

1985 Assembly Bill 425

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1985 Wisconsin Act 262

AN ACT to repeal 967.041 to 967.043; to repeal and recreate 967.04 (7); and to create 48.293 (3), 908.08, 967.04 (8) to (10) and 971.24 (3) of the statutes, relating to videotape statements and depositions by children.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Legislative purpose. This act is intended to allow children to testify in criminal, juvenile and probation and parole revocation proceedings in a way which minimizes the mental and emotional strain of their participation in those proceedings; to preserve the right of all parties to cross-examine those child witnesses; and to allow the trier of fact to observe the demeanor of those child witnesses while testifying.

SECTION 2. 48.293 (3) of the statutes is created to read:

48.293 (3) Upon request prior to the fact-finding hearing, counsel for the interests of the public shall disclose to the child, child's counsel or guardian ad litem the existence of any videotaped oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the requesting person to view the videotaped oral statement. If, subsequent to compliance with this subsection, the state obtains possession, custody or control of such a videotaped statement, counsel for the interests of the public shall promptly notify the requesting person of that fact and make reasonable arrangements for the requesting person to view the videotaped oral statement.

JUDICIAL COUNCIL NOTE: Subsection (3) makes videotaped oral statements of children in the possession, custody or control of the state discoverable upon demand by the child, child's counsel or guardian ad litem. These statements may be admissible under s. 908.08, stats.

SECTION 3. 908.08 of the statutes is created to read:

908.08 Videotaped statements of children. (1) In any criminal trial or hearing, juvenile fact-finding hearing under s. 48.31 or revocation hearing under s. 57.06 (3) or 973.10 (2), the court or hearing examiner may admit into evidence the videotaped oral statement of a child who is available to testify, as provided in this section.

(2) (a) Not less than 10 days prior to the trial or hearing, or such later time as the court or hearing examiner permits upon cause shown, the party offering the statement shall file with the court or hearing officer an offer of proof showing the caption of the case, the name and present age of the child who has given the statement, the date, time and place of the statement and the name and business address of the

videotape camera operator. That party shall give notice of the offer of proof to all other parties, including notice of reasonable opportunity for them to view the videotape prior to the hearing under par. (b).

(b) Prior to the trial or hearing in which the statement is offered and upon notice to all parties, the court or hearing examiner shall conduct a hearing on the statement's admissibility. At or prior to the hearing, the court shall view the videotape. At the hearing, the court or hearing examiner shall rule on objections to the statement's admissibility in whole or in part. If the trial is to be tried by a jury, the court shall enter an order for editing as provided in s. 885.44 (12).

(3) The court or hearing examiner shall admit the videotape statement upon finding all of the following:

(a) That the trial or hearing in which the videotape statement is offered will commence:

1. Before the child's 12th birthday; or

2. Before the child's 16th birthday and the interests of justice warrant its admission under sub. (4).

(b) That the videotape is accurate and free from excision, alteration and visual or audio distortion.

(c) That the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth.

(d) That the time, content and circumstances of the statement provide indicia of its trustworthiness.

(e) That admission of the statement will not unfairly surprise any party or deprive any party of a fair opportunity to meet allegations made in the statement.

(4) In determining whether the interests of justice warrant the admission of a videotape statement of a child who is at least 12 years of age but younger than 16 years of age, among the factors which the court or hearing examiner may consider are any of the following:

(a) The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.

(b) The child's general physical and mental health.

(c) Whether the events about which the child's statement is made constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the

conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.

(d) The child's custodial situation and the attitude of other household members to the events about which the child's statement is made and to the underlying proceeding.

(e) The child's familial or emotional relationship to those involved in the underlying proceeding.

(f) The child's behavior at or reaction to previous interviews concerning the events involved.

(g) Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a close emotional relationship, will ensue from providing testimony.

(h) Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

(i) Whether admission of the videotape statement would reduce the mental or emotional strain of testifying or reduce the number of times the child will be required to testify.

(5) If the court or hearing examiner admits a videotape statement under this section, the party who has offered the statement into evidence may nonetheless call the child to testify immediately after the videotape statement is shown to the trier of fact. If that party does not call the child, the court or hearing examiner, upon request by any other party, shall order that the child be produced immediately following the showing of the videotape statement to the trier of fact for cross-examination.

(6) Videotaped oral statements of children under this section in the possession, custody or control of the state are discoverable under ss. 48.293 (3) and 971.24 (3).

JUDICIAL COUNCIL NOTE: See the legislative purpose clause in SECTION 1 of this act.

