

**SUPREME COURT OF PENNSYLVANIA
DOMESTIC RELATIONS PROCEDURAL RULES COMMITTEE**

NOTICE OF PROPOSED RULEMAKING

Proposed amendment of Pa.R.C.P. No. 1915.11-2

The Domestic Relations Procedural Rules Committee is planning to propose to the Supreme Court of Pennsylvania the amendment of Pa.R.C.P. No. 1915.11-2 — Appointment of Guardian *Ad Litem* — for the reasons set forth in the accompanying publication report. Pursuant to Pa.R.J.A. No 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

**Bruce J. Ferguson, Counsel
Domestic Relations Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
Fax: 717-231-9531
domesticrules@pacourts.us**

All communications in reference to the proposal should be received by **November 5, 2021**. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Domestic Relations Procedural Rules
Committee

Jennifer P. Bierly, Esquire
Chair

**SUPREME COURT OF PENNSYLVANIA
DOMESTIC RELATIONS PROCEDURAL RULES COMMITTEE**

RULE PROPOSAL 181

Rule 1915.11-2. [Appointment of Guardian Ad Litem]Guardian Ad Litem.

*** * * The following text replaces the current rule text in its entirety * * ***

(a) Appointment.

- (1) On its own motion or a party's motion, the court may appoint a guardian *ad litem* if the court finds that the appointment is necessary for determining the child's best interest.
- (2) The court's order appointing the guardian *ad litem*, as provided in Pa.R.C.P. No. 1915.21, may apportion to the parties the reasonable cost of the guardian *ad litem*.

(b) Qualifications. The guardian *ad litem* shall be a licensed attorney or licensed mental health professional.

(c) Duties. As provided in 23 Pa.C.S. § 5334, which has been suspended in part by Pa.R.C.P. No. 1915.25, the guardian *ad litem* shall perform the duties as enumerated in Section 5334, including representing the child's best interest but not the child's legal interest or act as the child's legal counsel.

(d) Report. As required by 23 Pa.C.S. § 5334(b)(6), the guardian *ad litem* shall prepare a written report, which shall include specific recommendations relating to the child's best interest.

- (1) The written report may include a subject child's statement to the guardian *ad litem* that would otherwise be inadmissible under the Pennsylvania Rules of Evidence provided the requirements of Pa.R.E. 703 are satisfied.
- (2) The guardian *ad litem* shall file the written report with the prothonotary, which shall become part of the record, except as set forth in subdivision (d)(4).
- (3) The guardian *ad litem* shall provide the report to the parties and the court when filed but not later than 20 days prior to a hearing or trial.
- (4) **Comments. Objections.**

- (i) Within ten days of receiving the guardian *ad litem*'s report, a party may file with the prothonotary and serve on the other party and the court:
 - (A) a comment to the report, which shall become part of the record; or
 - (B) an objection to the report's admissibility, in whole or in part, including a child's statement to the guardian *ad litem*.
 - (ii) The court shall determine the admissibility issue prior to the hearing or trial.
- (5) A party may subpoena:
- (i) a witness interviewed by the guardian *ad litem* or identified in the report to appear and testify at the hearing or trial; or
 - (ii) the guardian *ad litem* for the production of a document relied upon by the guardian *ad litem* in preparing the report.

(e) **Testimony.**

- (1) The guardian *ad litem* shall attend the court proceedings and, as necessary, testify.
- (2) If called to testify by a party or the court, the guardian *ad litem* shall be subject to cross-examination by any party, including the party calling the guardian *ad litem* to testify.
- (3) The guardian *ad litem* may testify about a subject child's statement included in the written report, except as determined by the court as provided in subdivision (d)(4)(ii).

(f) The order appointing a guardian *ad litem* shall be in substantially the form set forth in Pa.R.C.P. No. 1915.21.

