

Children's Testimony Outside Presence of Others

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When a child is called as a witness, a party may seek an order allowing the child to testify outside the presence of a parent, guardian, custodian or an alleged abuser. The following is a brief summary of relevant case law.

Testimony in Juvenile Court:¹

In Juvenile Court proceedings, procedural due process applies to all hearings that may impact or affect parental rights.² Procedural Due Process includes a reasonable opportunity for a parent to confront and cross-examine adverse witnesses, including child witnesses.³ However, because juvenile proceedings are civil and not criminal in nature, the parent's right of confrontation derives from the Due Process Clause of the 14th Amendment and not from the 6th Amendment. Accordingly, the Nebraska Supreme Court has held that the "heightened standards" of the 6th Amendment's Confrontation Clause are not required in juvenile proceedings, but that the proper analysis is whether or not the parent's due process rights under the 14th Amendment have been violated. Because due process is flexible, it calls for such procedural protection as a particular situation might demand. In determining the due process requirements to be applied in a given case, a court must weigh the interest of the parent, the interest of the State, and the risk of an erroneous decision, given the procedures to be used.⁴

Mandatory Protocol for Party Seeking to Allow Child Testimony Outside Presence of Parents:⁵

Party MUST give notice of request to the parents or counsel prior to hearing
Juvenile Court MUST conduct separate hearing to determine whether
sufficient reasons exist for excluding parents
Separate hearing MUST be held before or at the time of the adjudication or
termination hearing in which the child's testimony will be offered
Party MUST show "legitimate concerns of risk of harm" to child if testifying
parent's presence

In order to show a "legitimate concern of risk of harm," a showing will usually require the testimony of an expert who is qualified to render an opinion that the child's testimony in the presence of a parent would at least pose a risk of harm to the child in the form of trauma, psychological harm or emotional distress. If the court determines that a showing of "legitimate concern of risk of harm" has been made, then the court must determine what process to use to protect the rights of the parent. Potential processes could include (1) testifying in chambers with only judge, court reporter, and attorneys present; (2) testifying in the courtroom with parents

¹ Information adapted from Nebraska Juvenile Court Law and Practice 2010 Edition, by Christine Costantakos

² *In re Rebecka P.*, 266 Neb. 869 (2003); *In re Interest of Kantril P.*, 257 Neb. 450 (1999)

³ Neb. Rev. Stat. § 43-279 and 43-279.01

⁴ *In re Brian B.*, 268 Neb. 870 (2004)

⁵ *In re Brian B.*, 268 Neb. 870 (2004)

present but child not able to actually see the parent⁶; (3) parents able to view testimony by live video feed. Note that an order granting or denying a motion requesting permission for a child to testify outside the presence of the parents, in and of itself, is not a final, appealable order.⁷

District Court:

Criminal Hearings:⁸

Nebraska Law recognizes that obtaining testimony in a criminal prosecution from a child victim of or a child witness to a felony offense may be a delicate matter and may require some special considerations. The Legislature has expressed an intent to promote, facilitate, and preserve the testimony of such child victim or child witness in a criminal prosecution to the fullest extent possible consistent with the constitutional right to confrontation guaranteed by the Sixth Amendment of the Constitution of the United States and Article I, section 11, of the Nebraska Constitution.⁹ In felony cases, the prosecution or defense can request the court to order the taking of a videotaped deposition of the child witness.¹⁰ In doing so, Neb. Rev. Stat. § 29-1926 controls and requires that:

State MUST show compelling need to protect child witness from further injury or particularized showing that child will be further traumatized or intimidated by testifying in front of defendant

Use of new evidentiary tool (closed-circuit television) MUST be minimally intrusive as possible

- MINIMUM: defendant able to communicate with attorney and court control testimony¹¹

Custody Hearings:

“Generally, where the parties have given consent or acquiescence to private interviews with the children and the court conducts an in camera hearing, such consent waives any objections which might be raised on appeal”¹²

“Assuming that it may be improper for the trial court to interview a child privately, a party to a divorce action may consent to such an interview or waive objections to the informal procedure, in which event the court may not only interview the child but also weigh what the child said as a basis for its order”¹³

⁶ *In re Kelly D.*, 256 Neb. 465 (1999)

⁷ *In re Interest of Marcella B.*, 18 Neb. App. 153 (2009)

⁸ Adapted from Nebraska Practice Series – Trials – 2010 Edition, by Daniel A. Morris

⁹ Neb. Rev. Stat. § 29-1925

¹⁰ Neb. Rev. Stat. § 29-1926

¹¹ *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986)

¹² *Capaldi v. Capaldi*, 235 Neb. 892, 457 N.W.2d 821 (1990)

¹³ *Marez v. Marez*, 217 Neb. 613, 350 N.W.2d 531 (1984)