

**STATE OF VERMONT  
VERMONT SUPREME COURT  
JUNE TERM, 2020**

**Order Promulgating the Addition of Rules 80.9, 80.10, and 80.11 of the Vermont Rules of Probate Procedure**

Pursuant to the Vermont Constitution, Chapter II, § 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 80.9 of the Vermont Rules of Probate Procedure be added to read as follows:

**RULE 80.9. REPRESENTATION BY GUARDIANS AD LITEM OF MINORS**

(a) **Applicability.** This rule applies to any proceeding under 14 V.S.A. Chapter 111 in which the probate court, on its own or a party's motion, considers the appointment of a guardian ad litem for a minor, except for those situations in which a minor is proposed to be a witness under 14 V.S.A. § 2625. It also applies to change of name proceedings under 15 V.S.A. Chapter 13, and to adoption proceedings under 15A V.S.A. Article 3.

**(b) Appointment of Guardian Ad Litem.**

(1) *On Court's Own Motion.* The court, on its own motion, may appoint a guardian ad litem for a minor.

(2) *On Motion of a Party.* Any party may move for appointment of a guardian ad litem for a minor.

(3) *Replacement; Discharge.* The court in its discretion may replace or discharge a guardian ad litem.

(4) *Objections.* Any party may file a written objection to the appointment, replacement, or discharge of a guardian ad litem provided the written objection is filed with the court no less than 7 days after the appointment, replacement, or discharge of a guardian ad litem if no prior objection to the appointment, replacement, or discharge has been filed by the party. If a written objection to the appointment, replacement, or discharge has been timely filed, and a written request for hearing has been timely filed by any party, the court shall hold a hearing.

**(c) Settlements, Compromises, and Waivers.**

(1) *In General.* In any proceeding in which a guardian ad litem has been appointed pursuant to this rule, the court shall review all settlements, compromises, waivers of evidentiary, statutory, constitutional or common-law privileges, stipulations, and other decisions affecting the substantial rights or interests of the minor.

(2) *Disagreements Between Minor and Guardian Ad Litem.* When a minor and a minor's guardian ad litem disagree as to a matter governed by paragraph (1), the attorney assigned to represent the minor shall promptly and fully inform the court of the position of the guardian ad litem. The guardian ad litem also shall be afforded the right to be heard but shall not disclose privileged information or information that has not been admitted into evidence. The court may, in its discretion, appoint additional counsel for the guardian ad litem.

(3) *Waivers of Constitutional and Other Important Rights.* When a minor or a guardian ad litem wishes to waive a constitutional right of the minor, enter an admission to the merits of a proceeding, or waive patient's privilege under V.R.E. 503, the court shall not accept the proposed waiver or admission unless the court determines, after opportunity to be heard, each of the following:

(A) that there is a factual and legal basis for the waiver or admission;

(B) that the attorney has investigated the relevant facts and law, consulted with the client and guardian ad litem, and the guardian ad litem has consulted with the minor;

(C) that the waiver or admission is in the best interest of the minor; and

(D) that the waiver or admission is being entered into knowingly and voluntarily by the minor and also by the guardian ad litem, except as set forth in paragraph (4).

(4) *Approval Without Minor's Consent of Constitutional or Other Important Waivers.* A waiver or admission listed in paragraph (3) may be approved with the consent of the guardian ad litem but without the consent of the minor if the minor, because of mental or emotional disability, is unable to understand the nature and consequences of the waiver or admission or is unable to communicate with respect to the waiver or admission. A person who has not attained the age of thirteen shall be rebuttably presumed to be incapable of understanding the nature and consequences of the waiver or admission and of communicating with respect to the waiver or admission; a person thirteen years old or older shall be rebuttably presumed to be capable. The rebuttable presumptions shall have the effect set forth by V.R.E. 301 and shall also allocate the burden of persuasion.

**(d) Role of Guardian Ad Litem.**

(1) *In General.* The guardian ad litem shall act as an independent advisor and advocate whose goal shall be to safeguard the minor's best interest and rights.

(2) *Duties Generally.* Each guardian ad litem shall meet with the minor, the minor's attorney, and others who may be necessary for an understanding of the issues in the proceeding. The guardian ad litem shall be familiar with all pertinent pleadings, reports, and other documents. The guardian ad litem shall discuss with the minor and the minor's attorney all options which may be presented to the court, and shall assist the attorney in advising the minor regarding those options.

