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IN THE  
COURT OF APPEALS OF INDIANA

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State of Indiana,  
*Appellant-Plaintiff,*

v.

Aaron L. Riggs, II,  
*Appellee-Defendant*

July 29, 2021

Court of Appeals Case No.  
20A-CR-2144

Interlocutory Appeal from the  
Daviess Superior Court

The Honorable Dean A. Sobecki,  
Judge

Trial Court Cause Nos.  
14D01-1907-F4-1170  
14D01-1909-F4-1440

**Crone, Judge.**

### Case Summary

[1] After Aaron L. Riggs, II, was charged with child molesting and related crimes, he sought to depose the alleged child victim. Pursuant to the newly enacted Indiana Code Section 35-40-5-11.5 (the Child Deposition Statute), the

prosecutor declined to consent to the deposition of the child victim. Riggs filed a motion to depose the child victim in accordance with the Indiana Rules of Trial Procedure arguing, among other things, that the Child Deposition Statute conflicts with the trial rules and therefore is a nullity. Following a hearing on the sole issue of whether the Child Deposition Statute is enforceable, the trial court issued an order ruling that the Child Deposition Statute is unenforceable because it conflicts with the trial rules and granting Riggs's request to depose the child victim.

[2] The State of Indiana now appeals that order, arguing that the Child Deposition Statute is enforceable because it is a substantive statute addressing rights granted to child victims by the Indiana Constitution and statute and therefore is not subject to the general rule that the Indiana Trial Rules supersede conflicting procedural statutes. The State further argues that, even if the Child Deposition Statute is considered a purely procedural statute, it does not conflict with the trial rules such that it should be deemed a nullity. We conclude that any substantive provisions of the Child Deposition Statute do not exempt the procedural provisions of the Statute from the general rule that the Indiana Trial Rules supersede conflicting procedural statutes. We also conclude that the procedural provisions of the Child Deposition Statute conflict with the trial

rules, and therefore the procedural provisions are unenforceable. Accordingly, we affirm.<sup>1</sup>

## **Facts and Procedural History**

[3] On July 31, 2019, in cause number 14D01-1907-F4-1170, the State charged Riggs with level 4 felony child molesting, level 4 felony attempted child exploitation, level 6 felony performing sexual conduct in the presence of a minor, and level 6 felony attempted voyeurism. On September 26, 2019, in cause number 14D01-1909-F4-1440, the State charged Riggs with level 4 felony child molesting, level 5 felony obstruction of justice, and three counts of class A misdemeanor invasion of privacy. Riggs allegedly committed the charged offenses against his nine-year-old stepchild. After Riggs posted bond, a protective order was issued, prohibiting him from having any contact with the child victim and her mother.

[4] Effective March 18, 2020, the Indiana General Assembly enacted the Child Deposition Statute, Indiana Code Section 35-40-5-11.5, which imposes limitations on a criminal defendant's ability to conduct an oral deposition of a child under the age of sixteen who is alleged to be the victim of a sex offense. In June and July 2020, Riggs filed in both causes a motion to depose the child

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<sup>1</sup> Because we affirm on the basis that the Child Deposition Statute conflicts with the trial rules, we need not address the State's separation of powers argument or Riggs's argument that the Statute denies him fundamental due process by imposing unequal access to investigation and preparation for trial. We also note that Riggs raises some additional constitutional issues, but because he failed to raise them before the trial court, they are waived. See *Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004) (“[A] party may not present an argument or issue on appeal unless the party raised that argument or issue before the trial court.”).

witness as allowed by Indiana Rules of Trial Procedure 26 and 30 and a supporting brief, arguing that the Child Deposition Statute conflicts with the trial rules, violates the separation of powers provision of the Indiana Constitution,<sup>2</sup> and denies him due process by imposing unequal access to investigation and preparation for trial. Appellant’s App. Vol. 2 at 36, 95. The State filed a response to Riggs’s motion. The trial court held a joint hearing on Riggs’s motions on the sole issue of the enforceability of the Child Deposition Statute. Riggs filed a post-hearing brief in support of his motions for deposition. *Id.* at 54. On September 22, 2020, the trial court granted Riggs’s motions in a joint order that states, “The Court finds that I.C. 35-40-5-11.5 directly conflicts with Indiana Trial Rules 26 and 30 and violates the separation of powers between the legislature and judicial branches. Further, the Indiana Trial Rules provide for protection against abusive discovery actions.” Appealed Order at 1. The State filed a motion to stay the proceedings and certify the order for interlocutory appeal, both of which the trial court granted. This Court accepted jurisdiction over the appeal.

