IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MA (Mother),	:	
Plaintiff	:	**FC-20-20486**
	:	
v.	:	**CIVIL ACTION – LAW**
	:	
JH,	:	**PROTECTION FROM ABUSE**
Defendant	:	

OPINION

I. Factual and Procedural Background

This matter involves a Petition for Protection From Abuse filed on July 14, 2020 by MA (Mother) on behalf of herself and the parties' minor daughter, M.A. The Second Abuse Hearing was scheduled for September 3, 2020. Prior to the hearing, Mother requested a Tender Years Hearing[1] and filed a Motion pursuant to 42 Pa.C.S.A. § A(1)(iii)(B) seeking to admit statements made by the child who is currently approximately 4.5 years old.[2] Counsel for Mother provided timely notice of six statements she intended to introduce and a hearing was held on August 31, 2020 before the Honorable Joy Reynolds McCoy.[3]

At the conclusion of the hearing, Judge McCoy determined that statements 2 through 6 were not admissible statements under the statute. However, the Court found that statement 1 fell within the hearsay exception but in order for the statement to be

---

[1] Pursuant to 42 Pa.C.S.A. § 5985.1, commonly referred to as the Tender Years Hearsay Act.

[2] The tender years exception is one exception to the hearsay rule.*Com. v. Kriner*, 915 A.2d 653, 656 (Pa.Super. 2007). The tender years exception states as follows:

> (1) An out-of-court statement made by a child victim or 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.

42 Pa.C.S.A. § 5985.1(a)(1).

[3] Judge McCoy issued an extensive Opinion and Order dated August 31, 2020 detailing her findings and conclusions regarding the August 31, 2020 hearing.

introduced as evidence, the child must testify at the hearing or the Court must deem the child unavailable pursuant to 42 Pa.C.S.A. § 5985.1(a)(1)(ii)(B).[4] At the time of the August 31, 2020 hearing, an expert regarding forensic interviewing of children in relation to sexual abuse allegations testified that, in her opinion, her interview with M.A. did not cause any emotional distress to M.A. Based upon this testimony as well as the testimony of Mother and CYS Assessment Caseworker, Sarah Neff, the Court did not find that M.A. was unavailable to testify as a witness at the Protection From Abuse hearing. Neither party requested that the Court conduct an *in camera* interview with the child at that time.

On September 3, 2020, the parties appeared in person with their Counsel for the Second Abuse Hearing. Prior to the hearing, the Court interviewed M.A. with only Counsel present.[5] The purpose of the interview was to determine if M.A. was competent to testify under the Pennsylvania Rules of Evidence. Based upon the child's responses to the Court's questioning, the Court found that the child was incompetent to testify under Pa.R.E. 601. Because the Court found that the child was available to testify pursuant to 42 Pa.C.S.A. § 5985.1(a)(1)(ii)(B) but incompetent to testify pursuant to Pa.R.E. 601, the child did not testify at the Protection From Abuse hearing and therefore, the child's statement could not be admitted into evidence as an exception to the hearsay rule.

[4] In order to find the child "unavailable," the court must determine that "testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate." 42 Pa.C.S.A. § 5985.1(a.1). Pursuant to the statute, the Court is given latitude on the evidence it uses to make this determination. 42 Pa.C.S.A. § 5985.1(a.1).

[5] Defendant Father requested to be present for the child's interview but the Court denied his request pursuant to 42 Pa.C.S.A. § 5985.1(a.2)(2) ("If the court observes or questions the child, the court shall not permit the defendant to be present). However, the interview with the child was transcribed.

II. Discussion

Pennsylvania Rule of Evidence 601 provides that "[e]very person is competent to be a witness except as otherwise provided by statute or in these rules." Pa.R.E. 601(a). A person is incompetent to testify if the Court finds that the person:

1. Is, or was, at any relevant time, incapable of perceiving accurately;
2. Is unable to express herself so as to be understood either directly or through an interpreter;
3. Has an impaired memory; or
4. Does not sufficiently understand the duty to tell the truth.

Pa.R.E. 601(b)(1)-(4).

The Supreme Court of Pennsylvania has established a test to determine the competency of a child under 14 years of age. *Rosche v. McCoy,* 156 A.2d 307 (Pa. 1959). "Competency is the rule and incompetency the exception. The burden to show incompetency lies upon the party who asserts it." *Id.* at 309. When a child is under 14, there **must** be a judicial inquiry as to mental capacity" and it was within trial court's discretion to find minor incompetent to testify as witness. *Id.* at 310 (emphasis added); *Com. v. Meredith*, 221 A.3d 186 (Pa.Super. 2019). The *Rosche* Court instructed that the following factors must be applied in determining competency of a child:

1. Such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers;
2. Mental capacity to observe the occurrence itself and the capacity of remembering what it is that the child is called to testify about; and
3. Consciousness of the duty to speak the truth.

Id.

M.A. was very open and talkative during the Court's *in camera* interview with her. However, M.A., as is expected from any four and a half year old, was generally unresponsive to specific questions and often changed the subject of conversation. Based on M.A,'s answers to the questions, the Court found that M.A. was susceptible to suggestions made by the questioning. For example, the Court asking M.A., "Do you know what a Court is?" to which M.A. responded in the affirmative. However, when the Court asked her to explain what it is, she responded with "I don't know." The Court also asked M.A. if she remembered speaking with Judge McCoy the last time she was in the Courthouse on August 31st and M.A. responded that she did. However, Judge McCoy has never met with the child. Based on the line of questions and M.A.'s responses the Court found that the child was not mature enough, and therefore incompetent, to testify about prior incidents and conversations. Thus, the child's hearsay statement could not come into evidence.

ORDER

AND NOW, this **9th** day of **September**, **2020**, for the foregoing reasons, the Court finds that the minor child, M.A., is not competent to testify in this matter. Therefore, no statements made by the child shall be introduced into evidence. This Order will also apply to the Custody action docketed at FC-19-20085.

By the Court,

Ryan M. Tira, Judge

RMT/ads

CC: Michael Morrone, Esquire
Mary Kilgus, Esquire
Gary Weber, Esquire – Mitchell Gallagher