(3) *Courtroom Role.* In any proceeding governed by this rule, the guardian ad litem may, at any phase of the proceeding, state his or her position or opinion on the merits of any issue before the court and the reasons therefor, which reasons shall be based upon the evidence which is in the record. At any hearing the court may inquire, subject to the provisions of this rule, whether the guardian ad litem is satisfied with the representation of the minor by the attorney, including but not limited to the presentation of evidence made by the minor's attorney. If the guardian ad litem at any time is not satisfied that the minor's rights and interests are being effectively represented, the guardian ad litem shall so advise the court in open court, orally or in writing.

(4) *Guardian Ad Litem as Witness.* A guardian ad litem may be called as a witness only when his or her testimony would be directly probative of the minor's best interest, and no other persons could be employed or subpoenaed to testify on the same subject matter.

(5) *Reports Prepared by Guardians Ad Litem.* If the guardian ad litem prepares a written report, it may be submitted to the court pursuant to the Vermont Rules of Evidence and subject to these rules.

### **Reporter's Notes**

Rules 80.9-80.11 are added to incorporate in the Rules of Probate Procedure, with appropriate modifications, those provisions of Rules 6, 6.1, 7, and 7.1 of the Rules for Family Proceedings that are applicable in proceedings in the Probate Division. See Rule 80.9(a).

Rule 80.9(a), making the procedure for appointment of a guardian ad litem (GAL) applicable to nearly all matters affecting minors under 14 V.S.A. Ch. 111, gives the Rule a broad scope to include the appointment of a financial guardian, modifications of permanent guardianships, and minor custodial guardianships. It is inapplicable only to proceedings under 14 V.S.A. § 2625 in which a minor will be a witness and counsel is to be appointed for the minor. In addition, the Rule also applies to change of name proceedings under 15 V.S.A. Ch. 13, and to adoption proceedings under 15A V.S.A. art. 3, eliminating the need for a separate Rule equivalent to V.R.F.P. 7 covering minors who are the subject of proceedings under those rules.

Rule 80.9(b) adapts V.R.F.P. 6(c)(2) and (3) in simpler form. Here and throughout Rule 80.9, "minor" is substituted for "ward," "proposed ward," "person under guardianship," or "child" for uniformity and simplicity of usage. The reference to V.R.C.P. 78(b) in V.R.F.P. 6(c)(2) is not carried forward because, unlike the family rules, the probate rules do not generally incorporate the civil rules.

Rules 80.9(c) and (d) carry forward V.R.F.P. 6(d) and (e) with minor editorial changes. A sentence in V.R.F.P. 6(e)(4) allowing the court to appoint a new GAL if a GAL has been called as a witness is omitted as superfluous in light of the broad discretion to replace a GAL provided by proposed V.R.P.P. 80.9(b)(3). There is no equivalent of V.R.F.P. 6(f) requiring a verbatim record to be made, because V.R.P.P. 47(a), as amended in 2016, requires a recording to be made in all cases except the finalization of an adoption, an uncontested name change proceeding, and an uncontested vital records request.

2. That Rule 80.10 of the Vermont Rules of Probate Procedure be added to read as follows:

**RULE 80.10. REPRESENTATION BY ATTORNEYS AND GUARDIANS AD LITEM OF ADULTS IN SPECIFIED PROCEEDINGS**

(a) **Applicability.** This rule applies to all proceedings involving adults under Subchapter 12 of 14 V.S.A. Chapter 111 and 18 V.S.A. Chapters 215 (Protective Services) and 231 (Advance Directives).

(b) **Appointment of Counsel.** In all proceedings to which this rule applies, the court shall assign counsel pursuant to Administrative Order No. 32 to represent the respondent unless counsel has been retained by that person.

(c) **Appointment of Guardian Ad Litem.**

(1) *Appointment.* In all proceedings to which this rule applies, the respondent, or an attorney who has been appointed or retained to represent a respondent, or any other attorney or party, may file and serve a motion, supported by affidavit, requesting the appointment of a guardian ad litem. The court may raise the issue on its own motion. In all cases other than where the respondent has personally filed the motion or consents in open court, the motion and affidavit shall be served upon the respondent. The motion shall not be granted except after opportunity for hearing. No hearing is required when the respondent does not object any later than 7 days prior to a hearing date for the appointment of a guardian ad litem, and the court in its discretion finds that the affidavit provides sufficient support for the motion.