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<sup>2</sup> Article 3, Section 1 establishes a government divided into the legislative, executive, and judicial departments and provides that “no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

## Discussion and Decision

[5] The State argues that the trial court erred in concluding that the Child Deposition Statute is a nullity because it conflicts with Trial Rules 26 and 30.<sup>3</sup> Generally, “[a] trial court has broad discretion with regard to rulings on discovery matters based upon its duties to promote discovery of the truth and to guide and control the proceedings.” *Moore v. State*, 839 N.E.2d 178, 182 (Ind. Ct. App. 2005). Thus, to obtain reversal of a trial court’s ruling, the complaining party must demonstrate that the trial court abused its discretion. *Id.* The trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before it. *Id.* Questions of law, which include the enforceability and interpretation of a statute, are reviewed de novo. *In re M.S.*, 140 N.E.3d 279, 282 (Ind. 2020).

[6] Specifically, the State contends that the Child Deposition Statute is enforceable because it is a substantive law that is not subject to the general rule regarding conflicts between procedural statutes and trial rules and, even if it is deemed to be a purely procedural statute, it is not in conflict with Trial Rules 26 and 30. Before addressing these arguments, we note that the enforceability of the Child Deposition Statute was recently addressed by other panels of this Court. *See*

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<sup>3</sup> Indiana Criminal Procedure Rule 21 provides, “The Indiana rules of trial and appellate procedure shall apply to all criminal proceedings so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings.” *See also Brewer v. State*, 173 Ind. App. 161, 166, 362 N.E.2d 1175, 1177 n.4 (1977) (“Trial Rules 30 and 31 provide for the taking of depositions in civil cases, and these rules apply to criminal cases through Ind. R. Crim. P. 21.”).

*Sawyer v. State*, No. 20A-CR-1446, 2021 WL 1991699 (Ind. Ct. App. May 19, 2021), *trans. pending*; *Church v. State*, No. 21A-CR-68, 2021 WL 2644110 (Ind. Ct. App. June 28, 2021). Although we ultimately reach a resolution in accord with those decisions, we note that they did not address the State’s arguments as articulated in the State’s briefs in this case. We now turn to the merits of this appeal.

**Section 1 – The Child Deposition Statute contains procedural provisions that are subject to the general rule that the trial rules take precedence over conflicting procedural statutes.**

- [7] We first address the State’s contention that the Child Deposition Statute is a substantive law that is not subject to the general rule regarding conflicts between procedural statutes and trial rules. Substantive laws “fix duties, establish rights and responsibilities among and for persons,” while procedural laws “prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court.” *State ex rel. Blood v. Gibson Cir. Ct.*, 239 Ind. 394, 400, 157 N.E.2d 475, 478 (1959). “The time, place and method of doing an act in court properly fall within the category of procedural rules.” *Id.*
- [8] “The Supreme Court has the inherent power to create rules of procedure and [that] right has been recognized by the Indiana General Assembly.” *State ex rel. Bicanic v. Lake Cir. Ct.*, 260 Ind. 73, 76, 292 N.E.2d 596, 598 (1973). Indiana Code Section 34-8-1-3 declares that our “supreme court has authority to adopt, amend, and rescind rules of court that govern and control practice and procedure in all the courts of Indiana[, and] all laws in conflict with the

supreme court’s rules have no further force or effect.”<sup>4</sup> As for the enforceability of a statute addressing judiciary procedure, this Court has explained,

It is a fundamental rule of law in Indiana that in the event of a conflict between a procedural statute and a procedural rule adopted by the supreme court, the latter shall take precedence. When a statute conflicts with the Indiana rules of trial procedure, the rules of procedure govern, and phrases in statutes which are contrary to the rules of procedure are considered a nullity. To be in conflict, it is not necessary that the rule and the statute be in direct opposition. The rule and the statute need only be incompatible to the extent that both could not apply in a given situation. A procedural statute may not operate as an exception to a procedural rule having general application. A procedural statute that does not conflict with any of the trial rules may be held operative. However, any statute conflicting with procedural rules enacted by our supreme court shall have no force or effect.

