

# Franklin County Legal Journal

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Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

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**Commonwealth of Pennsylvania, Plaintiff v.  
Michael Guessford, Defendant**

Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch, Criminal Action No. 201-2019

**HOLDING:** The Commonwealth’s Motion to find the children M.A., M.W., and B.C. unavailable to testify as witnesses pursuant to 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b) is DENIED. M.W. and B.C. shall testify as usual in open court. M.A. shall testify at trial via contemporaneous alternative method pursuant to 42 Pa. C.S. § 5985.

**HEADNOTES**

*Criminal Law – Trial, Reception of Evidence, Necessity and scope of proof*

1. The admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error. *Commonwealth v. Ballard*, 622 Pa. 177, 197-98, 80 A.3d 380, 392 (2013), cert. denied, 573 U.S. 940, 134 S.Ct. 2842, 189 L.Ed.2d 824 (2014).

*Criminal Law – Tender Years Hearsay Act, Availability of Witness*

2. For a child to be determined unavailable as a witness for the purposes of 42 Pa. C.S. §5985.1(a)(1)(ii)(b), the court must find that the 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. The standard is not merely that the child might suffer some emotional distress as a result of testifying, or even that the child might suffer serious emotional distress. 42 Pa. C.S. §5985.1(a)(1)(ii)(b)

*Criminal Law – Tender Years Hearsay Act, Alternative Means of Testifying*

3. The Tender Years Hearsay Act provides two alternatives to ensure the reliability of the child’s testimony, including recording the child’s testimony for later presentation in court and allowing the child to testify via contemporaneous alternative method, usually in the form of live video or close-circuit television technology. 42 Pa. C.S. §5985

4. The standard under 42 Pa. C.S. §5985 requires the trial court to make an evidence-based determination 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 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).

*Criminal Law – Tender Years Hearsay Act, Child’s Ability to Testify*

5. In making a determination about a child witness’s ability to testify, the Tender Years Hearsay Act allows the trial court to hear testimony of a parent or custodian of a child as well as any other person, “such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting.” The statute gives broad leeway to the trial court in hearing testimony from anyone who knows the child and who can competently address the Court concerning the child’s ability to testify. *See* 42 Pa. C.S. §5985 (a.1)(1), (2); 42 Pa. C.S. §5985.1 (a.1)(1), (2).

Appearances:  
Travis Kendall, Esquire *for Commonwealth*  
Dave Erhard, Esquire *for Defendant*

## OPINION

Before Sponseller, J.

Defendant is accused of corruption of minors and indecent assault after three young girls in his neighborhood disclosed abuse that he allegedly committed to their parents. The three children are ten-year-old M.A., her eight-year-old sister M.W.<sup>1</sup>, and their neighbor, six-year-old B.C. The alleged abuse took place approximately two years ago when the children were eight, six, and four, respectively. The Commonwealth has filed a *Motion* pursuant to 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b), a section of the “Tender Years Hearsay Act,” seeking a declaration that the three children are unavailable to testify as witnesses.<sup>2</sup> For the reasons fully set forth below, the Commonwealth’s *Motion* shall be denied as to all three children. However, M.A. will be permitted to testify via contemporaneous alternative method pursuant to 42 Pa. C.S. § 5985.

### I. FACTS AND PROCEDURAL HISTORY

In June of 2019, M.A., who was then eight years old, disclosed to her mother that the Defendant, a close friend of the family, had touched her and her sister inappropriately while he had been babysitting them. The children’s parents pondered what to do for several days before learning from their neighbors down the road that their daughter B.C., then age four, had also disclosed inappropriate touching by the Defendant. The parents of all three children then involved the police. Each child has disclosed slightly different inappropriate behavior by Defendant. We will discuss with each child’s claims individually and in greater depth below.

Trial in this matter has been substantially delayed due to the COVID-19 pandemic and was continued numerous times throughout 2020. The Commonwealth filed the instant *Motion* pursuant to 42 Pa. C.S.

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<sup>1</sup> The alleged crimes against M.A. and M.W. are docketed at 201-2019, where the alleged crime against B.C. is docketed at 202-2019. The Motion instant to this case concerns both dockets, and the evidentiary hearing in this matter was combined. As such, this Opinion addresses both dockets simultaneously. For continuity, we will make no further mention of the separation of dockets.

<sup>2</sup> We note that the Commonwealth’s *Motion* includes a second request pursuant to 42 Pa. C.S. § 5985.1, relating to the admissibility of certain statements. However, the Defendant does not contest the admissibility of these statements and this Court further finds them to be admissible and will grant the *Motion* as to this issue. The center of the controversy in this matter surrounds the Commonwealth’s request that the children in the case be found unavailable to testify. As the matter regarding admissibility is not in controversy, we will not address it here.