Hearings on these motions shall be set expeditiously, and sufficiently in advance of the hearing on the merits so as to allow the guardian ad litem adequate time to prepare for the hearing on the merits.

When served upon the respondent, the motion and affidavit must include or be accompanied by the statement that a guardian ad litem will be appointed if the respondent does not timely file a written objection with the court and the court finds sufficient support for the motion. If the respondent files a written objection, the respondent has a right to appear in person before the court.

(2) *Standard.* The court shall appoint a guardian ad litem for the respondent only upon a finding that the respondent does not understand the nature of the proceeding or is unable to communicate effectively with counsel. For purposes of this rule a respondent is deemed able to communicate effectively or to be communicative when the respondent is able to convey information and express opinions responsively to questions related to the proceeding.

(3) *Appointment, Replacement, Discharge.* The court in its discretion may appoint, replace, or discharge a guardian ad litem. The court shall discharge the guardian ad litem immediately upon a finding that the respondent understands the nature of the proceeding and can communicate effectively with counsel. Any party may file a written objection to the appointment, replacement, or discharge of a guardian ad litem provided the written objection is filed with the court no less than 7 days after the appointment, replacement, or discharge of a guardian ad litem if no prior objection to the appointment, replacement, or discharge has been

filed by the party. If a written objection to the appointment, replacement, or discharge has been timely filed, and a written request for hearing has been timely filed by any party, the court shall hold a hearing.

**(d) Settlements, Compromises, and Waivers.**

(1) *In General.* In any proceeding in which a guardian ad litem has been appointed pursuant to these rules, the court shall review all settlements, compromises, waivers of evidentiary, statutory, constitutional or common-law privileges, stipulations, and other decisions affecting the substantial rights or interests of the respondent.

(2) *Waivers of Constitutional and Other Important Rights.* When a respondent or guardian ad litem wishes to waive a constitutional right of the respondent, enter an admission to the merits of a proceeding, or waive patient's privilege under V.R.E. 503, the court shall not accept the proposed waiver or admission unless the court determines, after opportunity to be heard, each of the following:

(A) that there is a factual and legal basis for the waiver or admission;

(B) that the attorney for the respondent has investigated the relevant facts and law and consulted with the respondent and guardian ad litem, and that the guardian ad litem has consulted with the respondent;

(C) that the waiver or admission is in the best interest of the respondent; and

(D) that the waiver or admission is being entered into knowingly and voluntarily by the respondent and also by the guardian ad litem, except as set forth in paragraph (3).

(3) *Approval Without Respondent's Consent of Constitutional or Other Important Waivers.* A waiver or admission listed in paragraph (2) may be approved with the consent of the guardian ad litem but without the consent of the respondent only if the respondent is unable to communicate effectively with respect to the waiver or admission.

**(e) Role of Guardian Ad Litem.**

(1) *In General.* The guardian ad litem shall act as an independent advisor and advocate whose goal shall be to safeguard the respondent's best interest and legal rights. When the respondent can effectively communicate his or her wishes with respect to any aspect of the proceedings, the guardian ad litem's advocacy shall be consistent with the expressed wishes of the respondent, and the guardian ad litem shall state no fact nor disclose any opinion in regard to that aspect of the proceeding except with the express consent of the respondent.

(2) *Duties Generally.* The guardian ad litem shall meet with the respondent, the respondent's attorney, and others who may be necessary for an understanding of the issues in the proceeding. The guardian ad litem shall not contact the court ex parte, or disclose confidential or privileged information to opposing parties without the express consent of the respondent after consultation with counsel. The guardian ad litem shall be familiar with all pertinent pleadings, reports, and other documents. The guardian ad litem shall discuss with the respondent and the respondent's attorney all options which may be presented to the court, and shall assist the attorney in advising the respondent regarding those options.

(3) *Courtroom Role.* In any proceeding governed by this rule, the guardian ad litem may state his or her position or opinion on the merits of any issue before the court in which the respondent has not effectively communicated his or her wishes. Such statement by the guardian ad litem shall be based upon the evidence which is in the record. At any hearing the court may inquire, subject to the provisions of this rule, whether the guardian ad litem is satisfied with the representation of the respondent by the attorney, including but not limited to the presentation of evidence made by the respondent's attorney. If the guardian ad litem at any time is not satisfied that the respondent's rights and interests are being effectively represented, the guardian ad litem shall so advise the court in open court, orally or in writing.

