COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

FAMILY COURT DEPARTMENT
LOWELL DIVISION
DOCKET NO. DL04L0807

TARA ARNEY

v.

GEORGE ARNEY,
Defendant

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR ADMISSION OF CHILDREN'S OUT-OF-COURT STATEMENTS

ISSUE PRESENTED

Whether the court should grant the motion to admit the children's out-of-court statements if they are reliable and if the children cannot testify without experiencing severe emotional trauma.

FACTS

Tara and George married on June 7, 1999 and lived in Tewksbury, Massachusetts. According to Tara, while George physically and mentally abused her, he was careful not to do anything in front of others, except his children. When Tara had obvious bruising from the beatings, George made sure she stayed in the house. George also destroyed property, mostly Tara's. George not only kept her from having outside friends, he also prevented her from developing professionally or intellectually by forbidding her to work or to go back to school. In addition, he forbade her from ever confiding in anyone about their home life. Tara states that the

children have made many statements about the abuse, both before and after she left George. Tara lived in constant state of fear, always preparing for the next beating, always ensuring her children were safe in their rooms and protected from George's rages and physical attacks. Lionel's first words were "No Daddy no!" Tara is expected to testify that George always behaved in a physically and emotionally harmful way toward her, and that the children witnessed many attacks.

Tara states that the children have made statements about witnessing many violent episodes, and also have told her they remembered the night Tara left George. George came home drunk. The children were trained from previous violent episodes, and so they ran to their rooms. Because no dinner was prepared, George held a gun to Tara's head and threatened her that she would not live long enough to see the morning. The children told Tara that they could hear everything until they fell asleep after eleven. George then proceeded to rape Tara. While George was asleep, Tara took the children out of the house and to a motel. She then filed for divorce.

The psychologist is expected to testify that Tara is a battered woman with symptoms of post-traumatic stress disorder. Tara has never sought a restraining order for any of George's actions. The psychologist is expected to testify that abused women lost their self-esteem, and most women who suffer from the syndrome are too ashamed to seek help. The therapist is expected to testify about the effects of domestic violence on the children and will also present evidence that forcing the children to testify would cause them severe psychological trauma.

ARGUMENT

I. THIS COURT HAS THE AUTHORITY UNDER MASS. GEN. LAWS CH. 233 §82, TO ADMIT CHILD HEARSAY

A. RELIABILITY

Out-of-court statements made by a child under the age of ten relating to sexual abuse are admissible if "(a) a child is unavailable; and (b) the judge makes the additional finding that the statement was reliable, based on a list of enumerated factors." Adoption of Quentin, 424 Mass. 882 (1997). In Quentin, the statements of the eight year old Quentin were found to be admissible after a determination of reliability, including "specific examples of independent corroborative evidence." Id. at 893.

As in Quentin, Lionel Arney, seven, and Georgia Arney, six, are also children under the age of ten. Adoption of Quentin, 424 Mass. 882 (1997). Even though the facts are silent to the details of the therapy sessions of Lionel and Georgia, the court can infer from the given facts that because Lionel heard the grandfather clock chime at 11pm, corroboration does in fact exist to the timeframe of the events, as required under Quentin. Id. Some of the enumerated factors, not all, are required to demonstrate that out-of-court statements were reliable. Id. at 892. Corroborative evidence of the substance of the statement, and a child's statements supported by testimony of the treating clinician are some of these "enumerated" factors. Mass. Gen. Laws ch. 233 §82(c)(2)(i)-(iii). As demonstrated in Quentin, Tara will testify to the validity of the children's facts, as well as the therapist to the consistency of the children's statements before and after the separation. Id.

