

**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:

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All communications in reference to the proposal should be received by **February 12, 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

The Honorable Daniel J. Clifford
Chair

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

RULE PROPOSAL 181

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

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

(a) Appointment.

- (1) On its own motion or a motion of a party, the court may appoint a guardian *ad litem*.
- (2) Prior to appointing a guardian *ad litem*, the court shall find that the appointment is necessary for the court to determine the child's best interest.
- (3) The guardian *ad litem*:
 - (i) shall represent the child's best interest in the custody action;
 - (ii) shall not act as the child's legal counsel or represent the child's legal interest; and
 - (iii) shall be a licensed attorney or licensed mental health professional.
- (4) The court may order the parties to pay all or part of the guardian *ad litem*'s fees or costs.

(b) Duties and Responsibilities.

- (1) **Reports.** The guardian *ad litem* shall:
 - (i) file of record any report prepared by the guardian *ad litem*; and
 - (ii) provide to the parties and the court a copy of the filed report not later than 20 days prior to a hearing or trial.
 - (A) The court shall determine the admissibility of the report at the hearing or trial.

(B) Prior to disclosing confidential information prohibited by 23 Pa.C.S. § 5336 to the parties, the court shall determine whether the guardian *ad litem* may disclose the information.

(2) **Testimony.** The guardian *ad litem*:

- (i) shall attend court proceedings and testify as necessary; and
- (ii) shall be subject to cross-examination if called to testify by a party or the court.

(3) **Child's Statement.** The guardian *ad litem*'s report or testimony may include a subject child's statement that would be otherwise inadmissible hearsay under Pa.R.E. 802.

*** 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**

PUBLICATION 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*. Specifically, the proposed amendment would permit a guardian *ad litem* (GAL) to testify or include in the GAL's report a minor child's statement even if the statement would be otherwise inadmissible hearsay.

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 provides for the appointment of a GAL when the court finds that it is necessary in determining the child's best interest. As set forth in Pa.R.C.P. No. 1915.11-2, a GAL is required to meet with a child of an appropriate age in order to ascertain the facts.

Often, the child makes statements to the GAL that could impact the court determining the child's best interest. The child's statements are generally considered hearsay under Pennsylvania Rule of Evidence 802 unless an exception would apply, but are often included in a GAL's report or testimony. As a matter of course, a GAL prepares a report, which is filed and served on the parties and the court, and the GAL also testifies at a hearing or trial. Absent a hearsay exception that would permit the child's statement into evidence, excluding the statement could significantly impact the court's ability to determine the child's best interest.

Generally, 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 are inadmissible unless a hearsay exception applies. As reported to the Committee, the statement's admissibility varies from court to court. Some courts will allow the statement into evidence since it does 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, the Committee believes an exception to the hearsay rule is 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. As the exception would be limited in its application to child custody cases, the Committee believes the child custody procedural rules should provide the exception rather than the Rules of Evidence. Including a hearsay exception in the procedural

rules is permitted by the Rules of Evidence, see Pa.R.E. 802, and the Supreme Court has incorporated hearsay exceptions into other procedural rules. See Pa.R.C.P. Nos. 4020 and 4017(g); Pa.R.Crim.P. 574, 542(E), and 1003(E).

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 (b)(3). 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. 701 - 706.

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