



**5 Stone
Buildings**

Webinar – Litigation Friends

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Who needs a litigation friend, anyway?

- Children (i.e. those under 18: CPR 21.1(2) and 21.2(2))
 - Unless court makes an order permitting child to conduct litigation without one- CPR 21.2(3)
- Protected parties (i.e. those who lack capacity to conduct the proceedings: CPR 21.1(2) and 21.2(1))
 - Note capacity is function specific: *Masterman-Lister v Jewell*
 - However conduct of litigation usually requires a high degree of capacity, because it requires understanding and ability to take complex decisions



How is a litigation friend appointed?

- Without court order:-
 - Protected parties
 - Is there a deputy?
 - If yes, does the deputy have authority to litigate? (Not under standard deputyship order)
 - If yes, must file a copy of the order when acting for C “at time claim made” and when acting for D “when first takes step” (CPR 21.5)
 - In all other cases, by filing certificate of suitability when for C “at time claim made” and when for D “when first takes step”(CPR 21.5(3))
 - Certificate of suitability must confirm that LF complies with CPR 21.4(3)



How is LF appointed (2)

- In all other circumstances by court order (CPR 21.6)
- Application may be made by
 - Prospective LF
 - Party
- Court may not appoint LF unless satisfied that person to be appointed satisfies CPR 21.4(3) (CPR 21.6(5))

Timing of steps and consequence of failure!

- Appointment of litigation friend without court intervention only possible at the outset (for C “when claim first made” and for D “when he first takes a step in the proceedings for D”)
- *Hinduja v Hinduja* [2020] EWHC 1533 (Ch)
- Until LF appointed:-
 - C may not take any step except issue and service of the proceedings or application for LF (CPR 21.3(2))
 - Any step taken before LF appointed has no effect unless court orders otherwise (CPR 21.3(4))

What happens when things change?

- Loss of capacity during proceedings
 - Court order appointing LF necessary (?)
 - No further steps in proceedings without permission until LF appointed (CPR 21.4(3))
- Regaining capacity during proceedings: LF appointment continues until ended by order (CPR 21.9(2))
- Achieving majority: LF appointment ceases automatically (CPR 21.9(1))
- Dispensing with litigation friend for child during proceedings (CPR 21.2(3))

Who is suitable to be a litigation friend?

- CPR 21.4(3): a person may act as a litigation friend if he:-
 - (a) can fairly and competently conduct proceedings on behalf of the child or protected party;
 - (b) has no interest adverse to that of the child or protected party; and
 - (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.
- Challenges by another party to litigation: e.g. *Keays v Parkinson* [2018] EWHC 1006; *Hinduja v Hinduja* [2020] EWHC 1533 (Ch).

Litigation friend's liability for costs

- Under CPR Part 21:-
 - *Where no court order:* CPR 21.4(3)(c): where the child or protected party is a **claimant** undertakes to pay any costs which child or protected party may be ordered to pay subject to any right he may have to be repaid from the assets of the child or protected party (N.B. does not apply to authorised deputy: CPR 21.4(2))
 - *Where court order:* CPR 21.6(5): the court may not appoint a LF...unless it is satisfied that the person to be appointed satisfies the conditions in rule 21.4(3)
 - Liability for costs of litigation friend continues until service of notice on other parties by him or person for whom acted that appointed to act has ceased: CPR 21.9(6) (**but only where ceases because child reaches 18 or protected party regains capacity**)

Litigation friend's liability for costs (2)

- A freestanding liability? *Barker v Confiance Ltd* [2019] EWHC 1401
 - “When considering whether to make an order against a litigation friend, who has acted for an unsuccessful child party, the court should apply the general approach that, as regards costs, the litigation friend is expected to be liable for such costs as the relevant party (if they had been adult) would normally be required to pay” (per Morgan J, para 53)

Litigation friend's liability for costs (3)

- Consistency with requirements in CPR 21.4(3)(c)?
 - “Mr Saoul submitted that CPR 21.4(3)(c) showed that a litigation friend can only be made liable for costs when acting for a claimant...I do not accept that submission. I consider that the specific requirements of CPR 21.4(3)(c) supplement the general principles...and do not detract from them”
- Does analysis apply to litigation friend for protected party?
- Hearing of appeal has taken place so...



Litigation friend's liability for costs (4)

- Problems/Issues
 - What if no prospective litigation friend will give undertaking under CPR 21.4(3)? Can court dispense with it?
 - Can court prospectively relieve litigation friend of liability for costs?
 - Possible impact of article 6 (right to fair trial) and 14 (right not to be discriminated against) of schedule 1 to HRA 1998?



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