*Bowyer v. Indiana Dep’t of Nat. Res.*, 798 N.E.2d 912, 916-17 (Ind. Ct. App. 2003) (citations and quotation marks omitted); *see also Garner v. Kempf*, 93 N.E.3d 1091, 1099 (Ind. 2018) (“On matters of procedure, to the extent a statute is at odds with our rule, the rule governs.”).

[9] Consistent with these principles, Indiana Code Section 35-37-4-3 provides, “The state and the defendant may take and use depositions of witnesses in

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<sup>4</sup> Referring to Section 34-8-1-3’s predecessor, our supreme court observed,

By the enactment of this statute the Legislature surrendered and abandoned any rights it might have had under Art. 7, § 4, of the Constitution of Indiana, to impose “regulations and restrictions” upon the jurisdiction of the Supreme Court with respect to “rules of court which shall govern and control practice and procedure in all the courts of the state.”

*Blood*, 239 Ind. at 400-01, 157 N.E.2d at 478.

accordance with the Indiana Rules of Trial Procedure.” The Child Deposition Statute applies to criminal cases involving a child less than sixteen years of age who is the victim or alleged victim of a sex offense and provides as follows:

(c) A defendant may depose a child victim only in accordance with this section.

(d) A defendant may not take the deposition of a child victim unless the defendant contacts the prosecuting attorney before contacting the child, and one (1) or more of the following apply:

(1) The prosecuting attorney agrees to the deposition. The prosecuting attorney may condition the prosecuting attorney’s agreement to the deposition upon the defendant’s acceptance of the manner in which the deposition shall be conducted.

(2) The court authorizes the deposition after finding, following a hearing under subsection (f), that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim’s testimony.

(3) The court authorizes the deposition after finding, following a hearing under subsection (g), that the deposition is necessary:

(A) due to the existence of extraordinary circumstances; and

(B) in the interest of justice.



(e) If the prosecuting attorney does not agree to the deposition, the defendant may petition the court for authorization to depose the child victim under subsection (d)(2), (d)(3), or both subsection (d)(2) and (d)(3). Upon receipt of the petition, the court shall notify the prosecuting attorney and set a hearing to determine whether to authorize a deposition of the child victim, and, if applicable, to determine the manner in which the deposition shall be conducted.

The defendant is required to prove by a preponderance of the evidence the circumstances set forth in either subsection (d)(2) or (d)(3). Ind. Code § 35-40-5-11.5(f), -(g).

[10] We note that the Child Deposition Statute is part of Title 35, Article 40, entitled “Victim Rights.” Article 40 was enacted with the General Assembly’s expressed “intent” to “[e]nact laws that define, implement, preserve, and protect the rights guaranteed to victims by Article 1, Section 13 [of the Indiana Constitution and] ensure that Article 1, Section 13 ... is fully and fairly implemented.” Ind. Code § 35-40-1-1. The General Assembly has decreed that Article 40 is to be construed “to preserve and protect the rights to which a victim is entitled without interfering with the rights of the accused to receive a fair trial or the duty of the prosecuting attorney to represent the people of Indiana.” Ind. Code § 35-40-3-1. Article 1, Section 13(a) protects the accused’s rights to a public trial by an impartial jury in the county in which the offense was committed; to be heard personally and by counsel; to demand the nature and cause of the accusation against him or her, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process for obtaining

witnesses in his or her favor. Article 1, Section 13(b) provides, “Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process ... to the extent that exercising these rights does not infringe upon the constitutional rights of the accused.”<sup>5</sup>