§ 5985.1 on November 2, 2020. An evidentiary hearing on this matter was ordered but also had to be continued three times before finally occurring on April 20, 2021, at the Fulton County Courthouse in McConnellsburg, Pennsylvania. All three children testified at the hearing along with their mothers. On May 24, 2021, This Court Ordered briefs to be filed by June 8, 2021. On June 6, 2021, we Ordered that a transcript of the April 20, 2021, hearing be prepared, and the transcript was filed on June 20, 2021.<sup>3</sup> The Commonwealth filed its brief in support of the *Motion* on June 9, 2021. The Defendant filed their brief on August 18, 2021. Both briefs were timely filed.<sup>4</sup> This matter is now ripe for decision.

## II. THE TENDER YEARS HEARSAY ACT

The Tender Years Hearsay Act, codified at 42 Pa. C.S. § 5985, was enacted to balance the fragile nature of young victims of sexual abuse<sup>5</sup> with the Defendant's right to confront his accuser under both the state and federal constitutions.<sup>6</sup> The language of the Tender Years Hearsay Act is narrowly tailored and is not as broad as often thought. The Tender Years Hearsay Act was not enacted to ensure that children would be protected from emotional distress, but rather to ensure that children would not become overwhelmed by testifying such that their testimony would be rendered unreliable or useless.

For a child to be determined unavailable as a witness for the purposes of 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b), this Court must find that the 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*. The standard is **not** merely that the child might suffer from some emotional distress as a result of testifying, or even that the child might suffer *serious* emotional distress. In order for this Court to find these children are unavailable to testify as witnesses, their distress must be so serious as to substantially impair their ability to reasonably communicate.

It is important to remember that, although there are three accusations against the Defendant made around the same time, the children in question are all individuals and must be considered as such. They are not a package

<sup>3</sup> *Transcript of Proceedings – Motion for In-Camera Hearing*, April 20, 2021 (“hereafter *T.P.*”)

<sup>4</sup> For reasons unknown to this Court, there have been multiple breakdowns in communication with the Fulton County Clerk of Courts on this matter which resulted in a substantial delay in the filing of Defendant's brief. The Defendant requested an extension of time in this case and it had been granted, but both the request and the Order granting it seem to have been lost somewhere in transit. We further note that Defendant's brief, which Defendant's attorney avers was properly filed on August 18, 2021, still appears to be missing from both the digital and physical file. This Court obtained a copy of Defendant's brief from Defendant's attorney. We note that the unusual delay in these filings was caused by a breakdown in the judicial process and must not prejudice Defendant in any way. As such, both briefs, though facially untimely, shall be considered timely.

<sup>5</sup> See *Com. v. Kriner*, 2007 PA Super 3, 915 A.2d 653 (2007); *Com. v. Hunzer*, 2005 PA Super 13, 868 A.2d 498 (2005).

<sup>6</sup> See *Com. v. Kemmerer*, 2011 PA Super 220, 33 A.3d 39 (2011).

deal – it is the Commonwealth’s burden to prove that these children, based on their *individual* circumstances, should be determined unavailable to testify under 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b).

The Commonwealth has only requested this Court review their *Motion* as it pertains to 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b), the children’s availability to testify. However, this is the most extreme remedy offered by the Tender Years Hearsay Act, which includes two other potential alternatives to ensure the reliability of the child’s testimony. They include recording the child’s testimony for later presentation in Court<sup>7</sup> and allowing the child to testify via contemporaneous alternative method, usually in the form of live video or close-circuit television technology.<sup>8</sup> In the instant case, the Commonwealth has not met its burden as to any of the three children pursuant to 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b). However, the Court finds that the Commonwealth has met its burden as to M.A. under 42 Pa. C.S. § 5985.

The standards to which this Court must adhere are very similar under both 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b) and 42 Pa. C.S. § 5985. The standard under 42 Pa. C.S. § 5985 requires the trial court to make an evidence-based determination “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 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). This language is nearly identical to the language of 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b), reproduced *supra*, which requires the Commonwealth to show that the child would be unavailable to testify under *any* means.

In order to make such determination, both statutes are identical in stating that the trial court **may** do all of the following:

- (1) Observe and question the child victim or child material witness, either inside or outside the courtroom.
- (2) Hear 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. Determinations under the Tender Years Hearsay Act, therefore, are left entirely within the sound discretion of the trial court.

42 Pa. C.S. § 5985 (a.1)(1) and (2); 42 Pa. C.S. § 5985.1 (a.1)(1) and (2).

<sup>7</sup> 42 Pa. C.S. § 5984.1. We find that allowing M.A. to testify via video is a more appropriate alternative than pre-recorded testimony. Therefore, we will not further discuss the remedy available under 42 Pa. C.S. § 5984

<sup>8</sup> 42 Pa. C.S. § 5985.

