IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MA,		**: No. 20-20,486**
	Plaintiff	**:**
		:
vs.		**: CIVIL ACTION - LAW**
		:
JRH,		**:**
	Defendant	**: PFA**

OPINION AND ORDER

AND NOW, this **31st** day of **August, 2020**, before the Court is a Request for a Tender Years Hearing filed by the Plaintiff, MA, hereinafter "Mother" on August 10, 2020, and Motion pursuant to 42 Pa.C.S.A. §A(1)(iii)B filed by Mother on August 20, 2020. Mother was present with her counsel, Mary Kilgus, Esquire, and Defendant, JRH, hereinafter "Father", was present with his counsel, Michael Morrone, Esquire. The basis of Mother's motions is to seek admission of hearsay statements made by the child pursuant to what is commonly known as the Tender Years Hearsay Act, 42 Pa.C.S.A. §5985.1 in relation to a Protection from Abuse Petition that has been filed by Mother against Father on behalf of the parties' child.

A hearing on Plaintiff's request for a final protection from abuse order was originally scheduled before this Court on July 29, 2020. At that time, there was only 30 minutes of Court time set aside for purposes of the hearing. Counsel for Plaintiff advised the Court at the commencement of the hearing that she wished to seek out-of-Court statements made by the child pursuant to the Tender Years Hearsay Act. At that time, the Court discussed with both counsel that there was insufficient time for a hearing on the matter; therefore, the

matter would be rescheduled to a half a day to allow for sufficient time to complete the testimony. Additionally, the Court required counsel for Mother to place on the record the statements made by the child that she sought to introduce and provided Mother with a directive that any additional statements must be provided in writing to Father's counsel no later than August 14, 2020.

It is noted that 42 Pa.C.S.A. §5985.1(b) provides that notice of the statements that a party wishes to present pursuant to this statute must be provided sufficiently in advance to the opposing party. At the time of the initial hearing in this matter, Plaintiff's counsel failed to provide Defendant's counsel with any notice of the statements she wished to present. Plaintiff's counsel did provide written notice on August 4, 2020, pursuant to this Court's directive as to the statements that she was seeking admission of. Those statements included those placed on the record by Mother's counsel on July 29, 2020.

The following are the statements that Defense counsel was put on notice that the Plaintiff was seeking to be introduced through this statute:

> "1. On or about April 13, 2020, while the child was in the custody of Respondent, he sent the Petitioner a text claiming that the child must have a "yeast infection" and stated that the child had "had an accident" and she was "bright red, swollen and irritated in her vaginal area". When the child arrived home and was asked what happened, she stated "JRH Dad had touched her" in her vaginal area and "it hurt to pee".
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> 2. In April, 2020, the child was visiting DS (Petitioner's Mother), and made statements that some girls have hair "down there" and referred to that areas as "pussycat".
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> 3. In June, 2020, the child was visiting her maternal grandmother, and said, "my JRH dad has a penis", then she went around the table stating who did and who didn't have a penis and said, "Nana, you don't have a penis, neither does my mom, but all boys do".
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> 4. In June, 2020, when the child was visiting KA, she stated, "I play this game with JRH Dad and he smells my butt".

5. July 6, 2020, the child came into Petitioner's bedroom. Petitioner asked her if she wanted to watch cartoons with her, and the child began taking off her underwear. Petitioner asked her what she was doing, and the child stated, "This is how I play the game with my JRH Dad".

6. July 10, 2020, the child woke the Petitioner's 11 year old son up by getting into his bed and sitting on his face. When asked why she did that, she stated, "that is what I do with my JRH Dad". When asked if that happened once or more, the child stated, "no, we do it all the time, it is part of the game we play". She then stated that once while "Grammy was at the store" it happened, and when Grammy came home, the child told her what happened, at which time the Paternal Grandmother ("Grammy") "got made about the game and yelled at JRH dad."."

The Mother seeks to introduce the child's statements which were made to herself, the child's step-father, and the Paternal Grandmother. 42 Pa.C.S.A. §5985.1 allows out-of-court statements under the following circumstances:

"(1) An out-of-court statement by a child victim or a witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in paragraph (2), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:

(i) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(ii) the child either:

(A) testifies at the proceeding; or
(B) is unavailable as a witness.

(2) The following offenses under 18 Pa.C.S. (relating to crimes and offenses) shall apply to paragraph (1): Chapter 25 (relating to criminal homicide); Chapter 27 (relating to assault); Chapter 29 (relating to kidnapping); Chapter 30 (relating to human trafficking); Chapter 31 (relating to sexual offenses); Chapter 35 (relating to burglary or other criminal intrusion); Chapter 31 (relating to robbery); Section 4302 (relating to incest); Section 4304 (relating to endangering the welfare of children), if the offense involved sexual contact with the victim; Section 6301(a)(1)(ii) (relating to corruption of minors); Section 6312 (b) relating to sexual abuse of children);

> Section 6318 (relating to unlawful contact with minor); Section 6320 (relating to sexual exploitation of children)."