[11] Turning now to the relevant trial rules, Trial Rule 26(A) provides that parties may obtain discovery by “depositions upon oral examination or written questions[,]” and “[u]nless the court orders otherwise under subdivision (C) of this rule, *the frequency of use of these methods is not limited.*” (Emphasis added.) Subdivision (C) addresses protective orders and provides that “[u]pon motion by any party or by the person from whom discovery is sought, *and for good cause shown,*” the court “may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” (Emphasis added.) Subdivision (C) also sets forth the ways in which the court may fashion such an order. For example, the court may (1) order that the discovery not be had; (2) specify the terms and conditions of the discovery, including the time or place; (3) specify the method of discovery; (4) limit the scope of discovery; and/or (5) limit who can be present during discovery to the

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<sup>5</sup> We emphasize that Article 1, Section 13(b) specifically provides that the rights granted to victims cannot be exercised in a manner that would violate the defendant’s right to meet the witnesses face to face. Child witnesses may be protected pursuant to Indiana Code Section 35-37-4-8 from the trauma of having to testify in open court in the presence of the person they are accusing.

parties, their attorneys, and persons designated by the court. Ind. Trial Rule 26(C).

[12] Trial Rule 30(A) addresses when parties may take depositions:

*After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of twenty [20] days after service of summons and complaint upon any defendant except that leave is not required:*

(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

(2) if special notice is given as provided in subdivision (B)(2) of this rule [regarding the taking of a deposition by the plaintiff].

The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(Emphasis added.)

[13] The State contends that the Child Deposition Statute is a substantive law because it gives “substance to the child victim’s constitutional and statutory rights to be treated with respect and dignity and to be protected from abuse throughout the criminal justice proceedings.” Appellant’s Br. at 14. In addition, the State asserts that the Child Deposition Statute embodies the legislature’s decision not to grant a criminal defendant the substantive right to a

discovery deposition in the context of a limited class of cases unless extraordinary circumstances exist. In sum, it is the State's position that the Statute reflects the legislature's balancing of the child victim's substantive right to be treated with respect and protected from abuse against the defendant's substantive right to a discovery deposition; therefore, it is a substantive law, and any of its procedural provisions do not fall within the general rule that a procedural trial rule takes precedence over a conflicting procedural statute.

[14] In support of its position, the State compares the right to take depositions to the right to a change of venue, citing *State ex rel. Hatcher v. Lake Superior Court, Room Three*, 500 N.E.2d 737 (Ind. 1986). In *Hatcher*, a city court and city court judge filed a petition in Lake Superior Court alleging that the mayor was illegally exercising power over the judiciary by revising the court's budget before its submission to the city common council. The mayor moved for a change of venue pursuant to Indiana Trial Rule 76, which the Lake Superior Court denied. The mayor then petitioned for a writ of mandamus and prohibition asking our supreme court to direct the Lake Superior Court to grant the mayor's motion for change of venue. In determining whether to grant the mayor's petition, the question before the supreme court was whether the Lake Superior Court was under a duty to automatically grant the mayor's motion for a change of venue pursuant to Indiana Trial Rule 76. *Id.* at 739. At that time, Trial Rule 76(1) provided, "In all civil actions ... where the venue may now be changed from the judge or the court, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefor

by a party or his attorney.” However, Indiana Code Section 36-4-4-5(a) provided that in a county having a superior court that has more than three judges, a petition to determine the nature of a power or duty to be exercised by a branch of government “shall” be filed in the superior court and “shall” be heard and determined by the court sitting en banc. Lake County had a superior court that had more than three judges. Thus, our supreme court had to determine whether Trial Rule 76 or Section 36-4-4-5(a) applied.

[15] Our supreme court reasoned as follows:

It is fundamental, and all parties agree, Indiana law makes a distinction between the substantive and procedural aspects of a change of venue from a judge or county. The substantive right to a change of venue can be granted only by the Legislature. [*Blood*, 239 Ind. at 400, 157 N.E.2d at 478]; *State ex rel. Draper v. Roszkowski* (1967), 248 Ind. 590, 591, 230 N.E.2d 296, 297; *State ex rel. Wade v. Cass Circuit Court* (1983), Ind. 447 N.E.2d 1082. This has been done by the Legislature in Ind. Code § 34-1-13-1 [now recodified as Section 34-35-1-1], which sets out the substantive requirements for a change of venue. The statute in general provides that in all civil actions, a change of venue shall be granted provided other provisions of the sections are satisfied. *The time, manner, and method of exercising this right, once it is conferred, lies with this Court in our rule making power*, [*Blood*, 239 Ind. at 400, 157 N.E.2d at 478], and is articulated in Ind.R.Tr.P. 76.

