

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

MA,		: No. 20-20,486
	Plaintiff	:
		:
vs.		: CIVIL ACTION - LAW
		:
JH,		:
	Defendant	: 1191 MDA 2020

Dated: October 28, 2020

**OPINION IN SUPPORT OF THE ORDER OF SEPTEMBER 1, 2020, IN COMPLIANCE
WITH RULE 1925(a)(2) OF THE RULES OF APPELLATE PROCEDURE**

The Appellant, MA, (hereinafter referred to as “Appellant”) filed the present appeal on September 10, 2020. Appellant’s Notice of Appeal claims that she is appealing the Orders entered in this matter on August 31, 2020, and September 3, 2020, and that these Orders were “entered in the docket as evidenced by the attached copies of the docket entries.” This Court notes, pursuant to the docket attached to the Notice of Appeal, the Order entered on August 31, 2020, was an Order indicating that, for efficiency and avoidance of duplicative testimony, the undersigned Judge would handle the Request for a Tender Years Hearing and Motion pursuant to 42 Pa.C.S. §9585.1(a)(1)(iii)(B) as scheduled on August 31, 2020, and the hearing on the Protection from Abuse matter would be handled by the Honorable Ryan Tira on September 3, 2020, in conjunction with the custody trial between these parties that had been previously scheduled for that day. There were no substantive findings related to the Tender Years Hearsay Act and Motion pursuant to 42 Pa.C.S. §5985.1(a)(1)(iii)(B) contained in this Court’s Order docketed on August 31, 2020, which would correlate

with the issues raised in Appellant's Concise Statement of Matters Complained of on Appeal. For this reason, this Court would request that Appellant's appeal be summarily dismissed.

If the appellate court is not inclined to dismiss Appellant's appeal on the basis of the date of the Order referenced in the Notice of Appeal, this Court believes that Appellant intended to appeal this Court's Order docketed on September 1, 2020, after a hearing held on August 31, 2020, and submits this opinion in compliance with Pa.R.A.P. 1925(a). The hearing was held pursuant to Appellant's Request for a Tender Years Hearing and Motion pursuant to 42 Pa.C.S.A. §5985.1(A)(1)(iii)(B) to determine whether a child witness should be deemed unavailable to testify in a Protection from Abuse hearing. Appellant sought to admit hearsay statements made by Appellant's child into evidence by having the child deemed unavailable to testify. Of the six statements that Appellant provided opposing counsel with written notice that she wished to seek admission of, this Court found that only one possibly described one of the offenses enumerated in 42 Pa.C.S. §5985.1(a)(2). Regarding that particular statement, this Court found that the statement was made to the Appellant spontaneously and provided a sufficient indicia of reliability. However, after hearing all the testimony, this Court found that Appellant had not satisfied her burden of proving that the child would be subject to severe emotional distress if she were required to testify. This Court found that the child's statement was admissible into evidence, but only if the child testified at the hearing. By Order docketed September 8, 2020, the Appellant's request for a final Protection from Abuse Order was denied after a hearing held on September 3, 2020. Appellant's appeal was filed on September 10, 2020.

Appellant filed her Amended Concise Statement on October 6, 2020, alleging the following errors, presumably associated with this Court's Order docketed on September 1, 2020, and not the Order docketed on August 31 2020, as indicated in the Notice of Appeal:

1. The court erred in finding that Petitioner must address the actual crimes attributed by the child under 42 Pa.C.S. 5981.1, et seq. (The "Act").
2. The court erred in requiring that Petitioner to "notify" the Court of which crimes the statements in question applied to.
3. The court erred in failing to find all the statements applied to Corruption of Minors, 18 Pa.C.S. 6301(a)(i).
4. The court erred in requiring the Petitioner to proffer statements at the final protection from abuse hearing on August 31, 2020.
5. The court erred in failing to find the statements made by the minor child were made in reliable circumstances and therefore admissible under the Act.
6. The court erred in failing to find the minor child "unavailable" under the Act.

This Court's Opinion and Order docketed September 1, 2020, contained a very detailed analysis of the Tender Years Hearsay Act and its applicability, or lack thereof, to the present case. This Court will rely on that Opinion and Order for purposes of this appeal, with the following supplemental information in support of the Court's determination.