The judge has the discretion, based upon the evidence, to determine whether parental behavior adversely affects the child. Adoption of Quentin, 424 Mass. 882,887 (1997). "[C]hildren have an ongoing need for a stable and structured home environment to meet their educational, social, therapeutic, medical, and emotional needs." Id. In our case, similar to what the judge stated in Quentin, Lionel and Georgia should be able to live in a stable home where

they do not have to run to their rooms every time daddy comes home, or in a home where they do not have to witness physical abuse to their mother. Id. The court found the child's out-of-court statements to be reliable when the interviewers determined the child could understand "the distinction between truth telling and lying, and that he made the statements in a controlled and comfortable setting." Adoption of Arnold, 50 Mass.App.Ct. 743 (2001). The court in Arnold also found that the consistency of the statements made multiple times in the absence of questioning added to the reliability, similar to our case where the children repeated the statements before and after the separation. Id.

In Bea, the child "consistently recounted" the details. Adoption of Bea, 64 Mass.App.Ct. 1104 (2005). "Her demeanor and reluctance to discuss the incident reflected her understanding of the gravity of her statements and their consequences." Id. Many observable factors are of the child "to observe, remember and give expression to that which he has seen, heard or experienced" are considered when evaluating reliability. Mass. Gen. Laws ch. 233 §82(c)(i). "[C]onsistent repetition" is a substantial element when considering the reliability of the child's hearsay statements. Adoption of Gillian, 63 Mass.App.Ct. 398 (2005).

B. HEARING

This court must have a hearing in order to determine reliability under the Quentin test. Adoption of Quentin, 424 Mass. 882 (1997). For out-of-court statements not sworn in under oath, a separate hearing is required to "determine the sufficiency of the statements' reliability." Adoption of Veda, 65 Mass.App.Ct. 1119 (2006). The Supreme Judicial Court found that if a child's hearsay statements are admitted for their truth, than this would violate the requirement where the parent has the right to rebut those statements. Adoption of Carla, 416 Mass. 510 (1993). "[D]ue process and fundamental fairness require that a parent should have the

opportunity to rebut the evidence against the parent." Id. at 514. "[B]ecause the child did not testify the judge can not rely on such statements without making certain required findings under G.L. c. 233 §82." Id. The moving party must satisfy the burden of proof with physical or corroborative evidence, otherwise the hearsay statements in and of themselves "may not be considered substantively by the judge as evidence." Adoption of Stuart, 39 Mass.App.Ct. 380 (1995). Therefore, having a separate hearing to evaluate the unavailability and reliability of the child is required in order to admit out-of-court statements. Quentin, 424 Mass. at 893, Adoption of Talia, 56 Mass.App.Ct. 1101 (2002). During this hearing, the court can better understand the reliability of the hearsay statements of the Lionel and determine if they are supported by "other evidence or testimony which was properly admitted". Carla, 416 Mass. at 510. Even if the statements cannot be used as probative evidence, then "using the statements of the children for hearsay purposes" is "harmless." Carla, 416 Mass. at 510.

C. TRAUMA

This court must follow the decision in Bea, where a qualified expert stated under oath that allowing the child to testify would "likely provoke considerable anxiety." Bea, 64 Mass.App.Ct. at 1108. The judge could rely on the testimony because there "were no arrangements that could be created for Bea's testimony that could eliminate the psychological harm." Id. This requires a finding that "testifying would likely cause severe psychological or emotional trauma to the child". Mass. Gen. Laws ch. 233 §82(b)(5). The courts have found that the child was unable to testify "because doing so would be likely to cause severe psychological or emotional trauma to him." Adoption of Xavier, 54 Mass.App.Ct. 1103 (2002); Adoption of Kerry, 66 Mass.App.Ct. 1109 (2006). Like in Bea, Dr. Helen Hollis has already stated and will

testify to the potential damaging effects of having the children testify. Bea, 64 Mass.App.Ct. at 1108.

CONCLUSION

Based upon the case presented, Plaintiff Tara Arney respectfully requests having a hearing to determine the reliability of the out-of-court statements of her children. Plaintiff Tara Arney also respectfully requests the court to admit the out-of-court statements of the children without Lionel or Georgia testifying themselves. It has been shown that the Supreme Judicial Court has found that if there are other corroborative evidence of the reliability of the statements, then the out-of-court statements can be admitted as evidence.

Respectively Submitted,
Tara Arney
By her attorney,

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