*Hatcher*, 500 N.E.2d at 739 (emphasis added). The *Hatcher* court concluded that although Section 34-1-13-1 provided for the substantive right to a change of venue in all civil actions, Section 36-4-4-5 “specifically [took] away the right in suits arising under that statute,” and therefore Trial Rule 76 did not apply. *Id.*

Accordingly, the *Hatcher* court denied the mayor's petition for writ of mandamus and prohibition. *Id.* at 740.

[16] *Hatcher* does not support the State's position that because the Child Deposition Statute embodies substantive law, the procedural provisions in the Statute are not subject to the general rule that a procedural trial rule supersedes a conflicting procedural statute. In *Hatcher*, Section 36-4-4-5 did not address the time, manner, or method of exercising the substantive right to a change of venue; it simply abrogated the right to a change of venue in a certain type of proceeding. In contrast, the Child Deposition Statute prescribes the manner and method governing a defendant's right to depose witnesses that is granted in Section 35-37-4-3. Specifically, the Child Deposition Statute requires the defendant to seek the prosecutor's consent, requires the trial court upon the defendant's motion to hold a hearing if the prosecutor does not consent, sets forth the burden of proof, and places the burden of proof on the defendant. These provisions are procedural. The State attempts to cast the provisions governing the burden of proof as substantive matters, but the burden of proof is a matter of procedure. *See Shepard v. Schurz Commc'ns, Inc.*, 847 N.E.2d 219, 224 (Ind. Ct. App. 2006) (resolving inconsistency between the anti-SLAPP statute and Trial Rule 56 in favor of Rule 56 where anti-SLAPP statute provided that summary judgment is appropriate only when the movant has "proven by a preponderance of the evidence" that the act underlying the claim is a lawful act, and Rule 56 placed a burden upon the movant to make a "prima facie" showing of entitlement to judgment.). As noted above, procedural laws

“prescribe the manner in which ... rights and responsibilities may be exercise and enforced in a court.” *Blood*, 239 Ind. at 400, 157 N.E.2d at 478. The Child Deposition Statute clearly addresses the method and manner in which a defendant may obtain a deposition of a child victim.

[17] We find our supreme court’s decision in *Blood* helpful because it illustrates how the procedural aspects of a statute are treated even where the right conveyed in the statute is substantive. That case involved a proceeding for the construction of a levee, and one of the parties filed a petition for writ of mandate to require the circuit court to set aside an order granting a motion for a change of judge. The trial rule at issue, Rule 1-12B, provided as follows:

In all cases where the venue of a civil action may now be changed from the judge \* \* \* such change shall be granted upon the filing of an unverified application or motion therefor by a party or his attorneys: \* \* \*.

In any action except criminal no change of judge \* \* \* shall be granted except within the time herein provided. Any such application for change of judge \* \* \* shall be filed not later than ten (10) days after the issues are first closed on the merits, or if the issues are closed without answer by operation of law, \* \* \* not later than ten (10) days after the party has knowledge the cause is ready to be set for trial.

239 Ind. at 397-98, 157 N.E.2d at 477. The statute at issue, Section 27-802, provided, “At any time before the work is declared established and referred to a superintend[e]nt for construction, as provided in the next section, a change of

venue may be taken from the judge by the petitioners or any of them, and one [1] by the remonstrants or any of them[.]” *Id.* at 398, 157 N.E.2d at 477.