(4) *Guardian Ad Litem as Witness.* A guardian ad litem may be called as a witness only when that person's testimony would be directly probative of the respondent's best interest, and no other persons could be employed or subpoenaed to testify on the same subject matter.

(5) *Reports Prepared by Guardian Ad Litem.* If the guardian ad litem prepares a written report, it shall be submitted to the court only by agreement of the parties or pursuant to Rule 43(a) and other provisions of these Rules.

### **Reporter's Notes**

Rule 80.10 is adapted from V.R.F.P. 6.1. to incorporate that rule as appropriate in probate proceedings. See Rule 80.10(a) and Reporter's Notes to Rule 80.9(a).

Rule 80.10(c)(1) departs from V.R.F.P. 6.1(c)(1) by requiring the respondent to object, rather than consent, to an appointment without hearing. The reference to V.R.C.P. 78(b) in paragraph (c)(1) is not carried forward because, unlike the family rules, the probate rules do not generally incorporate the civil rules.

Rule 80.10(c)(3) differs from the family rule by giving the court more discretion in selecting a guardian but providing a procedure for a written objection and hearing on the court's action. Rule 80.10(e)(3) gives the guardian more opportunity to address the court than does the family rule. As with V.R.P.P. 80.9, the provisions of V.R.F.P. 6.1(d)(5) for replacement of a guardian ad litem and of V.R.F.P. 6.1(f) for a verbatim record are not carried forward. See Reporter's Notes to V.R.P.P. 80.9.

3. That Rule 80.11 of the Vermont Rules of Probate Procedure be added to read as follows:

### **RULE 80.11. REPRESENTATION BY GUARDIANS AD LITEM AND ATTORNEYS OF CHILD WITNESSES**

(a) **Applicability.** This rule applies to a proceeding in which a guardian ad litem has not previously been appointed for a minor and a party to a proceeding seeks to call as a witness that minor child.

(b) **Child Witnesses.** A party seeking to call as a witness a minor child must request permission of the court. If the court finds that the testimony of the child is necessary to assist the court in determining the issue before it and that the evidence sought is not reasonably available by any other means and is otherwise admissible, the court may allow the testimony under such conditions, including appointment of a guardian ad litem or an attorney to represent the child, as it deems appropriate to protect the child.

(c) **Order of Appointment.** In appointing a guardian ad litem under this rule, the court shall issue an order containing any directions to the guardian ad litem that the court deems necessary for the protection of the child.

(d) **Role of Guardian Ad Litem.**

(1) *In Pretrial Proceedings.* At any conference or pretrial proceeding if a guardian ad litem has been appointed, the guardian ad litem, if requested by the court, shall prior to the proceeding submit to the court and the parties a list of all of the guardian ad litem's activities carried out pursuant to the court's order issued under (c) and, if requested by the court, may make a brief oral statement on the record as to matters that will help the court formulate issues for further pretrial procedure and trial. The guardian ad litem's oral statement will not be considered evidence.

(2) *In Evidentiary Hearings.* If a guardian ad litem has been appointed, the guardian ad litem shall be present at any evidentiary hearing at which the child is to testify to provide assistance and support for the child as directed by the court in the order of appointment issued under (c). The guardian ad litem may not be called as a witness unless an attorney for the child has been appointed and the testimony of the guardian ad litem would be directly probative of a contested fact as to which no other person could be employed or subpoenaed to testify.

**Reporter's Notes**

Rule 80.11 is adapted from V.R.F.P. 7.1 to incorporate that rule as appropriate in Probate proceedings. See Rule 80.11(a) and Reporter's Notes to Rule 80.9(a). The Rule combines and simplifies the procedures under V.R.F.P. 7 and 7.1 by making the same process applicable to a child witness regardless of whether the child is a subject of the proceeding in view of the greater breadth provided by Rule 80.9(a). In most respects the Rule carries forward the process of both family rules. As with V.R.P.P. 80.9, the provision of V.R.F.P. 7.1(d)(2) for replacement of a GAL is not carried forward. See Reporter's Notes to V.R.P.P. 80.9.

4. That these added rules are prescribed and promulgated effective August 18, 2020. The Reporter's Notes are advisory.

5 That the Chief Justice is authorized to report these rules to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 12<sup>th</sup> day of June, 2020.



Signed by the Vermont Supreme Court

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

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William D. Cohen, Associate Justice