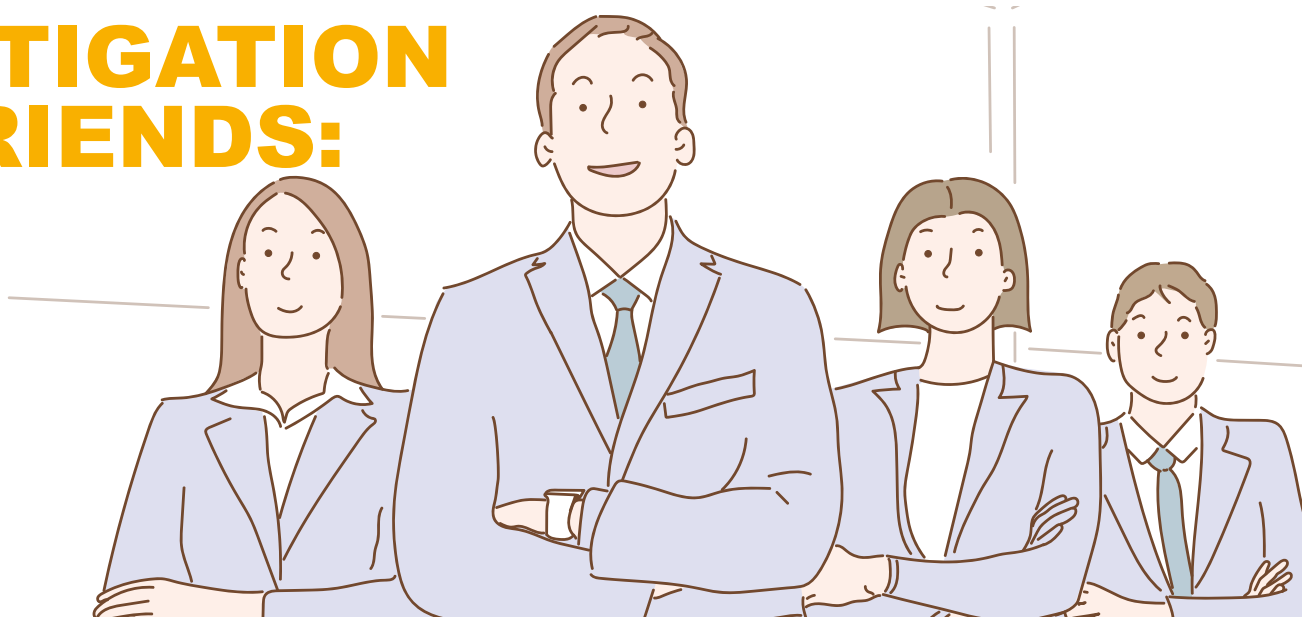


# LITIGATION FRIENDS:



## WHO WOULD WANT TO BE ONE?

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Litigation friends are required when a person lacks capacity to participate in court proceedings. That will be because that person is (a) a child [under the age of 18] or (b) lacks the mental capacity to be involved with or without a solicitor [known as a protected party].

Litigation friends are often a parent, family member or friend. But, sometimes a solicitor is appointed or a Court of Protection deputy. Where there's still no one suitable, willing and able to act, the court may ask the Official Solicitor to step in but only if there is money available to pay the Official Solicitor's costs.

And, it is that issue of costs which is often uppermost in a potential litigation friend's mind if approached to be one. Whilst a litigation friend who incurs costs or expenses on behalf of a child or protected person is in principle entitled to recover such reasonable costs and expenses from any money recovered [CPR Part 21.12], what is the position if a costs order is made against that child or protected person? Whilst a litigation friend is not named as a party to the proceedings, does the fact that s/he is acting on behalf of a liable party mean that the litigation friend then has to pay the costs personally?

It was that issue and others which the Court of Appeal recently considered

in the case of *Glover v Barker* [2020] EWCA Civ 1112.

### Facts

Mr Barker was a wealthy and successful businessman. He was also a father to five children by three mothers: Tom and Freya (twins and the children of Mrs Glover, the appellant); Euan and Rowan; and Lauren.



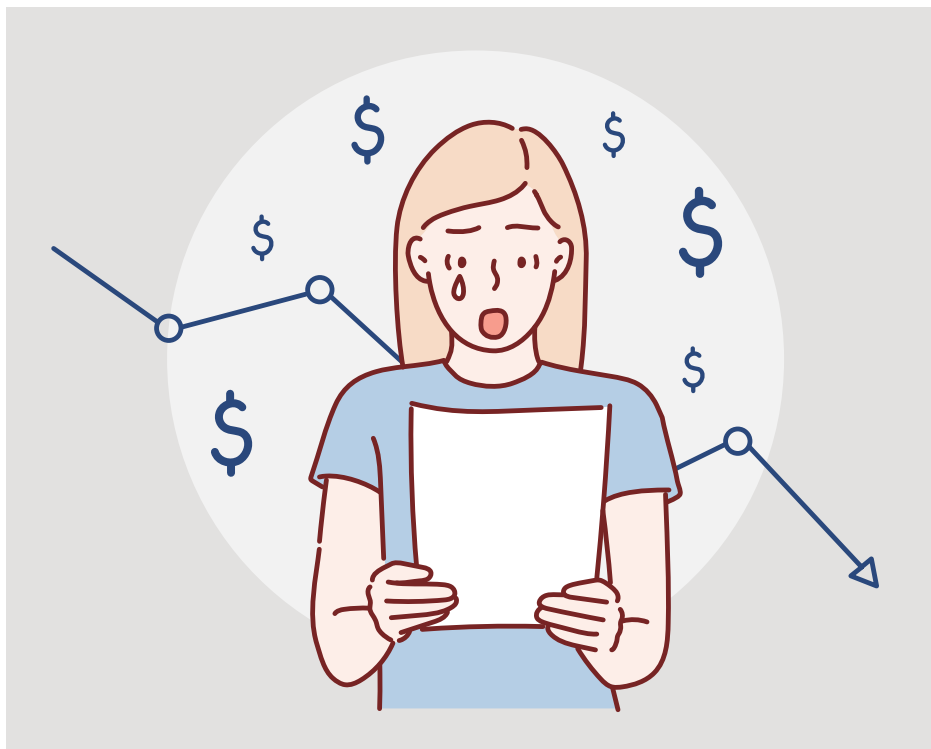
In the late 1990's, Mr Barker wanted to sell his business. To do so in a tax efficient way, he was advised to create an employee benefit trust and a sub-trust, the principal beneficiaries of which included the five children. That scheme was ultimately successfully challenged by HMRC, however, and Mr Barker ended up paying about £11.3M in tax.

