

alternative method.” 42 Pa. C.S. § 5985(a). If granted, “[o]nly the attorneys for the defendant and for the Commonwealth, the court reporter, the judge . . . and any person whose presence would contribute to the welfare and well-being of the child victim or child material witness . . . may be present in the room with the child during his testimony.” *Id.* “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” and cross examination shall occur in a standard fashion. *Id.* This Court’s responsible for determining whether testifying “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.” 42 Pa. C.S. § 5985(a.1). The Court is to make that determination by “[o]bserv[ing] and question[ing] the child victim or child material witness, either inside or outside the courtroom” or by “[h]earing 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.” *Id.* The intent of the legislation is “where necessity is shown, [establish] procedures which will protect [victims under the age of eighteen] during their involvement with the criminal justice system.” 42 Pa. C.S. § 5981. Although there is no clearly established factor test to determine when testimony via an alternative method is appropriate in such circumstances a court found sufficient justification based on the following:

- (1) experiencing frequent nightmares;
- (2) sleeping in bed with his parents;
- (3) bedwetting at night;
- (4) experiencing difficulty in school with obeying instructions from his teacher and staying focused on assigned tasks, which requires additional assistance at school;
- (5) becoming “very agitated” and experiencing “a complete freak out” one day when the victim believed he observed Appellant’s vehicle;
- (6) becoming “moody” when informed of his required attendance in court; and
- (7) responding, when informed that Appellant may be present in court for his testimony, that he did not want to see Appellant,

that he would “run out of the room” if he were present, and that if he even saw Appellant he would either conceal his face or try to hide under a table.

Commonwealth v. Strafford, 194 A.3d 168, 174-75 (Pa. Super. 2018).

In the present case, T.G. is currently nine years of age. Her mother testified that, after her interview at the Children’s Advocate Center, T.G. felt “kind of uncomfortable and a little fearful.” N.T. 6/20/19, at 5. Since the incident, her mother stated T.G. had a period of acting out, she will not let her mother get out of her sight and checks in a lot when playing with her friends, and T.G. does not like if her mother has to go somewhere. *Id.* When someone mentions Defendant to T.G. “[s]he covers her face or she runs and hides.” *Id.* T.G.’s mother believes if she had to testify in Defendant’s presence she would be “very scared” and would answer the questions but would be “cringing down, trying to get away. Quietly. She would whisper.” *Id.* at 6. On cross examination her mother stated although she would be scared T.G. would still be able to tell the truth. *Id.* at 7. The Court then questioned and observed T.G. She said that she understood what lying was and that it was a bad thing to do. *Id.* at 12. When asked how she felt about discussing what had happened T.G. stated “kind of scared” and when asked how she felt about Defendant she stated “I’m scared of him.” *Id.* at 13. T.G. also stated she would not be able to talk in front of Defendant and that she did not like talking about what happened to her. *Id.* at 15-16. Although T.G. stated she did not like to talk about what happened she said she could if she had to, but not if Defendant was also in the room. *Id.* at 18. T.G. became visibly upset and stated she was scared about the possibility of having to say what happened in front of Defendant. *Id.* at 21. Throughout the testimony there were pronounced pauses in the conversation and some unanswered questions. *Id.* at 26.

Based on the testimony of T.G.’s mother and observing and questioning T.G., this Court is satisfied that having T.G. testify in front of Defendant at the preliminary hearing would cause

T.G. to suffer serious emotional distress that would substantially impair her ability to reasonably communicate. Throughout the questioning of T.G. she appeared to be very frightened and nervous. Any time the possibility of testifying in front of Defendant was brought up to T.G. she became visibly emotional and appeared as though she was going to cry. This Court also believes T.G. that she would not be able to communicate what allegedly occurred in the presence of Defendant. For these reasons, the Court grants Defendant's Motion to Permit Testimony by Contemporaneous Alternative Method and T.G. shall be permitted to testify outside the presence of Defendant for the purposes of the Preliminary Hearing only in accordance with 42 Pa. C.S. § 5985.

ORDER

AND NOW, this 2nd day of August, 2019, based upon the foregoing Opinion, the Commonwealth's Motion to Permit Testimony by Contemporaneous Alternative Method is **GRANTED**. The alleged victim shall be able to testify outside the presence of Defendant for the purposes of the Preliminary Hearing only. The District Court shall comply with all statutory requirements of 42 Pa. C.S. § 5985.

By the Court,

Nancy L. Butts, President Judge

cc: DA (MW)
PD (JH)
MDJ Kemp

NLB/kp