In this case, we opted to observe and question all three children during the *in camera* proceeding held on April 20, 2021, and hear testimony from their mothers. Pursuant to this hearing and for reasons discussed below, we find that it is appropriate to order that M.A. shall testify via contemporaneous alternative method. The fact that the Commonwealth did not specifically request this form of relief does not prevent this Court from granting it, as neither statute requires a motion to be made before the trial court renders a decision. We also note that “the admissibility of evidence is at the discretion of the trial court and only a showing of an abuse of that discretion, and resulting prejudice, constitutes reversible error.” *Commonwealth v. Ballard*, 622 Pa. 177, 197-98, 80 A.3d 380, 392 (2013), cert. denied, 573 U.S. 940, 134 S.Ct. 2842, 189 L.Ed.2d 824 (2014). As such, we shall exercise our discretion and view the evidence obtained at the April 20, 2021, hearing through the lens of both statutes.

### III. ANALYSIS

#### a. The April 20, 2021 Hearing

At 2:15 P.M. on April 20, 2021, the evidentiary hearing commenced in the law library of the Fulton County Courthouse in McConnellsburg, Pennsylvania. The only persons present in the room during the interviews were the Court, counsel for the Commonwealth, counsel for the Defendant, and the court reporter. After the testimony of one witness irrelevant to the instant matter,<sup>9</sup> the mothers of the children testified. We first heard from Jenna C., mother of B.C., followed by Destiny A., mother of both M.A. and M.W. At the conclusion of the mothers’ testimony, the children testified, with M.A. testifying first, B.C. second, and M.W. third. We will discuss each child below in turn together with the statements of their respective mothers.

#### b. Six-year-old B.C.

We begin our analysis with the most straightforward of the three children. B.C. was four years old at the time of the alleged incident and six years old at the time she testified at the April 20, 2021, hearing. Her mother, Jenna C., testified that sometime during the summer of 2019, B.C. told her that Defendant had touched her inappropriately while helping her put on her pajamas.<sup>10</sup> B.C. also said that her mother was in the other room looking for a hairbrush when it occurred.<sup>11</sup> B.C. made no further disclosures to her

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<sup>9</sup> Rebecca Voss, who had interviewed the children at the Over the Rainbow Children’s Advocacy Center, also testified at this hearing. Her testimony is largely irrelevant to the matter at issue, as her testimony was related to the Commonwealth’s other request in this matter. See n. 2, *supra*.

<sup>10</sup> April 20, 2021, Hearing Transcript 20:3-7.

mother, and to this Court’s knowledge, this was the only disclosure B.C. has made.

Jenna C. did not indicate any specific concerns with regard to her daughter. Jenna C. indicated only that she was concerned about “ripping the scab back open” and that she didn’t want B.C. and the other children to be traumatized by these incidents.<sup>12</sup> On cross-examination, Jenna C. indicated that B.C. had told her she was scared of seeing the Defendant and scared of having to talk to the Judge.<sup>13</sup>

When B.C. came into the law library to testify, we noted that she did not seem particularly nervous or distraught. She had no hesitation when discussing Defendant, had no difficulty answering questions, and exhibited no substantial change in demeanor when the questions began probing B.C.’s allegations.

B.C. testified that she was comfortable talking about the Defendant in front of the lawyers and the judge.<sup>14</sup> She indicated that it would make her scared to talk about the Defendant “in front of other people”, but that she would be able to do it anyway.<sup>15</sup> On cross-examination, B.C. initially indicated that she would not be scared if Defendant was in the room, but then stated that she would be scared if he was there “because [she hadn’t] seen him in a long time.”<sup>16</sup> She then indicated that there was no other reason she would be scared of him.<sup>17</sup> On redirect, B.C. seemed very confident that she could testify. She indicated that it would make her feel “good” to come in and tell the Court what happened, that she would not be scared, and that she would be able to remember and tell everything.<sup>18</sup>

We begin our discussion of B.C.’s interview by addressing a point the Commonwealth raises in their brief about all three children, generally. The Commonwealth points out in their brief that “none of [the children] were able to come close to providing the kind of detail that they provided [in their interviews at the Children’s Advocacy Center], even in the more informal setting of sitting at the Fulton County Law Library table.”<sup>19</sup> This

<sup>11</sup> *Id.*

<sup>12</sup> *H.T.* 21:5-9.

<sup>13</sup> *H.T.* 27: 7-11.

<sup>14</sup> *T.P.* 75:4-6; *T.P.* 77:15-21.

<sup>15</sup> *T.P.* 77:2-13.

<sup>16</sup> *T.P.* 79:12-25.

<sup>17</sup> *T.P.* 80:17-19.

<sup>18</sup> *T.P.* 81:14-82:8.

is true. However, we do not find that this lack of detail was in any way the fault of the children. The *in camera* interviews of these children probed very minimally into their disclosures, with both attorneys focusing on the children’s fear and comfort surrounding their testimony. While there is no fixed rule about how in-depth the Commonwealth should go in interviewing children in this setting, we remind the Commonwealth that it is their burden to show that these children are unavailable to testify. *Commonwealth v. Strafford*, 194 A.3d 168, 2018 PA Super 223 (Pa. Super. 2018) If there was a proper time pre-trial to delve into detail about the children’s disclosures, it was at the April 20, 2021, hearing. The Commonwealth chose not to do so, and thus, they are bound by the mostly one-word answers the children gave in response to direct yes-or-no questions. Comparing these brief interviews with the children’s hour-long interviews at the Children’s Advocacy Center, where most of the questions are open-ended, would be unreasonable.

