

Appellate Court Procedural Rules Committee

The Appellate Court Procedural Rules Committee proposes to amend Pennsylvania Rule of Appellate Procedure 311(a)(4). The amendment is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court.

Proposed new material is underlined while deleted material is bracketed.

All communications in reference to the proposed amendment should be sent no later than July 1, 2008 to:

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An Explanatory Comment precedes the proposed amendment and has been inserted by this Committee for the convenience of the bench and bar. It will not constitute part of the rule nor will it be officially adopted or promulgated.

By the Appellate Court Procedural Rules Committee

Honorable Jane Cutler Greenspan,
Chair

NOTE ON SECOND PUBLICATION, MAY 2008

Proposed revisions to Rule 311(a)(4) were originally published for comment in the summer of 2006. The primary change in the proposed rule was to remove references to decrees nisi. The proposal also conformed the rule to case law by specifying that only orders of courts could be appealed immediately under Rule 311(a)(4). Based upon comments received from the Bar, the Committee formed a special Subcommittee to examine whether it is possible to interpret Rule 311(a)(4) or to craft an equivalent rule to provide relief during the course of an administrative action. Members of the Subcommittee consulted with Commonwealth administrative agencies as well. Ultimately, the Subcommittee concluded that the Commonwealth Court did not have the same supervisory jurisdiction over agencies that the Superior Court exercises over the courts of common pleas, and that it was a necessarily accurate statement of the law to say that only an order of a court is immediately appealable under Rule 311(a)(4).

If a person is aggrieved by an order of a Commonwealth administrative agency that is not immediately appealable and otherwise qualifies for equitable relief, however, that person can initiate an action in equity in the original jurisdiction of the Commonwealth Court. While this has always been the case, the Subcommittee considered it important to draw the attention of the Bar to that fact, given the response to the proposed rule change as originally published. Accordingly, the new proposed recommendation includes additional material in the Note.

Because the case law has clarified the circumstances under which post-trial motions are required, it was not considered necessary to state that none are needed

under Rule 311(a)(4), and that reference was removed. Otherwise, the proposed rule change conforms to the prior recommendation.

Rule 311. Interlocutory Appeals as of Right.

(a) General Rule. An appeal may be taken as of right and without reference to Pa. R.A.P. 341(c) from:

(1) *Affecting judgments.* An order refusing to open, vacate or strike off a judgment. If orders opening, vacating or striking off a judgment are sought in the alternative, no appeal may be filed until the court has disposed of each claim for relief.

(2) *Attachments, etc.* An order confirming, modifying or dissolving or refusing to confirm, modify or dissolve an attachment, custodianship, receivership or similar matter affecting the possession or control of property, except for orders pursuant to Sections 3323(f) and 3505(a) of the Divorce Code, 23 Pa.C.S. §§ 3323(f) and 3505 (a)

(3) *Change of criminal venue or venire.* An order changing venue or venire in a criminal proceeding.

(4) *Injunctions.* An order of a court granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except for [injunctions] an order entered pursuant to:

(i) Section[s] 3323(f) [and] or 3505(a) of the Divorce Code, 23 Pa. C.S. §§ 3323(f), [and] 3505(a)[.]; or

(ii) Pa. R.C.P. 1038 that is not immediately effective upon its entry.

[A decree nisi granting or denying an injunction is not appealable as of right under this rule, unless the decree nisi (i) grants an injunction effective upon the entry of a decree nisi or (ii) dissolves a previously granted preliminary injunction effective upon the entry of a decree nisi.]

(5) *Peremptory judgment in mandamus.* An order granting peremptory judgment in mandamus.

(6) *New trials.* An order in a civil action or proceeding awarding a new trial, or an order in a criminal proceeding awarding a new trial where the defendant claims that the proper disposition of the matter would be an absolute discharge or where the Commonwealth claims that the lower court committed an error of law.

(7) *Partition.* An order directing partition.

(8) *Estate and Trust Matters.* An order determining the validity of a will or trust.

(9) *Other Cases.* An order which is made appealable by statute or general rule.

