

Weber

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA

: No. MD-446-2022

vs.

: CIVIL ACTION - LAW

DEREK MAGGS,

Defendant

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OPINION AND ORDER

AND NOW, this 8th day of November, 2022, before the Court is a Motion to Permit Testimony by Contemporaneous Alternative Method and Motion to Admit Out of Court Statements filed on September 7, 2022, by the Commonwealth. The alleged victim in this case is a five-year old child who is the biological daughter of the Defendant. The Motion avers that the child will experience severe emotional distress if required to testify in a courtroom in front of the Defendant; specifically, it is believed that she will shut down and become substantially non-communicative if forced to testify about sensitive matters in front of the Defendant. The Commonwealth seeks an Order admitting out-of-court statements made by the alleged victim and an Order permitting the child to testify at the preliminary hearing in a room other than the courtroom and outside the presence of the Defendant. A hearing was held on October 3, 2022, at which time the Defendant was present and represented by Matthew Diemer, Esquire, and Matthew Welickovitch, Esquire, appeared on behalf of the Commonwealth.

With regard to the Commonwealth's request that the child testify at the preliminary hearing in a room other than the courtroom and outside the presence of the Defendant, 42 Pa.C.S.A. §5985 permits a court to conduct an *in camera* hearing to

determine whether a child victim should testify by contemporaneous alternative method. In order to allow this alternative method, the court must find "that testifying either in an open forum in the presence and full view of the finder of fact or in the defendant's presence will result in the [child] suffering serious emotional distress that would substantially impair the [child's] ability to reasonably communicate." 42 Pa.C.S. § 5985(a.1). The court may observe and question the child inside or outside the courtroom, or hear testimony from a parent, custodian, or any other person that has dealt with the child "in a medical or therapeutic setting." 42 Pa.C.S. § 5985(a.1)(1)-(2). **Com. v. Strafford**, 194 A.3d at 174. In this case, the Court heard testimony from the child's mother and grandmother and the Court also had the opportunity to meet with and question the child in the presence of the attorneys for the Commonwealth and the Defendant.

The child's grandmother, Michelle George, testified that if the child has to testify about the allegations in front of her father it will cause her emotional distress as she will think she will get in trouble. Ms. George indicated the child may shut down if required to testify in front of her father. Ashtyn Herman, the child's mother, testified that the child would have a difficult time testifying in front of her father because it would cause too much pressure and mental distress on her. Ms. Herman testified that she is concerned that the child knows that certain looks from Father could indicate that she would be in trouble, thus causing her to shut down on the witness stand.

The undersigned met with the child in the courtroom outside the presence of the Defendant, and while she was not overly talkative, she did not exhibit any outward signs of emotional distress while engaging in a basic conversation. However, when asked about

her father, the child did not audibly respond to questions, which leads the court to believe that the mother and grandmother's concerns about the child's ability to reasonably communicate being impaired if required to testify in front of her father may be valid.

This case is at the preliminary hearing stage, and this Court finds that between the testimony of the child's mother and grandmother and the Court's *in camera* interview with the child, the Commonwealth has established enough evidence that the child may experience emotional distress if she is required to testify in front of her father.

Accordingly, for purposes of the preliminary hearing, the Commonwealth's request is **GRANTED**. The Defendant shall be permitted to observe and hear the testimony of the child but the child shall testify in a location where she cannot hear or see the Defendant.

The Commonwealth seeks to introduce the child's statements, which were made to her mother and maternal grandmother. With regard to the statements, the maternal grandmother, Michelle George, testified that the child indicated that she did not want to go to her father's "because he hurts me." Ms. George also testified that the child pointed a finger to her private area and stated "he goes like this." Ashtyn Herman, the child's mother, testified that the child has stated "my dad touches me there" and "he hurts me" while pointing to her vaginal area. 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 16 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).

The Tender Years Hearsay Act creates an exception to the general rule against hearsay for a statement made by a child who is [16] years old or younger at the time of the statement, if the statement describes an enumerated offense, the statement is relevant, and that the time, content and circumstances of the statement provide 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). 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 child's mother testified that the child has made statements "countless times" about the Defendant touching her private area, and exhibits behaviors which, when asked about them states "my dad used to do that to me." The child's grandmother testified that the child made the statement "because he hurts me" spontaneously and without any prompting or questioning by her. The Court finds that the child did not have a motive to fabricate the statements, as her mother testified that she lets her make her own decisions and the parties were not embroiled in a contentious custody battle at the time the statements were made. The Court finds that the time, content, and circumstances of the statement provide a sufficient indicia of reliability at this stage of the proceedings to enable the Commonwealth to seek to introduce the child's statements which would otherwise be inadmissible as hearsay.

Notably, 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. 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. As the Court has determined that the child may testify at the preliminary hearing by contemporaneous alternative methods, the concern that the child would suffer serious emotional distress that would substantially impair her ability to reasonably communicate is alleviated. Therefore, she shall not be deemed unavailable as a witness.

Based upon the foregoing, the Commonwealth's request that statements made by the child to the mother and maternal grandmother be admissible pursuant to 42

Pa.C.S.A. §5985.1 is **GRANTED**, as long as the child testifies as a witness. As indicated above, the child shall be permitted to testify at the hearing by contemporaneous alternative means. The Court notes that this decision applies only to the preliminary hearing at this time.

By the Court,


Ryan M. Tira, Judge

RMT/jel

- c. DA (M. Welickovitch, Esquire)
Matthew Diemer, Esquire
~~Gary Weber, Esquire~~