An example of this issue occurred relating to the final question the Commonwealth asked B.C., after B.C. had repeatedly assured him that she would be able to testify:

Q. And you think you could tell us everything? Because we’re not talking about it right now. But it would be a different kind of conversation. Do you understand that?

A. Yes.

*T.P.* 82:4-8.

It is possible, had B.C. been made aware that the “different kind of conversation” she would be expected to have would include testifying in open court before a panel of strangers with Defendant sitting nearby, that she would have given a different answer. However, in response to many questions by the Commonwealth directed toward establishing her emotional distress, B.C. repeatedly insisted that she would be able to testify. B.C. herself indicated nothing that would suggest that her ability to communicate would be substantially impaired if she had to testify in open court, even in the presence of the Defendant.

The Commonwealth raises two examples of lapses in B.C.’s memory and uses them as “minor examples of emotional distress substantially impairing her ability to reasonably communicate.” However, the Commonwealth has not shown that these lapses in memory were anything more than simple forgetfulness by a six-year-old child testifying about matters that occurred nearly two years ago when she was only four. Adult witnesses also frequently have lapses in memory, but we do not assume that these lapses are caused exclusively by emotional distress.

Lastly, while we understand and appreciate Jenna C.’s concern for her daughter, it is not enough for the Commonwealth to show that

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19 *Commonwealth’s Brief in Support of Use of Tender Years Hearsay at Trial* (hereafter “*Commonwealth’s Brief*”), pg. 4.



a child might be nervous to testify or that she may have an otherwise unpleasant experience. Very few children face the idea of coming to Court and testifying with anything besides fear and anxiety, and indeed, most adults are also nervous to testify. The standard for the applicable statutes is heightened well above simple nervousness, and the Commonwealth has simply not provided evidence to support a finding that B.C. is unavailable to testify.

The Commonwealth has also not met the standard to allow B.C. to testify via contemporaneous alternative method. B.C. indicated no particular fear of the Defendant beyond that she had not seen him in a long time. B.C. did not relate any further fear of the Defendant, indicated that there was no other reason she might be afraid of him, and did not express that she would be unable to testify if he was in the room. There is also nothing beyond mere speculation to indicate that B.C. would be unable to testify before a jury in open court.

For the above reasons, we find that Commonwealth has not met their burden to show that B.C. would be unable to testify in open court as an ordinary witness. As such, the Commonwealth's *Motion* as to B.C. shall be denied.

### **c. Eight-year-old M.W.**

Next, we address eight-year-old M.W., who is the step-sister of M.A. by different fathers. Destiny A., their natural mother, testified at some length about both children. Destiny A. provided a considerable amount of specificity related to her children, and we relied heavily on her testimony in reaching our decision.

During her *in camera* interview, M.W. gave her answers easily and concisely, and although she seemed somewhat nervous, she did not seem unusually so. However, she did answer questions inconsistently, often changing her answers with minimal prompting. For example, after discussing her school at some length, M.W. had the following exchange with the attorney from the Commonwealth:

Q. Okay. Do you ever get up in front of the other kids in school and read things or sing or anything like that?

A. We just raise our hands and the teacher call on us.

Q. Okay. Do you raise your hand a lot?

A. Uh-huh.

Q. Because you know the answer?

A. (Nods head up and down.)

Q. Are you comfortable talking in front of the class?

A. Yes.

Q. Okay. Are you comfortable talking in front of us?

A. (Nods head up and down.)

Q. You're not afraid of grown-ups?

A. (Shakes head side to side.)

Q. A little bit scared of grown-ups?

A. (Nods head up and down.)

*T.P.* 89:9-90:2.

M.W. also exhibited a substantial lapse of memory related to the incidents concerning Defendant. She initially indicated that no one had ever touched her on her privates<sup>20</sup> and that she had never told anyone that someone had.<sup>21</sup> She also indicated that she did not remember giving an interview at the Children's Advocacy Center, and she did not remember Defendant.<sup>22</sup>

Shortly thereafter on redirect examination, M.W. did indicate that she remembered Defendant.<sup>23</sup> When asked if she would be comfortable with Defendant in the room, M.W. indicated "no."<sup>24</sup> However, when asked why, M.W. stated, "He is always uncomfortable – constantly being beside me and I hate it when he does that. He always cuddles my sister and I say no."<sup>25</sup> She did not indicate any particular fear of Defendant for her own safety, or even for the safety of her sister. She merely seemed annoyed with his past conduct.

