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Webinar with Fraser and Fraser

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Fraser and Fraser

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Litigation Friends

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Litigation Friends

- What is a Litigation Friend and when do you need one?
- Who should be a Litigation Friend and how should they behave?
- How are Litigation Friends appointed?
- What happens when things change?
- Removal/Replacement of a Litigation Friend
- What happens when a claim finishes?
- Entitlement/liability of Litigation Friend for costs?
- Case updates

When is a Litigation Friend required?

Children: CPR 21.2(2) and 21.2(2)

Unless the Court makes an order permitting the child to conduct litigation without one under CPR 21.2(3)

Protected Parties: those who lack capacity to conduct the proceedings under CPR 21.1(2) and 21.2(1)

If a Protected Party, MUST have a Litigation Friend to conduct or defend proceedings on his or her behalf.



When is a Litigation Friend required?

- CPR 21.1(2): a Protected Party is a party, or an intended party, who lacks capacity to conduct the proceedings within the meaning of the Mental Capacity Act 2005...
- Capacity within the meaning of the MCA 2005
 - Person lacks capacity...if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain: Section 2(1) of the MCA 2005
 - Presumption in favour of capacity: Section 1(2) of the MCA 2005
 - Balance of probabilities: Section 2(4) of the MCA 2005
 - Not merely established by age, appearance, condition, or behaviour: Section 2(3) of the MCA 2005
 - Person is not treated as unable to make a decision merely because he makes an unwise decision: Section 1(4) of the MCA 2005



When is a Litigation Friend required?

- Capacity to conduct the proceedings
 - Assessed with the specific decision at issue
 - May have capacity to conduct some proceedings but not others
 - All aspects of proceedings, not just a part
 - Capacity is function specific
- Conduct of litigation usually requires a high degree of capacity, because it requires understanding and ability to make complex decisions.
- **Masterman-Lister v Brutton [2003] 3 All ER 162**

Who should be a Litigation Friend?

- A person may act as a Litigation Friend on behalf of a child, or the Protected Party, providing they:
 - Can fairly and competently conduct proceedings on behalf of that person; and
 - Have no interests adverse to those of that person
- Re: NRA [2015] EWCOP 59: inevitable that family members may have ‘an interest’ in the outcome of proceedings. However, does not preclude them from acting as LF in COP proceedings.



Who should be a Litigation Friend?

- Once appointed, an act done or decision made, must be one in their best interests: Section 1(5) of the MCA 2005.
- Factors to consider for 'best interests' under Section 4 of the MCA 2005.
- Function of Litigation Friend is to 'guard or safeguard'.
- Must acquaint themselves with the nature of the action and, under proper legal advice, take steps to further their interests.



Picture attribute: IPVANISH

Who should be a Litigation Friend?

- What if Litigation Friend and PP disagree?
 - RE NRA case: the role of LF...involve[s] them forming a view on what is in P's best interests and advancing it although it may not accord with what P is asserting...it follows that...anyone performing those roles may well have to advance a solution which does not accord with objections expressed by P.
 - **DM v Dorset County Council [2019] EWCOP 4**
 - Appointment of Official Solicitor



How are Litigation Friends Appointed?

- **Without Court Order: CPR 21.5**
 - Deputyship Order?
 - Power to conduct legal proceedings – not under a normal order
 - Certificate of Service by filing for Claimant ‘at the time claim made’ and/or ‘when Defendant first takes steps’: CPR 21.5(3)
 - COS must confirm that Litigation Friend complies with requirements of CPR 21.4(3)

How are Litigation Friends Appointed?

- **With Court Order: CPR 21.6**
 - Application made by prospective Litigation Friend or Party
 - Court may not appoint unless satisfied that person to be appointed satisfies CPR 21.4(3)
 - Can be appointed by the Court's own initiative
 - Until appointed, Claimant may not take any steps except to issue and serve the proceedings or application for Litigation Friend

What happens when things change?

- Loss of capacity during proceedings
- Regaining capacity during proceedings
- Turning 18 years old (achieve majority)
- Dispensing with Litigation Friend for child during the proceedings

Removal and Replacement of Litigation Friend

- Adverse Interest:
 - **Nottingham County Council v Bottomley**
 - **Davila v Davila**
- Existence of financial interest
- Termination and replacement: CPR 21.7
- **Keays v Parkinson [2018] EWHC 1006**
- **Major (by his Litigation Friend) v Kirishana [2023] EWHC 1593 (KB)**

When is a Litigation Friend required?

- **CPR 21.10:** settlement, compromise, payment and/or money paid into court requires the approval of the court
- **CPR 21.11(9):** money recovered for the benefit of a protected beneficiary



Entitlement and Liability for Costs?

- **CPR 21.4(3)(c)**: undertaking as part of certificate of suitability
- Costs may be ordered subject to the right to be repaid from assets of the child or protected party. Subject to there being no personal award made against the Litigation Friend.
- Does not apply to an authorised deputy under CPR 21.4(2).
- Liability runs until service of notice on other parties that ceased to act.
- Free standing liability: **Barker v Confiance Ltd [2019] EWHC 1401**
- **Y v Z [2023] EWFC 205**

Case Update

Hinduja v Hinduja [2020] EWHC 1533

Questions?





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