

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

[(a) The court may, on its own motion or the motion of a party, appoint a guardian ad litem to represent the best interests of the child in a custody action. The guardian ad litem shall be a licensed attorney or licensed mental health professional. The guardian ad litem shall not act as the child's counsel or represent the child's legal interests. Prior to appointing a guardian ad litem, the court shall make a finding that the appointment is necessary to assist the court in determining the best interests of the child.

(b) The court may order either or both parties to pay all or part of the costs of appointing a guardian ad litem.

(c) The guardian ad litem shall file of record and provide copies of any reports prepared by the guardian ad litem to each party and the court not later than 20 days prior to trial. The admissibility of the report shall be determined at the hearing. Prior to disclosure to the parties of confidential information prohibited by 23 Pa.C.S. § 5336, the court shall make a determination of whether the information may be disclosed. The guardian ad litem shall attend all proceedings and be prepared to testify. The guardian ad litem shall be subject to cross-examination if called to testify by either party or the court.

(d) The order appointing a guardian ad litem shall be in substantially the form set forth in Rule 1915.21.

Note: 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.]

(This is entirely new text.)

(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) As set forth in Pa.R.Civ.P. 1915.21, the court's order appointing the guardian *ad litem* 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.**
 - (1) As provided in 23 Pa.C.S. § 5334, which has been suspended in part by Pa.R.Civ.P. 1915.25, the guardian *ad litem* shall perform the duties as enumerated in Section 5334, including representing the child's best interest.
 - (2) The guardian *ad litem* shall not represent the child's legal interest or act as the child's legal counsel.
- (d) **Report.** The guardian *ad litem* shall prepare a written report, which shall include specific recommendations relating to the child's best interest.
 - (1) **Child's Statement.**
 - (i) The written report may include a subject child's statement to the guardian *ad litem* that would be otherwise inadmissible as hearsay under the Pennsylvania Rules of Evidence, provided the requirements of Pa.R.E. 703 are satisfied.
 - (ii) A child's statement included in the written report under subdivision (d)(1)(i) shall not be considered substantive evidence.
 - (2) The guardian *ad litem* shall file the written report with the prothonotary, which shall become part of the record.
 - (3) **Confidential.** The guardian *ad litem*'s filed report and a party's filed response to the report as provided in subdivision (d)(5) shall be confidential and shall not constitute a public record.
 - (4) 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 or as otherwise ordered by the court.
 - (5) **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 subject child's statement to the guardian *ad litem*.
 - (ii) The court shall determine the report's admissibility prior to the hearing or trial.
- (6) Subject to Pa.R.Civ.P. 1915.11, a party may subpoena:
 - (i) an individual 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) When determined necessary by the trial court, the guardian *ad litem* shall participate in court proceedings by attending, and by providing sworn testimony if called to testify by a party or the court. The guardian *ad litem* shall not be permitted to provide argument, unsworn opinions, or unsworn testimony to the court.
 - (2) If called to testify by a party, the guardian *ad litem* shall be subject to cross-examination by opposing parties. If called to testify by the court, the guardian *ad litem* shall be subject to cross-examination by any party.
 - (3) **Child's Statement.**
 - (i) Except as precluded by the court in subdivision (d)(5)(ii), the guardian *ad litem*'s testimony may include the subject child's statement to the guardian *ad litem* that would be otherwise inadmissible as hearsay under the Pennsylvania Rules of Evidence, provided the requirements of Pa.R.E. 703 are satisfied.

- (ii) A child's statement included in the guardian *ad litem*'s testimony under subdivision (e)(3)(i) shall not be considered substantive evidence.

- (f) **Order.** The order appointing a guardian *ad litem* shall be substantially in the form set forth in Pa.R.Civ.P. 1915.21.

Comment: Subdivision (a)(1) states that the guardian *ad litem* may be appointed when "the appointment is necessary." Such appointments should be limited to extraordinary cases in which the trial judge determines that the level of conflict is unusually high or that the parties will be absolutely unable to provide the court with the information necessary to evaluate and determine the subject child's best interests. Regardless of appointment of a GAL, the duty and responsibility to determine the best interests of the children involved lies solely with the trial judge.