M.W. was also inconsistent on whether or not she was nervous or uncomfortable testifying. When asked by this Court, M.W. indicated that she was not uncomfortable or nervous and that she felt okay talking with the Court and the attorneys.<sup>26</sup> She stated that she would be nervous if she had to return, but did not otherwise indicate any particular fear. However, a bit later, she had the following exchange with the attorney for the Defendant:

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<sup>20</sup> M.W. stated that "privates" is the word she uses to describe places on her body that other people are not allowed to touch. *T.P.* 90:11-18.

<sup>21</sup> *T.P.* 90:19-25.

<sup>22</sup> *T.P.* 91:1-11.

<sup>23</sup> *T.P.* 91:16-21.

<sup>24</sup> *T.P.* 93:1-3.

<sup>25</sup> *T.P.* 93:5-7. M.W. later clarified that she was referring to M.A., her older sister.

<sup>26</sup> *T.P.* 91:15-24

Q. Okay. Are you scared talking to us right now?

A. No.

Q. If we had to talk another time – I know it’s not very fun. I know that. Nobody likes to talk to lawyers. But would you be okay talking to us another time if we had to talk?

A. Huh-uh.

Q. You don’t want to talk to us again?

A. (Shakes head side to side.)

Q. Okay. Do you think that you, even though you don’t want to, do you think that you could talk to us again?

A. (Shakes head side to side.)

Q. You couldn’t. Why don’t you think you would be able to say anything to us another time?

A. I don’t know.

Q. You don’t want to though, right?

A. (Shakes head side to side.)

Q. Is it boring talking to us?

A. No.

Q. It’s not fun though, right?

A. (Shakes head side to side.)

Q. And you didn’t want to talk about your family stuff with strangers. Is that true?

A. Uh-huh.

Q. I’m going to ask you one more time. It’s not because you’re scared to talk to us is it?

A. (Nods head up and down.)

Q. It is because you’re scared to talk to us?

A. (Shakes head side to side.)

Q. So you’re not scared to talk to us? You’re nodding no.

A. (Shakes head side to side.)

*T.P. 95:18-97-2.*

There is no doubt that M.W. was inconsistent and unreliable in her answers throughout the *in camera* interview. The Commonwealth addresses the litany of M.W.’s short and inconsistent answers in their brief, writing, “M.W.’s inability to recall and effectively communicate is not surprising—she is eight years old, and being asked to relate confusing and embarrassing things that happened two years ago under the stress of interrogation by strangers (lawyers and the court).<sup>27</sup>

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<sup>27</sup> *Commonwealth’s Brief*, pg. 5.

However, the Commonwealth faces the same problem with M.W. as they faced with B.C. Witnesses of any age experience lapses in memory. This is particularly true for a witness like M.W., who has not particularly discussed the incident involving Defendant since her disclosure two years earlier and who did not know why she was being interviewed at the *in camera* hearing. As discussed above, mere forgetfulness is insufficient to establish that M.W. is at risk of emotional distress such that her ability to reasonably communicate is substantially impaired.

We stress that the bar the Commonwealth must meet is not a low one. M.W. was still able to communicate, albeit inconsistently, and the Commonwealth has not shown that her inconsistency was the result of emotional distress. As they noted in their brief, she is indeed only eight years old. Even if we were to expect from M.W. testimony comparable to what an adult might give, the Commonwealth has still not shown that her inconsistencies or lapse of memory are the result of anything an ordinary adult witness does not also experience. Nothing about M.W.'s *in camera* testimony is inconsistent with what we might expect from any other ordinary child witness.

We also do not find that testifying by any alternative means would be necessary for M.W., as she has not indicated any particular fear of Defendant. Indeed, she must not be particularly afraid of him, as she initially forgot he existed. When reminded of him, she indicated that she would not be *comfortable* with him in the room, but as noted above, her discomfort stems more from perceived untoward contact by the Defendant on M.W.'s sister. Nothing about M.W.'s testimony indicates that the Defendant's presence in open court would cause her substantial emotional distress that her ability to reasonably communicate would be impaired.

Lastly, we address the testimony of Destiny A., M.W.'s mother. The Tender Years Hearsay Act allows the trial court to hear testimony of a parent or custodian of a child, as well as any other person, "such as a person who has dealt with the child victim or child material witness in a medical or therapeutic setting."<sup>28</sup> The statute gives broad leeway to the trial court in hearing testimony from *anyone* who knows the child and who can competently address the Court concerning the child's ability to testify. It was primarily for this purpose that we heard from Destiny A.

When evaluating the parents of children who have allegedly suffered abuse, this Court is mindful that parents often do not want their children to suffer more than they already have by being forced to testify about the situation. As we discussed above, no one *likes* testifying in court, children even less so, and it is completely normal for parents to want to protect their

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<sup>28</sup> See 42 Pa. C.S. § 5985 (a.1)(1) and (2); 42 Pa. C.S. § 5985.1 (a.1)(1) and (2), reproduced *supra*.

children from the anxiety associated with testifying. Indeed, it would be unusual to hear from a parent who had no trepidations at all. For this reason, the Court views the testimony of parents in these situations with heightened scrutiny.