[18] The respondents argued that because this statute governed a special statutory proceeding for the construction of a levee, the right to a change of judge in such a proceeding was a matter of substantive law that could not be altered by a rule of the court, and therefore *the right to and manner of* taking a change of judge in a levee proceeding was governed by statute and not by rule of court. *Id.* at 398, 157 N.E.2d at 477. The *Blood* court rejected this argument and held that “the *right to a change of judge granted by [Section] 27-802 is a substantive right which can be conferred only by the Legislature, but the method and time of asserting such right are matters of procedure and fall within the category of procedural rules.*” *Id.* at 400, 157 N.E.2d at 478. The *Blood* court then concluded,

Since the fixing of the time within which a motion for a change of judge in a levee proceeding is a matter of procedural law, ... it must follow that [the trial rule] supersedes the provisions of [the statute] as they relate to the time for filing a motion for a change of judge.

The method and time for filing for a change of judge ... are governed by [the trial rule].

*Id.* at 402-03, 157 N.E.2d at 479. In other words, the *Blood* court concluded that even though the statute granted the substantive right to a change of judge in a



levee proceeding, the timing for filing for a change of judge was procedural and thus that statutory provision was trumped by the trial rule.

- [19] Based on *Blood*, we conclude that regardless of whether the Child Deposition Statute embodies matters of substantive law, any and all procedural provisions of the Child Deposition Statute are subject to the well-established rule of law that a procedural statute that conflicts with a trial rule is a nullity.

**Section 2 – The procedural provisions of the Child Deposition Statute conflict with the Indiana Rules of Trial Procedure and therefore are unenforceable.**

- [20] We next address the State’s argument that the Child Deposition Statute does not conflict with Trial Rules 26 and 30. As previously noted, where a statute conflicts with the trial rules, the trial rules govern on matters of procedure. *M.S.*, 140 N.E.3d at 284. To be in conflict, “[t]he rule and the statute need only be incompatible to the extent that both could not apply in a given situation.” *Id.* (quoting *Bowyer*, 798 N.E.2d at 917).

- [21] Specifically, the State asserts that the Child Deposition Statute and the trial rules are compatible because the trial rules do not grant defendants an unlimited right to depose a victim; that is, the right to depose witnesses is limited by Trial Rule 26(C), which allows a defendant’s otherwise unfettered right to take a deposition to be limited “for good cause shown.” The State maintains that the Child Deposition Statute constitutes a legislative finding that good cause has been shown for limiting a defendant’s right to take a deposition in the specific

class of cases to which the Statute applies. According to the State, the “good cause” for limiting a defendant’s right is that child victims of molesting may suffer psychological harm from having to repeatedly relive their molesting while testifying about it. The State further claims that both the Statute and Trial Rule 26(C) leave the weighing of competing interests and ultimate decision to the trial court.

[22] We are unpersuaded. Trial Rule 26 provides that, except in the case of protective orders, the frequency of use of discovery methods including depositions “is not limited.” In addition, Trial Rule 30(A) provides that “any party may take the testimony of any person, including a party, by deposition upon oral examination” after commencement of the action. Thus, a criminal defendant may freely obtain a child victim’s deposition unless a person seeks to limit the defendant’s right by filing a motion and establishing good cause for a protective order pursuant to Trial Rule 26(C). The Child Deposition Statute conflicts with these provisions by providing that a defendant may depose a child victim only in accordance with the Statute, by requiring the defendant to seek the prosecutor’s permission, by requiring the defendant to move for a hearing when the prosecutor does not grant permission, and by placing the burden of proof on the defendant to establish that there is a reasonable likelihood that the child victim will be unavailable for trial and the deposition is necessary to preserve the child victim’s testimony and/or that the deposition is necessary due to the existence of extraordinary circumstances and in the interest of justice. Trial Rules 26 and 30 and the Child Deposition Statute are

incompatible because both cannot apply in Riggs's situation. As such, the trial rules prevail. *See Sawyer*, 2021 WL 1991699, at \*7 (concluding that because procedural provisions of Child Deposition Statute conflict with trial rules, trial rules govern); *Church*, 2021 WL 2644110, at \*4 (same). We conclude that the trial court did not err in finding that the Child Deposition Statute is unenforceable. Therefore, we affirm.

[23] Affirmed.

Riley, J., and Mathias, J., concur.