The Supreme Court of Pennsylvania suspended 23 Pa.C.S. § 5334 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.

See 23 Pa.C.S. § 5336, prohibiting disclosure of certain records and information to parents and parties.

Subdivision (d)(1) and (e)(3) reference the requirements of Pa.R.E 703. Rule 703 relates to the bases for expert opinion testimony. While the requirements of Rule 703 must be satisfied for any written report that includes statements made by a subject child, the guardian *ad litem* is not an expert witness and need not be qualified as an expert prior to testifying. However, the guardian *ad litem* remains subject to questions and cross-examination regarding qualifications and experience.

In addition, the guardian *ad litem* cannot serve as a mere conduit for hearsay or for the opinions of another person, including the subject child. The guardian *ad litem* cannot relate the opinion of a non-testifying witness unless the guardian *ad litem* has reasonably relied upon it. Upon appropriate objection from any party, the trial court shall strike any testimony or portion of the guardian *ad litem*'s written report that is inadmissible as hearsay if the requirements for Pa.R.E. 703 are not met.

Subdivision (d)(6) provides that a party may subpoena an individual interviewed by the guardian *ad litem*, an individual that is identified in the guardian *ad litem*'s report, or a document relied upon by the guardian *ad litem* in producing the report. The subdivision shall not be construed to limit a party's ability to subpoena other individuals or for the production of documents for a trial or hearing, or for discovery purposes, if the

court had previously authorized discovery pursuant to Pa.R.Civ.P. 1915.5(c).

Rule 1915.21. Form of Order Appointing Guardian *Ad Litem*.

The order appointing a guardian *ad litem* in a child custody action pursuant to Rule 1915.11-2 shall be in substantially the following form:

(Caption)

ORDER OF COURT

AND NOW, THIS _____ day of _____, 20 _____, it is hereby ordered as follows:

Pursuant to Pa.R.**[C]**Civ.P. No. 1915.11-2, _____ is appointed as guardian *ad litem* for the minor child _____ (D.O.B. _____) in connection with the civil proceedings related to the custody of the minor child.

The child's guardian *ad litem* shall represent the best interests of the child. The guardian *ad litem* shall not act as the child's attorney or represent the child's legal interests.

It is ordered and decreed that all relevant schools, police departments, hospitals and social service agencies including home and school agencies who have records, reports and/or information pertaining to the child relevant to the custody of the child, shall allow the guardian *ad litem* access to all files and records in its possession, custody or control and shall cooperate in responding to all relevant inquiries. These files/records may include but are not limited to medical, psychological or psychiatric charts including evaluations and progress notes and records, X-rays, photographs, tests, test evaluations, intake and discharge summaries, police records, and school records including report cards, educational assessments and educational plans, relevant to this custody dispute and/or relevant to any special needs or requirements of the child. The guardian *ad litem* shall have the right to copy any part of the files and records maintained in connection with the child.

It is further ordered and decreed that the guardian *ad litem* shall be permitted to see and speak with the child, and family, medical and/or social service providers connected with this case, and take all steps appropriate to and consonant with this order.

The guardian *ad litem* shall provide copies of any reports prepared by the guardian *ad litem* to each party, or to their counsel, and to the court **when filed but** not later than 20 days prior to **a hearing or** trial **or as otherwise ordered by the court.**

The guardian *ad litem* shall attend all proceedings and be prepared to testify. The guardian *ad litem* shall be subject to cross-examination **in accordance with Pa.R.Civ.P. 1915.11-2(e)(2)** if called to testify **[by either party or the court].**

The fees for the guardian *ad litem* shall be paid as follows:

This appointment shall terminate upon the entry of a final order resolving the petition pending as of the date of this order or as provided in subsequent order of court.

BY THE COURT:

J.