Appellant's allegations that this Court "required" her to "notify" the Court of which crimes the statements in question applied or address the actual crimes that the statements described to is simply false. In its Order and Opinion docketed September 1, 2020, this Court merely mentioned that "neither counsel for the Plaintiff nor counsel for Defendant at any time addressed this section of the statute." As

Appellant's counsel did not specify which offenses she believed applied to which statements, this Court independently reviewed each statement and each of the offenses enumerated in 42 Pa.C.S. §5985.1(a)(2). As stated in the Opinion and Order docketed September 1, 2020, this Court found only one of the child's statements could potentially describe any of the enumerated offenses. There are thirteen different chapters and single sections under Title 18 that are enumerated in 42 Pa.C.S. §5985.1(a)(2). Appellant's counsel raises the specific offense of corruption of minors, and her belief that it applied to each of the child's six statements, for the first time on appeal. While she was certainly not required to "notify" the Court of which crimes she believed the child's statements applied to, this Court is not tasked with guessing which crimes Appellant and her counsel intended to argue applied to the statements. Had appellant specified the offense of corruption of minors and advanced an argument in support thereof at the time of the hearing, this Court may have been swayed to reach a different conclusion than it did when it independently reviewed each crime and determined that only one statement possibly described one enumerated crime, which was not corruption of minors. Given that there was no mention by Appellant of any specific enumerated offenses to which she believed the child's statements applied, this Court rendered a decision based on an independent review of the child's statements and found that none of them rose to the level of describing the crime of corruption of minors.

Appellant additionally contends that this Court erred in "failing to find the statements made by the minor child were made in reliable circumstances and therefore admissible under the Act." Again, Appellant's allegations of error are misplaced. Regarding statement #1 made by the child, which this Court determined could possibly

describe indecent assault, this Court did make a finding that the time, content, and circumstances of the statement provided a sufficient indicia of reliability. Of the remaining five statements made by the child, this Court did not make *any* finding regarding whether the statements were relevant and that the time, content, and circumstances of the statement provided sufficient indicia of reliability. This is due to the fact that the Court found that those statements did not describe any of the offenses enumerated in 42 Pa.C.S. §5985.1 (a)(2) and therefore the Court did not proceed to an analysis of whether the statements met the criteria for providing a sufficient indicia of reliability pursuant to 42 Pa.C.S. §5985.1(a)(1)(i).

However, assuming *arguendo*, that Appellant did prevail on her argument that the statements by the child described the offense of corruption of minors, and that the time, content, and circumstances of the statements provided sufficient indicia of reliability, Appellant would still be faced with the task of proving that the child was unavailable as a witness if Appellant wished to have the hearsay statements admitted without the testimony of the child. Appellant alleges that this Court erred in failing to find the minor child “unavailable” under the Act. “Prior to concluding a child witness is unavailable, a court must determine whether forcing the child to testify will result in such serious emotional distress to the child that [she] will not be able to reasonably communicate.” **Commonwealth v. Lyons**, 833 A.2d 245, 254 (Pa. Super. 2003). “To reach this determination, the court ‘may’ either question the child witness or hear testimony of a parent or person who has dealt with the child in a therapeutic setting.” **Id.** at 254-255. “[T]here is no other manner, method, procedure, or definition of what constitutes unavailability.” **Commonwealth v. Kriner**, 915 A.2d 653 (Pa. Super. 2007).

Appellant and two additional witnesses, including a forensic interviewer at the Child Advocacy Center of the Central Susquehanna Valley and a Children & Youth Services caseworker, testified regarding the child's ability to testify as a witness. All three witnesses characterized the child as "vivacious," "active," and "easily distracted." Both the forensic interviewer and the Children & Youth caseworker testified that the child could appropriately communicate and that she did not appear to be under any emotional duress during the interviews. As the only basis for a finding of unavailability under the statute is emotional distress, and none of Appellant's witnesses supported Appellant's claim that testimony by the child as a witness would result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate, this Court did not err in failing to find the child "unavailable" for purposes of the Act.

For all of the foregoing reasons, this Court respectfully requests that Appellant's appeal be denied and this Court's Order docketed September 1, 2020, be affirmed.

By the Court,

Joy Reynolds McCoy, Judge