Destiny A. testified credibly, and at some length, about both her children. We did not find her to be experiencing the kind of apoplexy an ordinary parent might exhibit about her children testifying.<sup>29</sup> Rather, Destiny A. intimated specific concerns regarding both of her daughters. Given that she was discussing both of them, it is natural that her testimony would include some comparisons between M.A. and M.W. and were not always about one child or the other.<sup>30</sup> However, it is clear to this Court that the two children, when viewed individually, differ substantially in their ability to testify.

Destiny A. was far more concerned about M.A. than about M.W., and as she discussed the girls, she routinely indicated that M.A. was less capable of handling the stress of testifying than M.W. When asked about whether she had concerns about her children being required to testify, Destiny A. first stated yes, then indicated, “[M.W.] not so much.”<sup>31</sup> Destiny A. described M.W. as “stoic” and “strong willed.”<sup>32</sup> Destiny A. also indicated that M.W. was not particularly nervous or anxious upon learning that morning she would be going to court.<sup>33</sup>

M.W. also did not have a particularly close relationship with Defendant, considering him merely a family friend.<sup>34</sup> As such, M.W. did not exhibit many behavioral changes surrounding the alleged incident. Destiny A. indicated that for several weeks following the alleged incident with Defendant, M.W. had begun experience bed-wetting almost nightly.<sup>35</sup> These incidents stopped when Defendant stopped coming to the house.<sup>36</sup> Destiny

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<sup>29</sup> We note that Jenna C., although she did exhibit the kind of general concern for her daughter that is to be expected, was also not the type of obstinately protective parent of whom we are wary.

<sup>30</sup> Although we have no doubt that M.W. is more capable than M.A. of testifying without experiencing substantial emotional distress, we are mindful that the standard is not whether M.W. is more or less capable of testifying than her sister. As such, in our discussion of M.W., we avoid any comparisons to M.A. and her abilities and view M.W. as an individual with specific needs independent of the needs of her sister.

<sup>31</sup> *T.P.* 37:11:15.

<sup>32</sup> *T.P.* 48:7-12.

<sup>33</sup> *T.P.* 37:4:10.

<sup>34</sup> *T.P.* 42:4:7.

<sup>35</sup> *T.P.* 51:9-25

<sup>36</sup> *T.P.* 52:15-19.

A. also stated that M.W. had begun to dance in a sexually provocative manner,<sup>37</sup> for which Destiny A. still has to discipline her. M.W. had also told her mother that she wanted to be a stripper.<sup>38</sup> Destiny A. believes these behavioral changes to be related to the alleged incidents with Defendant.<sup>39</sup>

We reiterate that the burden the Commonwealth must meet is substantial. Evidence of bed-wetting or sexually-provocative dancing, even *with* a direct causal connection to Defendant,<sup>40</sup> would not be sufficient to prove that M.W. is at risk of become so emotionally distressed that her ability to reasonably communicate would be impaired.

The Commonwealth notes that M.W. has never had any conversations with either of her parents about the incident<sup>41</sup> and uses this as evidence to show M.W.'s inability to testify. But M.W.'s lack of disclosure to her parents appears to have more to do with her parents. Destiny A. testified that she and her husband "avoid talking about it around her" because Destiny A. becomes uncomfortable.<sup>42</sup> The mere fact that M.W. has not discussed the matter with her parents is not evidence of her inability to testify.

We also stress, as noted above, that if there was an appropriate time to press M.W. about her disclosures and her feelings surrounding Defendant, it was at the *in camera* hearing. This Court is bound to consider evidence that we *did* hear, not to speculate about what we did not.

Ultimately, the Court heard M.W. testify credibly, albeit inconsistently, that she would be able to return and testify at a later date. The Court heard credible testimony from Destiny A. that she was not particularly worried about M.W.'s ability to cope with the stress of testifying. We also heard nothing from Destiny A. indicating that M.W. is afraid of Defendant or of the court process in general, and indeed, Destiny A. testified that M.W. did not particularly react upon learning that she was coming to court. The inconsistencies in M.W.'s *in camera* testimony are attributed to other causes just as easily as they are attributed to fear.

For the above reasons, we find that Commonwealth has not met their burden to show that M.W. would be unable to testify in open court

37 *T.P.* 49:4-21.

38 *T.P.* 55:1-11.

39 *See* n. 37.

40 We note that, although M.W.'s instances of bed-wetting appear to coincide with the incident in question, Destiny A. could not be sure that the sexually-provocative dancing was related to Defendant in any way. *T.P.* 55:22-24.

41 *Commonwealth's Brief*, pg.5, citing to *T.P.* 48 and 53.

42 *T.P.* 36:4-13.

as an ordinary witness. As such, the Commonwealth's *Motion* as to M.W. shall be denied.