Subsection (1) limits this hearsay exception to criminal trials and hearings in criminal, juvenile and probation or parole revocation cases at which the child is available to testify. Other exceptions may apply when the child is unavailable. See ss. 908.04 and 908.045, stats. Subsection (5) allows the proponent to call the child to testify and other parties to have the child called for cross-examination. The right of a criminal defendant to cross-examine the declarant at the trial or hearing in which the statement is admitted satisfies constitutional confrontation requirements. *California v. Green*, 399 U.S. 149, 166 and 167 (1970); *State v. Burns*, 112 Wis. 2d 131, 144,

332 N.W. 2d 757 (1983). A defendant who exercises this right is not precluded from calling the child as a defense witness.

Subsection (2) requires a pretrial offer of proof and a hearing at which the court or hearing examiner must rule upon objections to the admissibility of the statement in whole or in part. These objections may be based upon evidentiary grounds or upon the requirements of sub. (3). If the trial is to be to a jury, the videotape must be edited under one of the alternatives provided in s. 885.44 (12), stats.

Subsection (3) (a) limits the applicability of this hearsay exception to trials and hearings which commence prior to the child's 16th birthday. If the trial or hearing commences after the child's 12th birthday, the court or hearing examiner must also find that the interests of justice warrant admission of the statement. A nonexhaustive list of factors to be considered in making this determination is provided in sub. (4).

Subsection (6) refers to the statutes making videotaped oral statements of children discoverable prior to trial or hearing.

SECTION 4. 967.04 (7) of the statutes is repealed and recreated to read:

967.04 (7) (a) In any criminal prosecution or any proceeding under ch. 48, any party may move the court to order the taking of a videotaped deposition of a child who has been or is likely to be called as a witness. Upon notice and hearing, the court may issue an order for such a deposition if the trial or hearing in which the child may be called will commence:

1. Prior to the child's 12th birthday; or
2. Prior to the child's 16th birthday and the court finds that the interests of justice warrant that the child's testimony be prerecorded for use at the trial or hearing under par. (b).

(b) Among the factors which the court may consider in determining the interests of justice are any of the following:

1. The child's chronological age, level of development and capacity to comprehend the significance of the events and to verbalize about them.
2. The child's general physical and mental health.
3. Whether the events about which the child will testify constituted criminal or antisocial conduct against the child or a person with whom the child had a close emotional relationship and, if the conduct constituted a battery or a sexual assault, its duration and the extent of physical or emotional injury thereby caused.
4. The child's custodial situation and the attitude of other household members to the events about which the child will testify and to the underlying proceeding.
5. The child's familial or emotional relationship to those involved in the underlying proceeding.
6. The child's behavior at or reaction to previous interviews concerning the events involved.
7. Whether the child blames himself or herself for the events involved or has ever been told by any person not to disclose them; whether the child's prior reports to associates or authorities of the events have been disbelieved or not acted upon; and the child's subjective belief regarding what consequences to himself or herself, or persons with whom the child has a

close emotional relationship, will ensue from providing testimony.

8. Whether the child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders, including, without limitation, reexperiencing the events, fear of their repetition, withdrawal, regression, guilt, anxiety, stress, nightmares, enuresis, lack of self-esteem, mood changes, compulsive behaviors, school problems, delinquent or antisocial behavior, phobias or changes in interpersonal relationships.

9. The number of separate investigative, administrative and judicial proceedings at which the child's testimony may be required, the likely length of time until the last such proceeding, and the mental or emotional strain associated with keeping the child's recollection of the events witnessed fresh for that period of time.

10. Whether a videotaped deposition would reduce the mental or emotional strain of testifying and whether the deposition could be used to reduce the number of times the child will be required to testify.

SECTION 5. 967.04 (8) to (10) of the statutes are created to read:

967.04 (8) (a) If the court orders a deposition under sub. (7), the judge shall preside at the taking of the deposition and enforce compliance with the applicable provisions of ss. 885.44 to 885.47. Notwithstanding s. 885.44 (5), counsel may make objections and the judge shall make rulings thereon as at trial. The clerk of court shall keep the certified original videotape deposition under sub. (7) in a secure place. No person may inspect or copy the deposition except by order of the court upon a showing that inspection or copying is required for editing under s. 885.44 (12) or for the investigation, prosecution or defense of the action in which it was authorized or the provision of services to the child.

(b) If the court orders a videotape deposition under sub. (7), the court shall do all of the following:

1. Schedule the deposition on a date when the child's recollection is likely to be fresh and at a time of day when the child's energy and attention span are likely to be greatest.

2. Schedule the deposition in a room which provides adequate privacy, freedom from distractions, informality and comfort appropriate to the child's developmental level.

3. Order a recess whenever the energy, comfort or attention span of the child or other circumstances so warrant.

4. Determine that the child understands that it is wrong to tell a lie and will testify truthfully if the child's developmental level or verbal skills are such that administration of an oath or affirmation in the usual form would be inappropriate.

5. Before questioning by the parties begins, attempt to place the child at ease, explain to the child the pur-

pose of the deposition and identify all persons attending.