Note: Authority -- This rule implements 42 Pa.C.S. § 5105(c) (interlocutory appeals), which provides:

Paragraph (a)(4) (injunctions) – The 1987 amendment to paragraph (a)(4) is consistent with appellate court decisions disallowing interlocutory appeals in matrimonial matters. *Fried v. Fried*, 509 Pa. 89, 501 A.2d 211 (1985); *O’Brien v. O’Brien*, 359 Pa. Super. 594, 519 A.2d 511 (1987).

[Paragraph (a)(4) (injunctions) – The 1987 amendment to paragraph (a)(4) is consistent with appellate court decisions disallowing interlocutory appeals in matrimonial matters. *Fried v. Fried*, 509 Pa. 89, 501 A.2d 211 (1985); *O’Brien v. O’Brien*, 359 Pa. Super. 594, 519 A.2d 511 (1987).]

The 1996 amendment to paragraph (a)(4) reconciled two conflicting lines of cases by adopting the position that generally an appeal may not be taken from a decree nisi granting or denying a permanent injunction. [*Humphreys v. Cain*, 84 Pa.Cmwlth. 222, 474 A.2d 353 (1984). To the extent that *Agra Enterprises, Inc. v. Brunoizzi*, 302 Pa. Super. 166, 170, 448 A.2d 579, 581 (1982); *Martin Industrial Supply Corp. v. Riffert*, 366 Pa. Super. 89, 91, 540 A.2d 906, 907 (1987); *Bolus v. Ryder Truck Rental, Inc.*, 258 Pa. Super. 387, 388, 517 A.2d 995, 996 (1986); *Commonwealth ex. rel. Lewis v. Allowill Realty Corp.*, 330 Pa. Super. 32, 35, 478 A.2d 1334, 1336 (1984); and *Neshaminy Constructors, Inc. v. Philadelphia, Pennsylvania Building and Construction Trades Council, AFL-CIO*, 303 Pa. Super. 420, 422 n.1 (1982) permit an immediate appeal from a decree nisi granting or denying prospective injunctive relief, they are overruled.

The 1996 amendment to paragraph (a)(4) simultaneously recognized to exceptions to the non-appealability of a decree nisi; these exceptions, identified as phrases (a)(4)(i) and (ii), permit an appeal from a decree nisi if the order has the immediate effect of changing the status quo. Thus, if the decree nisi grants or denies permanent injunctive relief to become effective when the decree nisi is made final, no appeal is possible. If, however, the decree nisi provides for permanent injunctive relief upon entry of the decree nisi, or strikes a previously granted preliminary injunction upon entry of the decree nisi, the decree nisi is appealable pursuant to phrase (a)(4)(1) or (ii).]

The 2008 amendment to the rule conformed the rule to the 2003 amendments to the Pennsylvania Rules of Civil Procedure abolishing actions in equity and thus eliminating the *decree nisi*. Because *decrees nisi* were in general not appealable to the extent they were not effective immediately upon entry, this principle has been expressly incorporated into the body of the rule as applicable to any injunction.

The word “court” has been inserted to clarify that orders or decisions that grant, modify, or deny injunctive relief but are issued by Commonwealth administrative agencies are not immediately appealable under this rule. See *Columbia Gas of Pennsylvania, Inc. v. Pennsylvania Public Utilities Commission*, 104 Pa. Commw. 142, 521 A.2d 105 (1987), petition for allowance of appeal denied, 517 Pa. 628, 538 A.2d 880 (1988); *Pittsburgh Bd. of Pub. Educ. v. Pa. Human Rels. Comm’n*, 820 A.2d 838 (Pa. Commw. 2003); *Green Mt. Energy Co. v. Pennsylvania Public Utilities Commission*, 812 A.2d 740 (Pa. Commw. 2002). Where such an agency has issued an interlocutory order that is not immediately appealable under Rule 311 or otherwise and there is no adequate remedy at law, a petition for review in the nature of a complaint in equity addressed to the original jurisdiction of the Commonwealth Court is available.