42 Pa.C.S.A. §5985.1(a).

Factors the Court should consider in determining the reliability of the statement should include, but are not limited to: the spontaneity of the statement, the consistent repetition of the statement, the mental state of the declarant, the use of terminology unexpected of a child of similar age, the lack of motive to fabricate, and the use of non-leading questions by the individual question questioning or speaking with the declarant. **Commonwealth v. Hunsler, 868 A.2d 498, 510 (Pa. Super. 2005).** The Tender Years Hearsay Act creates an exception to the general rule against hearsay for a statement made by a child who is 12 years old or younger at the time of the statement, if the statement describes an enumerated offense, the statement is irrelevant, the time, content and circumstances of the statement provides sufficient indicia reliability and the child either testifies or is unavailable as a witness. **Commonwealth v. Strafford, 194 A.3d 168, 173 (Pa. Super. 2018).**

The child victim in this case is MA, date of birth January 4, 2016, and was four years of age at the time that the statements were allegedly made. The statements were made out-of-court to the child's Mother, step-father, and Maternal Grandmother over several occasions. The statute clearly applies to the child in question. The next analysis the Court must make is whether or not the statements made describe any of the criminal offenses outlined in 42 Pa.C.S.A. §5985.1(a)(2). The Court notes that neither counsel for Plaintiff nor counsel for Defendant at any time addressed this section of the statute. Counsel for Plaintiff never advised the Court as to which criminal offenses she believed the statements

applied to, nor did counsel for the Defendant make any type of argument that the statements did not apply to one of the enumerated criminal offenses. If the Court determines that the statement describes one of the criminal offenses enumerated in the Statute, the Court must then determine if the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability. The Court will address each statement offered by the Mother individually.

> "1. On or about April 13, 2020, while the child was in the custody of Respondent, he sent the Petitioner a text claiming that the child must have a "yeast infection" and stated that the child had "had an accident" and she was "bright red, swollen and irritated in her vaginal area". When the child arrived home and was asked what happened, she stated "JRH Dad had touched her" in her vaginal area and "it hurt to pee"."

Mother testified that Father had texted her that he believed the child had a yeast infection. When the child returned home, Mother inspected the child and had a conversation with her during which the child said that JRH Dad had touched her and it hurt to pee.

Though it is a stretch, the Court finds that these statements could possibly describe indecent assault pursuant to §3126. The Court's next determination is whether or not the evidence is relevant and at the time content and circumstances of the statements provided sufficient indicia of reliability. The statements to Mother were made by the child spontaneously in reaction to Mother examining the child for a potential yeast infection. The circumstances in which these statements were made provide a sufficient indicia of reliability.

> "2. In April, 2020, the child was visiting Denise Staibly (Petitioner's Mother), and made statements that some girls have hair "down there" and referred to that areas as "pussycat"."

The statement made by the Maternal Grandmother during her testimony is slightly different than the statement that was provided in the notice by Plaintiff's counsel. The Maternal Grandmother testified that the child stated "my mom said you have a kitty cat because you have hair down there and she doesn't." The Court does not find that the statement made to the Maternal Grandmother in any way describes any of the criminal offenses enumerated in the statute; therefore, it cannot be presented in an out-of-court statement under this statute.

> "3. In June, 2020, the child was visiting her maternal grandmother, and said, "my JRH dad has a penis", then she went around the table stating who did and who didn't have a penis and said, "Nana, you don't have a penis, neither does my mom, but all boys do"."

The Maternal Grandmother testified that at a picnic, the child spontaneously went around to everyone at the picnic indicating who did and who did not have a penis. The child was accurate in identifying males versus females. The child also stated my JRH daddy has a penis. The Court does not find that these statements made by the child describe any of the offenses enumerated in the statute; therefore, these out-of-court statements of the child cannot be permitted in Court pursuant to this statute.

> "4. In June, 2020, when the child was visiting KA, she stated, "I play this game with JRH dad and he smells my butt"."

The step-father, KA, testified that at one point when he had MA, she tried to sit on his face and wanted him to smell her butt. When he told her that we don't play that game, the child responded that she plays this game with her JRH dad. The Court does not find that the statement made to step-father in any way describes any of the criminal offenses

enumerated in the statute; therefore, it cannot be presented in an out-of-court statement under this statute.

> "5. July 6, 2020, the child came into Petitioner's bedroom. Petitioner asked her if she wanted to watch cartoons with her, and the child began taking off her underwear. Petitioner asked her what she was doing, and the child stated, "This is how I play the game with my JRH Dad"."