6. Allow any questioner to have an advisor to assist the questioner, and upon permission of the judge, to conduct the questioning.

7. Supervise the spatial arrangements of the room and the location, movement, and deportment of all persons in attendance.

8. Allow the child to testify while sitting on the floor, on a platform, on an appropriately sized chair, or on the lap of a trusted adult, or while moving about the room within range of the visual and audio recording equipment.

9. Permit the defendant to be in a position from which the defendant can communicate privately and conveniently with counsel.

10. Upon request, make appropriate orders for the discovery and examination by the defendant of documents and other evidence in the possession of the state which are relevant to the issues to be covered at the deposition at a reasonable time prior thereto.

11. Bar or terminate the attendance of any person whose presence is not necessary to the taking of the deposition, or whose behavior is disruptive of the deposition or unduly stressful to the child. A reasonable number of persons deemed by the court supportive of the child or any defendant may be considered necessary to the taking of the deposition under this paragraph.

(9) In any criminal prosecution or juvenile fact-finding hearing under s. 48.31, the court may admit into evidence a videotaped deposition taken under subs. (7) and (8) without an additional hearing under s. 908.08. In any proceeding under s. 57.06 (3) or 973.10 (2), the hearing examiner may order and preside at the taking of a videotaped deposition using the procedure provided in subs. (7) and (8) and may admit the videotaped deposition into evidence without an additional hearing under s. 908.08.

(10) If a court or hearing examiner admits a videotaped deposition into evidence under sub. (9), the child may not be called as a witness at the proceeding in which it was admitted unless the court or hearing examiner so orders upon a showing that additional testimony by the child is required in the interest of fairness for reasons neither known nor with reasonable diligence discoverable at the time of the deposition by the party seeking to call the child.

JUDICIAL COUNCIL NOTE: Subsections (7) to (10) replace prior sub. (7) and ss. 967.041 to 967.043. See the legislative purpose clause in SECTION 1 of this act.

Like the prior statute and rules, these provisions authorize the court or hearing examiner to order the taking of a videotape deposition from a child likely to be called as a witness in a criminal trial or a hearing in a criminal, juvenile, probation revocation or parole revocation case, and to admit that deposition into evidence at such a trial or hearing.

This revision repeals statutory language limiting such videotape depositions to cases where there is a substantial likelihood that the child would otherwise suffer severe mental or emotional strain. It authorizes such depositions to be taken

whenever the trial or hearing at which the evidence is to be offered will commence before the child's 16th birthday. If it will commence after the child's 12th birthday, however, the court or hearing examiner must also determine whether the interests of justice warrant the taking and use of the child's testimony in this fashion. A nonexhaustive list of factors to be considered in making this determination is provided in sub. (7) (b), substantially similar to prior s. 967.041 (3), stats.

Subsection (8) (a) is substantially similar to prior ss. 967.042 (3) and (4) and 967.043. Subsection (8) (b) is substantially similar to prior s. 967.042 (2).

Subsection (10) is new. It prohibits the child from being called as a witness at the trial or hearing in which the videotape statement is admitted into evidence unless fairness so requires for reasons not known or reasonably discoverable when the deposition was taken.

SECTION 6. 967.041 to 967.043 of the statutes, as created by supreme court order dated April 30, 1985, are repealed.

SECTION 7. 971.24 (3) of the statutes is created to read:

971.24 (3) Upon demand prior to trial or revocation hearing under s. 57.06 (3) or 973.10 (2), the district attorney shall disclose to a defendant the existence of any videotaped oral statement of a child under s. 908.08 which is within the possession, custody or control of the state and shall make reasonable arrangements for the defendant and defense counsel to view the videotaped statement. If, subsequent to compliance with this subsection, the state obtains possession, custody or control of such a videotaped statement, the district attorney shall promptly notify the defendant of that fact and make reasonable arrangements for the defendant and defense counsel to view the videotaped statement.

JUDICIAL COUNCIL NOTE: Subsection (3) makes videotaped oral statements of children in the possession, custody or control of the state discoverable upon demand by the defendant. These statements may be admissible under s. 908.08, stats.

SECTION 8. Cross-reference changes. In the sections of the statutes listed in Column A, the cross-references shown in Column B are changed to the cross-references shown in Column C:

A	B	C
Statute Sections	Old Cross-References	New Cross-References
48.31 (2)	967.04 (7) (a)	950.02
48.31 (2)	967.04 (7)	967.04 (7) to (10)
57.06 (3)	967.04 (7)	967.04 (7) to (10)
950.055 (2) (b)	967.04 (7)	908.08 or 967.04 (7) and (8)
971.105	967.04 (7) (a)	950.02
973.10 (2m)	967.04	967.04 (7) to (10)