

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

On January 27, 2023, the Supreme Court of Pennsylvania amended Pa.R.Civ.P. 1915.11-2 and 1915.21, which address the appointment of a guardian *ad litem* (GAL) in a custody action, as authorized by 23 Pa.C.S. § 5334. Specifically, the amendments permit a GAL to include the subject child's statement to the GAL in the GAL's report, and to testify at trial about the statement as well, provided the requirements of the Pennsylvania Rule of Evidence 703 are satisfied. The Committee has prepared this Adoption Report describing the rulemaking process. An Adoption Report should not be confused with Comments to the rules. See Pa.R.J.A. 103, cmt. The statements contained in this Adoption Report are those of the Committee, not the Court.

The Committee received a request for rulemaking on the admissibility of a child's statement to a GAL in a custody hearing or trial. The Rules of Civil Procedure provide 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 to ascertain the facts. The GAL shall also interview potential witnesses, investigate facts and documents, and make specific recommendations in a written report to the court relating to the best interests of the child.

While meeting with the GAL, a child may make a statement to the GAL that could impact a court's best interest analysis. However, the Pennsylvania Rules of Evidence do not provide a categorical exception to Pa.R.E. 802 (Rule Against Hearsay) for a child's statement made to a GAL. 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 similar statutory exception and, as such, are inadmissible unless an enumerated hearsay exception applies. Nevertheless, as a matter of practice, a child's statement is often included in a GAL's report or testimony in custody matters.

As reported to the Committee, the admissibility of a child's hearsay vis-à-vis a GAL varies from court to court. Some courts will allow the statement into evidence because it could impact the child's best interest. 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 proposed amending the rules.

The Committee originally published proposed amendments 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 re-published the proposal for comment in the *Pennsylvania Bulletin*, 51 Pa.B. 6141 (September 25, 2021).

Pa.R.Civ.P. 1915.11-2 is rewritten in its entirety. In addition to substantive amendments, the rule reflects stylistic and format changes. Further, the Note was removed, and its content placed in a Comment.

One of the substantive amendments includes subdivision (d)(1), which addresses the admissibility of a child's hearsay statement to a GAL. The GAL's report and testimony may include the child's statement to the GAL. If the child's statement complies with Pa.R.E. 703 (Bases of an Expert's Opinion Testimony), *i.e.*, is the type of statement or information a GAL would rely upon in forming their recommendation on the child's best interest, the statement or information should be admissible and may be incorporated into the GAL's report or testimony. The revised rule reflects that a GAL may rely upon hearsay, as may be permitted pursuant to Pa.R.E. 703, as a basis for their recommendation. The amendment also confirms that a child's statement included in the GAL's report or testimony shall not be considered substantive evidence by the court.

Subdivision (d)(5) allows parties to file with the prothonotary, and serve on the other party and the court, a comment to the report or an objection to the report's admissibility, in whole or in part. The objection may be related to the child's statement.

Post-publication, the Committee added a subdivision related to the confidentiality of the report and a party's filed response. Subdivision (d)(3) states that the report and response shall be confidential and shall not constitute a public record.

Another substantive change is the deletion of the reference to 23 Pa.C.S. § 5336 in the rule text. Section 5336(b) identifies specific information that is expressly prohibited from disclosure to the parties. 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). A reference to 23 Pa.C.S. § 5336 is included in the Comment.

The revised rule also clarifies that a party may subpoena an individual interviewed by the guardian *ad litem* or identified in the report to appear and testify at the hearing or trial. A party may also subpoena the guardian *ad litem* for the production of a document relied upon by the guardian *ad litem* in preparing the report. Post-publication, the rule was further revised in subdivision (d)(6) confirming a subpoena shall be "subject to Pa.R.Civ.P. 1915.11," related to the appointment of an attorney for the child. Commentary was added confirming that this subdivision shall not be construed to limit a party's ability to subpoena other individuals, or limit the production of documents, if the court previously authorized discovery pursuant to Pa.R.Civ.P. 1915.5(c).

There were several post-publication revisions to the Comment to provide further guidance to the reader. The amended Comment confirms that "appointments should be limited to extraordinary cases..." and "the duty and responsibility to determine the best

interests of the children involved lies solely with the trial judge.” Furthermore, while the requirements of Pa.R.E. 703 (Bases of an Expert’s Opinion Testimony) must be satisfied, the guardian *ad litem* is not an expert witness and need not be qualified as an expert prior to testifying. Finally, the amendments clarify the guardian *ad litem* cannot simply relate the opinion of a non-testifying witness unless the guardian *ad litem* has reasonably relied upon it.

Additional post-publication revisions include amending Pa.R.Civ.P. 1915.21 concerning the form order appointing a guardian *ad litem*. Specifically, the form order was revised to align with the language of Pa.R.Civ.P. 1915.11-2(d)(4) governing the guardian *ad litem*’s report. The general language informing the guardian *ad litem* that they may be subject to cross-examination “by either party or the court” was also amended to refer the reader to Pa.R.Civ.P. 1915.11-2(e)(2).

The following text in the Note was removed:

23 Pa.C.S. § 5334 is suspended insofar as it (1) requires that a guardian *ad litem* be an attorney, (2) permits the guardian *ad litem* to represent both the best interests and legal interests of the child, (3) provides the guardian *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* from testifying.

The amendments become effective April 1, 2023.