. The court's finding of likely unavailability must be based upon, at a minimum, recommendations from the person's doctor or anybody else with direct contact with the dependent person and based on the dependent person's specific behavior. The prosecutor must provide reasonable written notice to the defendant, who shall have the opportunity to be present at the deposition and to cross-exam the dependent person. The deposition may be used at trial if the dependent person is unavailable and the defendant had notice of and an opportunity to be present at the deposition.

Liability

Failure to provide notice of the rights or to assure these rights to the dependent person shall not result in civil liability if the failure was in good faith.

Substitute Bill Compared to Original Bill:

The substitute bill removes sections stating the court may: (a) allow leading questions to develop the dependent person's testimony; (b) limit cross-examination to avoid confusing the dependent person; (c) instruct the jury regarding the dependent person's credibility; (d) provide frequent recesses; (e) vary the manner in which the oath is given; (f) admit character

evidence; and (g) postpone court proceedings for a day to accommodate the dependent person's special needs.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (In support) It is important that all persons have access to the justice system and are able to fully participate in the process. This bill is an attempt to better balance the legal proceedings involving dependent persons. Not everyone who appears in court is on equal footing. Making these accommodations for a dependent person will ensure that justice is served. The bill will help stop the serial victimization of elderly folks. Many people with mental disabilities are sexually assaulted and simply expect to be abused and exploited because these cases are so difficult to prosecute. This bill will help to prosecute these crimes.

(With concerns) It's unclear what the fiscal impact will be because many of the provisions in the bill are at the court's discretion. Very few courts have closed-circuit television equipment.

Testimony Against: If the prosecutor is allowed to ask for a deposition, the defense should also be allowed to ask for one. The court already has authority under court rules to do what is listed in section 4. The Legislature should set out a general policy and leave it to the court to adopt rules to implement that policy in court proceedings. The bill does not address what happens when a dependent person has a guardian. The bill would deny the disclosure of the dependent person's identifying information in a court proceeding, but that information would need to be disclosed to the defendant.

Persons Testifying: (In support) Representative Lantz, prime sponsor; and Seth Dawson and Phil Jordan, Washington Protection and Advocacy System.

(With concerns) Sophia Byrd, Association of Counties; Martha Harden Cesar, Superior Court Judges' Association; and Jeff Hall, Board for Judicial Administration.

(Opposed) Michael Hanby, Washington Defenders' Association and Washington Association of Criminal Defense Lawyers.

Persons Signed In To Testify But Not Testifying: None.