Mr Barker then brought proceedings against, amongst others, the trustee and Euan (purporting to act on behalf of all 5 children via a solicitor litigation

friend). He sought to unravel the ineffective trusts, and to recover the assets which he had transferred into it. Those proceedings were compromised on terms requiring money to be settled in both the employee benefit trust and the sub-trust, with the balance being held for Mr Barker absolutely.

In 2014, that settlement was approved by the court – as it had to be as Euan was a minor – and the proceedings were stayed. At that time, however, Tom and Freya knew nothing about the proceedings or about the compromise, and the court was not informed of their ignorance (of which the court was subsequently highly critical).

In 2017, Tom and Freya (acting via Mrs Glover as litigation friend) sought an order to be added as defendants to the stayed proceedings and for a declaration that the compromise was not binding on them. Given that the trust deeds could have been rescinded, however, that application was dismissed. The twins would not have had any claim against the trustee, and were therefore better off under the compromise than not. Mr Barker, the trustee and Euan then applied for Mrs Glover to be added to the proceedings so that they could obtain a costs order against her.



## The first instance costs decision ....

was given by Morgan J in 2019, who added Mrs Glover as a party and then ordered her to pay the respondents' costs of the twins' application. He refused, however, to make a costs order against Tom and Freya.

In reaching this decision, he examined a very long line of authorities concerning "litigation friends" dating back to 1727. He concluded that the litigation friend of a child claimant would generally be responsible for the costs that would otherwise be ordered against the child/protected party. He also rejected the submission that it was not appropriate to make an order for costs against the litigation friend of the child defendant in the absence of gross misconduct, concluding that "although one has regard to all the circumstances of the case, claimants and defendants are generally treated in the same way".

The matter of costs was therefore one for his discretion (regardless of whether the twins should be categorised as claimants or defendants) and that discretion would be exercised in favour of the respondents. That was because (i) the twins' application had had no merit and (ii) that, for the purposes of s.51 of the Senior Courts Act 1981 (which provides for costs to be ordered against a non-party), Mrs Glover had controlled the proceedings and stood indirectly to benefit from them.

## Court of Appeal decision

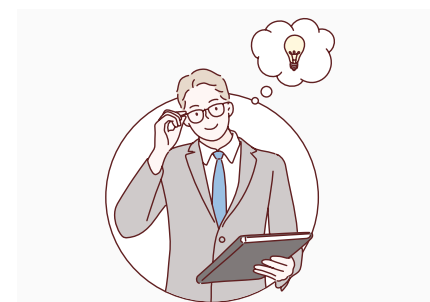
Mrs Glover appealed against the costs orders made against her. In allowing the appeal, the Court of Appeal held in August 2020 that:

1. there was an important distinction to be drawn between the liability for costs of claimant's litigation friends and that of defendant's litigation friends;
2. the issue of whether to make a costs order against a claimant's litigation friend was unlikely to arise in practice. That is because the CPR require a claimant's litigation friend to undertake to pay any costs ordered against the child or protected person as a precondition to their appointment. But, where no costs order is made against a party (and therefore the undertaking does not bite), the common law position is that a claimant's litigation friend will remain liable for costs, subject to the discretion retained by the court which must be exercised justly;
3. the position of defendants' litigation friends was, however, different. They will not be required to bear costs in the absence of gross misconduct, even if the litigation friend controlled the defence of a successful claim. As a matter of policy, if a defendant's litigation friend were usually vulnerable to

an adverse costs order "that would deter suitable individuals from taking on the role";

4. if it was not entirely clear whether the child/protected party was a claimant or defendant (as here), the costs need not be governed by a simple characterisation of the party. Instead, the court should engage in a "substance over form" analysis to determine the true position of the child or protected party and therefore the litigation friend; and
5. On the facts, the Court of Appeal decided that the circumstances of Tom and Freya's participation made it more appropriate to apply the approach of defendant's litigation friends. Although named as claimants that was only because they had not been named as defendants in the first place. The circumstances did not justify making an adverse costs order against Mrs Glover personally, and therefore the costs orders against her were set aside.

## Discussion points



In allowing the appeal in this case, the Court of Appeal were obviously concerned to ensure that children/protected parties who are named as defendants to proceedings are able to obtain representation from a litigation friend who is not put off by a potential costs order against them. But, the court may still make a defendant's litigation friend personally liable for costs where s/he is guilty of bad faith, unreasonable behaviour and/or where s/he has a prospect of personal benefit. In circumstances where costs litigation is obviously a growth industry, it will be interesting to see how this develops.