***** The preceding text replaces the current rule text in its entirety *****

Note: 23 Pa.C.S. § 5334 is suspended insofar as it (1) requires that a guardian **[ad litem]ad litem** be an attorney, (2) permits the guardian **[ad litem]ad litem** to represent both the best interests and legal interests of the child, (3) provides the guardian **[ad litem]ad litem** the right to examine, cross-examine, present witnesses, and present evidence on behalf of the child, and (4) prohibits the guardian **[ad litem]ad litem** from testifying.

**SUPREME COURT OF PENNSYLVANIA
DOMESTIC RELATIONS PROCEDURAL RULES COMMITTEE**

REPUBLICATION REPORT

Rule Proposal 181

The Domestic Relations Procedural Rules Committee (Committee) is proposing an amendment to Pa.R.C.P. No. 1915.11-2 - Appointment of Guardian *Ad Litem*. Previously, the Committee published this rule proposal for public comment in the *Pennsylvania Bulletin*, 50 Pa.B. 7007 (December 12, 2020). After reviewing the comments received from the original publication and additional deliberations, the Committee is republishing the Rule Proposal. Specifically, the proposed amendment would permit a GAL to testify or include in the GAL's report a minor child's statement even if the statement would be otherwise inadmissible hearsay provided the statement satisfies Pennsylvania Rule of Evidence 703.

As noted in the originally published Rule Proposal's Publication Report, the Committee received a request for rulemaking on the admissibility of a child's statement to a guardian *ad litem* (GAL) in a custody hearing or trial. The Rules of Civil Procedure provides for a GAL's appointment when the court finds that a GAL is necessary for the court to determine the child's best interest. As set forth in 23 Pa.C.S. § 5334(b), a GAL is required to meet with a child of an appropriate age in order to ascertain the facts. Often while meeting with the GAL, the child makes statements to the GAL that could impact a court's best interest analysis. However, the Pennsylvania Rules of Evidence does not provide for the blanket admissibility of a child's hearsay statements made to a GAL, and unlike dependency actions under the Juvenile Act, 42 Pa.C.S. §§ 6301 *et seq.*, in which a hearsay statement may be admissible in dispositional hearings, similar statements in a child custody action do not have a statutory exception and, as such, are inadmissible unless a hearsay exception applies.

Often, however, the child's statement is included in a GAL's report or testimony. As reported to the Committee, the statement's admissibility varies from court to court. Some courts will allow the statement into evidence since it could impact the child's best interest; while other courts will disallow the statement as hearsay unless a hearsay exception applies. To remedy the disparate treatment of the child's statement to a GAL, the Committee believes the current rule should be amended.

The originally published Rule Proposal 181 suggested that an exception to the hearsay rule was necessary to reflect the admissibility of the statement made to the child's GAL as the statement often is probative of the child's best interest. Instead, after additional deliberations, the Committee is now proposing that the GAL is akin to an expert witness, and that if the child's statement complies with Pa.R.E. 703, *i.e.*, is the

type of statement or data a GAL would rely upon in forming their opinion on the child's best interest, the statement or information should be admissible and may be incorporated into the GAL's report or testimony. In this way, the procedural rule reflects that most information gathered by the GAL is not firsthand information, including a child's statement, but acquired from other sources; nevertheless, this information should be included in the report or testimony, as appropriate.

As such, the Committee is proposing an amendment to Pa.R.C.P. No. 1915.11-2 - Appointment of Guardian *Ad Litem*. The rule proposal rewrites the rule in its entirety; however, the majority of the changes are stylistic and format changes. The substantive change related to the admissibility of a child's hearsay statement to a GAL is included in subdivision (d)(1). As result of the proposed change, the GAL's report and testimony would be treated similarly to an expert witness' report and testimony under Pa.R.E. 702 - 706.

An additional substantive change in the republished Rule Proposal is deleting the rule's reference to allow the court to determine whether confidential information under 23 Pa.C.S. § 5336 can be provided to the parties. Section 5336(b) identifies specific information that is expressly prohibited from disclosure to the parties. As such, the court does not have the discretion to order the disclosure of this information. Of course, the court retains the discretion under Section 5336(c) to limit a party's access to certain records or information set forth in Section 5336(a).

All comments, concerns, and suggestions concerning this rule proposal are welcome.