**d. Ten-year-old M.A.**

Lastly, we address ten-year-old M.A., the oldest of the three children and M.W.'s older sister. Like B.C. and M.W., the Commonwealth has not met their burden to substantiate a determination that M.A. is entirely incapable of testifying. However, in consideration of the credible testimony given by M.A. and Destiny A., we find that M.A. is likely to suffer severe emotional distress in the presence of Defendant and the jury panel such that her ability to communicate would be substantially impaired. As such, we will order that M.A. shall testify via contemporaneous alternative method.

In June of 2019, several days after the alleged incident involving Defendant, M.A. tearfully disclosed to Destiny A. that Defendant had touched M.A. and M.W. inappropriately while babysitting.<sup>43</sup> During the disclosure, M.A. was extremely hesitant, upset, and tearful. Since the disclosure, Destiny A. stated that M.A. has been having nightmares, trouble sleeping, anxiousness, and excessive worrying.<sup>44</sup> Upon learning about having to testify at the *in camera* hearing, M.A. became "a little anxious and nervous."<sup>45</sup>

Destiny A. related that she was much more concerned about M.A.'s ability to testify than M.W.'s. When asked whether she had concerns about her children being required to testify, Destiny A. stated:

[M.W.] not so much.<sup>46</sup> Because [M.W.] is a lot stronger than what [M.A.] is when it comes to, like, handling things. [M.A.] has always been more on the sensitive side of – you know, ever since she was a baby she has always had a hard time handling change. She struggles with things and she's very – she's in her emotions a lot. And when she gets put through – into a situation that she's not comfortable in it causes behavior problems.

She gets very anxious and she gets very angry and she

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43 *T.P.* 31:20-34-8.

44 *T.P.* 36:17-23.

45 *T.P.* 37:4-7.

46 *See* n. 30, *supra*. It is impossible in this case to completely separate our analysis as to M.A. and M.W., particularly because they share the same mother who was asked the same questions about both of them. We again stress that we have not reached our decision because M.A. is less capable of testifying in open court than M.W. We have reached our decision because we find that M.A., when viewed individually, is not capable of testifying in open court.

will, you know, she won't sleep properly. She won't sleep or she'll, you know, be very – she won't eat. She will cry all the time.

*T.P.* 37:15-38:6.

Destiny A.'s description of M.A.'s difficulty with stress and anxiety, as well as her specific examples of the behavior problems that result when M.A. is put into stressful situations, are not merely speculative. They are very specific and highly relevant. The purpose of hearing from M.A.'s mother was to gather exactly this kind of information about M.A., and we learned from Destiny A. that while M.W. is capable of handling the stress of testifying in open court, M.A. simply is not.

M.A. was the first of the three children to testify at the *in camera* hearing. She seemed nervous and somewhat hesitant to answer questions, but not overly so. She spoke about the incident in general terms and was hesitant to use Defendant's name, calling him "the person, the guy."<sup>47</sup> She later referred to the incident involving Defendant as "the whole memories that was happening,"<sup>48</sup> and it took considerable prompting by the attorney for the Commonwealth for M.A. to say anything more specific.<sup>49</sup> M.A. stated that she would be able to talk about the incident, but that it made her "a little bit nervous."<sup>50</sup> She related that she found it difficult to talk about in front of other people, strangers, and those in the *in camera* interview.<sup>51</sup>

Furthermore, M.A. has made considerably more allegations against Defendant than either M.W. or B.C., and her relationship to Defendant was much more complex. For a period of time before the disclosure, Destiny A. related that M.A. had a very close relationship with Defendant which Destiny A. could not explain.

[M.W.], I would say it was more of like a family friend. You know, she spent time with him at the house. She would go to the store with him and stuff like that every once in a while.

Where with [M.A.], she – I can't speak how – why she acted the way she did. But after a little while of him being around she started acting more obsessed, I would say, with being around him.

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<sup>47</sup> *T.P.* 60:8-22.

<sup>48</sup> *T.P.* 65:18-66:1.

<sup>49</sup> *T.P.* 68:16-70:5.

<sup>50</sup> *T.P.* 67:16-19.

<sup>51</sup> *T.P.* 70:6-20.



She only wanted to be around him. She would ask to go and stay the night with him. There was one time that she said that she loved him and that, you know, he felt the same way. But I don't know if she understood the concept of it or not. But she wanted to be with him and around him. She didn't want to be around me or around her dad.

She would act – she started acting differently after a while of being around him. She was more – I guess, she just wanted to be around him.

*T.P.* 42:4-21.