Mother testified that one morning, the child crawled into bed with her to watch cartoons and began to take off her underwear. When Mother questioned the child as to why she was taking off her underwear, the child responded "this is how is snuggle with my JRH dad". The Court would not that the use of the word snuggle was never provided in the notice of statements that was provided by Plaintiff's counsel. When further questioned on cross-examination, Mother testified that she also stated "this is the game I play with JRH dad". The Court does not find that the statement made to Mother in any way describes any of the criminal offenses enumerated in the statute; therefore, it cannot be presented in an out-of-court statement under this statute.

> "6. July 10, 2020, the child woke the Petitioner's 11 year old son up by getting into his bed and sitting on his face. When asked why she did that, she stated, "that is what I do with my JRH Dad". When asked if that happened once or more, the child stated, "no, we do it all the time, it is part of the game we play". She then stated that once while "Grammy was at the store" it happened, and when Grammy came home, the child told her what happened, at which time the Paternal Grandmother ("Grammy") "got made about the game and yelled at JRH dad."."

Mother testified and described an incident that occurred with her 11-year-old son. When Mother went into her son's room and questioned MA as to what she was doing, she stated "it's a game I play with my JRH dad. It's a game where I climb on his face. It's a game I play all of the time." The child further told her that she was playing the game with her father

one time when her grandmother was at the store and when she told her grandmother about it, her grandmother got very mad and yelled at JRH dad. The Court does not find that the statement made to Mother in any way describes any of the criminal offenses enumerated in the statute; therefore, it cannot be presented in an out-of-court statement under this statute.

Based upon the above, the Court finds that the statements made in numbers 2 through 6 are not statements that are admissible under the statute as those statements do not describe any of the criminal offenses outlined in the Statute.

In regard to statement 1, the child must either testify at the proceeding or the Court must determine the child is unavailable as a witness pursuant to 42 Pa.C.S.A. §5985.1(a)(1)(ii)(B) in order for the hearsay statement to be introduced into evidence. Mother argues that the child is unavailable. In order to find the child is unavailable, the Court must determine, based upon the evidence presented that the testimony by the child as a witness will result in the child suffering serious emotion distress that would substantially impair the child's ability to reasonably communicate.

Mother called Sherry Moroz. Sherry Moroz is a forensic interviewer at the Child Advocacy Center of the Central Susquehanna Valley. Mother did not offer Ms. Moroz's testimony in regard to statements that the child made to her which was she was seeking to enter pursuant to the statute, as Mother provided no notice to Father's counsel of any statements that the child made to Ms. Moroz. The Court, therefore, infers that Ms. Moroz's testimony was provided to support Mother's position that the child's testimony would cause emotional distress to the child. Ms. Moroz testified that she conducted an interview with MA on July 21, 2020. The Court found Sherry Moroz to be an expert in regard to forensic

interviewing of children in relation to sexual abuse allegations. The interview was done at the request of Lycoming County Children & Youth. Ms. Moroz found MA to be very active and communicated well. She stated she could communicate appropriately what had happened to her. She found MA to be a vivacious little girl. MA was not upset about being in a room with a stranger and speaking with her. At no time did MA cry or show duress and there was nothing in MA' demeanor that impaired her ability to communicate with Ms. Moroz. She noted that based on her experience, four year olds have a limited attention span when it comes to focusing or talking about things. She also stated she was unsure what MA' ability is to recall and express everything that has happened to her. She did testify that it was her belief that her interview did not, in any way, cause MA any emotional distress.

Sarah Neff, a Lycoming County Children & Youth Assessment Caseworker, testified that she was also present at the CAC interview and observed the interview from another room. She stated the child did not seem to be under any emotional duress during the CAC interview, that throughout the interview she was active and, at times, was easily distracted.

Mother also testified. She stated that it is hard to keep MA' attention or focus when talking to her and she does not feel that she will be able to give testimony in a setting that has other people who will be distracting. She also thinks that MA may be very similar to her and turn to laughter and smiling when she is emotional about something.

Based upon the testimony presented by Sherry Moroz, Sarah Neff and Mother, the Court does not find that MA is unavailable as a witness to testify at the Protection from Abuse Hearing. Mother's counsel argued that, as a four-year-old, MA does not have the capacity to testify herself and, therefore, her statements should be admissible. Whether or

not a four-year-old has the capacity to testify is not the inquiry before the Court as to whether or not MA is unavailable as a witness under the Tender Years Hearsay Act. MA has already spoken to Sherry Moroz in regard to these incidents. At no time when she spoke concerning these issues did MA become upset or unable to communicate with Ms. Moroz. There was absolutely no evidence presented that would support the position that MA providing testimony to the Court in regard to this matter would cause her serious emotional distress that would impair her ability to reasonably communicate with the Court. The child is, therefore, not unavailable to testify.

Based upon the foregoing, the Plaintiff's request to allow statements pursuant to 42 Pa.C.S.A. §5985.1 is DENIED. If, however, the child testifies at the hearing, only statement 1 may come into evidence under the Tender Years Hearsay Act.

By The Court,

Joy Reynolds McCoy, Judge

JRM/jrr