M.A., though briefly, corroborated some of her mother's testimony about her relationship with Defendant. She related that Defendant made her go to his house all the time and never let her spend time with her parents.<sup>52</sup> She stated that Defendant hated her parents and wanted her to live with him, and that he told her to tell her parents that "but they said no."<sup>53</sup> When asked if she could talk about the incidents involving defendant "in a room with other people like judges and lawyers and that kind of thing," M.A. related that she could.<sup>54</sup> However, when asked if she would be okay with Defendant in the room, she stated that she would be "scared" without hesitation.<sup>55</sup> On cross-examination, she thrice reiterated that she would be scared of Defendant if he was in the room.<sup>56</sup> When asked why, she stated, "because of the way he looks at me and the way he talks to me."<sup>57</sup>

This Court heard credible testimony about M.A.'s lowered ability to handle stressful situations, her nervousness and anxiety about discussing the matters in the *in camera* interview, and her repeatedly-expressed fear of Defendant. We find that, not only would M.A. likely be unable to testify with Defendant in the room, M.A. would likely be sufficiently scared by the open-court setting and jury of strangers that she would be unable to reasonably communicate.

However, we do not find that M.A. should be determined entirely unavailable as the Commonwealth requests. During the *in camera* interview, M.A. repeatedly indicated her ability to answer questions in a small room

<sup>52</sup> *T.P.* 68:24-69:4.

<sup>53</sup> *T.P.* 69:5-13.

<sup>54</sup> *T.P.* 62:17-22.

<sup>55</sup> *T.P.* 62:23-63:4.

<sup>56</sup> *T.P.* 63:16-64:6.

<sup>57</sup> *T.P.* 64:5-6.

with only a few people.<sup>58</sup> When asked point-blank by the attorney for the Defendant whether she would be too scared to “come in and talk again,” M.A. answered that she would be able to come in and talk again.<sup>59</sup>

Furthermore, M.A.’s overall demeanor indicated that, nervous though she may have been during the *in camera* interview, she was not so affected by emotional distress that she could not reasonably communicate. Indeed, she *did* reasonably communicate at some length, and although it was not in any particular depth, she never failed to answer a question posed to her. This Court has interviewed children *in camera* who become so overwhelmed by even the *in camera* setting that their testimony is rendered useless. With M.A., this was not the case.

Therefore, we find that the appropriate remedy to ensure that M.A.’s testimony is given clearly and reliably is to order that M.A. shall testify via contemporaneous alternative method, outside the presence of Defendant and the jury panel. The exact method will be determined at a later date depending on what kind of accommodation is available at the Fulton County Courthouse to facilitate her testimony.

#### IV. CONCLUSION

For the reasons stated above, the Commonwealth’s *Motion* to allow the admission of testimony by Rebecca Voss, Jenna C., Destiny A., as well as the admission of the children’s recorded interviews at the Children’s Advocacy Center shall be granted.<sup>60</sup> The Commonwealth’s *Motion* to for this Court to determine that M.A., M.W., and B.C. are unavailable to testify pursuant to 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b) shall be denied. However, this Court shall order that M.A. shall testify via contemporaneous alternative method pursuant to 42 Pa. C.S. § 5985.

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<sup>58</sup> We again note that the attorneys never explained to any of the three children exactly what they could expect by testifying in open court. Children generally do not have even a cursory understanding of the judicial process beyond what they see on television, and even then, we heard no evidence that any of these children were familiar with media depictions of the court process. Therefore, when these children were asked questions generally about whether they could “come in here and talk again,” *T.P.* 71:8-11, or if they would be “okay talking about that in a room with other people like judges and lawyers and that kind of thing,” *T.P.* 62:17-19, they can only expect what they have already endured. Therefore, when they answer in the affirmative as M.A. did, they are not telling us that they are capable of enduring all the stresses of testifying normally in open court. They can only tell us that they are capable of enduring testifying in a setting similar to the *in camera* interview.

<sup>59</sup> *T.P.* 71:6-11.

<sup>60</sup> See n.2, *supra*.

## **ORDER OF COURT**

**AND NOW**, this 23rd day of September, 2021, upon review and consideration of the Commonwealth's *Motion* pursuant to the Tender Years Hearsay Act, filed November 2, 2020, the evidence of record, arguments of counsel, briefs submitted by both the Commonwealth and the Defense, and the applicable law,

**IT IS HEREBY ORDERED** that the Commonwealth's *Motion* to find the children M.A., M.W., and B.C. unavailable to testify as witnesses pursuant to 42 Pa. C.S. § 5985.1 (a)(1)(ii)(b) is **DENIED**. M.W. and B.C. shall testify as usual in open court.

**IT IS FURTHER ORDERED** that M.A. shall testify at trial via contemporaneous alternative method pursuant to 42 Pa. C.S. § 5985.

**IT IS FURTHER ORDERED** that the Commonwealth's *Motion* to admit the testimony of Rebecca Voss, Jenna C., Destiny A., and the children's recorded interviews at the Children's Advocacy Center pursuant to 42 Pa. C.S. § 5985.1 is **GRANTED**. Rebecca Voss, Jenna C., and Destiny A. are permitted to testify in this matter at trial, and the children's recorded interviews at the Children's Advocacy Center are admitted into evidence.

*Pursuant to the requirements of Pa.R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.*