

Family

Keeping it in the family

Will the credit crunch tempt more litigants to adopt a *McKenzie* friend? ask **Ann Northover & Nicola Fisher**

IN BRIEF

- Although no replacement for a lawyer, an assistant to take notes, quietly advise and prompt can help to ensure a fair hearing.

As the global financial crisis continues, there has already been some speculation in the press as to how it will impact upon family law work. An increase in family disputes may follow as financial hard times put an inevitable strain on the domestic arena.

Litigants anxious to do all they can to reduce their legal fees may find the less costly “have-a-go” approach appealing. Like Heather Mills McCartney, litigants attempting a “do-it-yourself” approach may find the assistance of a “*McKenzie* friend” useful. In a surprising turn of events, particularly where marital assets were so plentiful, she parted company from her solicitors in her divorce proceedings earlier this year, and represented herself with the assistance of *McKenzie* friends. In doing so, she undoubtedly raised the profile of what was to many lay persons a hitherto unknown option.

A *McKenzie* friend

The phrase *McKenzie* friend comes from the 1970 Court of Appeal case *McKenzie v McKenzie* ([1970] 3 All ER 1034) in which a husband acting in person in contested divorce proceedings successfully appealed the decision of the lower court to deny him the use of an assistant to take notes, quietly advise, and prompt him at the trial.

The Court of Appeal noted the grave issues of fact and language communication difficulties involved. Highlighting the importance of justice being done, as well as the importance of justice being seen to be done, it concluded that the judge in the lower court had been incorrect in deciding



that a friend or adviser helping a litigant in this way constituted that assistant taking part in the proceedings. Litigants in person were entitled to have this type of assistance.

Different types

A variety of persons have been known to take on the role of a *McKenzie* friend. There have been a number of cases involving “professional *McKenzie* friends” who have been from support groups, and who have experience of helping litigants with court proceedings. At the other end of the spectrum is the friend or relative who may be key in providing moral support in proceedings which are of a personal nature for the litigant, in addition to practical assistance. A *McKenzie* friend may be a legal adviser who is not “on the record”. This was the case in *McKenzie* where the proposed assistant was a barrister who worked for the firm of solicitors that had been acting for the husband, prior to the termination of his legal aid.

The President’s Guidance: *McKenzie* Friends [2008] 2 FLR 110 of 14 April 2008 (the President’s Guidance) provides a summary of what a *McKenzie* friend can and cannot do. A litigant in person has a right to use a *McKenzie* friend and the litigant (not the proposed *McKenzie* friend) should make an application requesting the assistance at the earliest opportunity, providing details of the proposed *McKenzie* friend.

The courts are generally keen to protect litigants in person from disadvantage and have acknowledged the difficulties for litigants representing themselves. The President’s Guidance clearly states that a person’s right to a fair trial (Human Rights Act 1998, Sch 1, Pt 1, Art 6) is engaged in this area.

However, the use of a *McKenzie* friend is subject to the court concluding that the assistance is not contrary to the interests of justice and fairness. The opposing party is also entitled to a fair trial and if the court takes the view that a proposed *McKenzie* friend will obstruct the efficient administration of justice, then the court can refuse to allow the identified person to take on that role. Equally, an existing *McKenzie* friend can be removed from that role by the court at any stage of the proceedings.

By way of example, Dr Pelling, a campaigner for fathers’ rights, has in the past been refused leave to act as a *McKenzie* friend, on the basis that the court felt his campaigning agenda had a tendency to take over and his experience may have led to him, rather than the litigant, running the case.

The President’s Guidance makes it clear that where the court refuses to allow a litigant the use, or continued use, of an identified *McKenzie* friend, the court should give reasons for that decision. It is the litigant, and not the *McKenzie* friend, who has the right to appeal that refusal. This follows the decision by the Court of Appeal in *R v Bow County Court Ex Parte Pelling (No. 1)* ([1999] 4 All ER 751) where the refusal of Dr Pelling’s application for judicial review was upheld and it was confirmed that the rights in respect of litigation were the rights of the litigant and not the *McKenzie* friend.

Other assistance

While *McKenzie* friends may assist a litigant by providing quiet advice and support in court, they are not entitled as of right to address the court. The Courts and Legal Services Act 1990 gives the court the power to grant an unqualified person a right of audience (s 27), as well as conduct of the litigation (s 28). A litigant wanting his *McKenzie* friend to perform advocacy on his behalf should make an

August of this year by Mr Justice Munby in *Re N (A Child) G v A* [2008] EWHC 2042, [2008] All ER (D) 116 (Aug) where the father, in children proceedings, objected to the mother's *McKenzie* friend being granted a right of audience. Both parties had used *McKenzie* friends who had addressed the court at an earlier hearing, but the father had reverted to solicitor representation. The mother's *McKenzie* friend was a family friend. Munby J reviewed the case law and clarified that the

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application at the start of the hearing, with the *McKenzie* friend present. The right of audience may be granted “in exceptional circumstances and after careful consideration” as stated in the President's Guidance—a principle laid out by Lord Woolf MR in *D v S (Rights of Audience)* [1997] 1 FLR 724 where the aforementioned Dr Pelling was denied permission to act as an advocate *McKenzie* friend.

This issue was considered further in

requirement for the circumstances to be exceptional was, in his view, appropriate at one end of the *McKenzie* friend spectrum where one party was assisted by a “professional *McKenzie* friend”, holding himself out as an advocate, but not at the other end (though this could change depending on the circumstances), such as in *Clarkson v Gilbert* (Rights of Audience) [2000] 2FLR 839, [2001] All ER (D) 317 (Feb) where a husband seeks to assist his unwell wife.

Benefits

A *McKenzie* friend assisting a litigant in person by providing quiet advice, references and prompts in court will frequently be helpful, not only to the litigant but to the court and the other side in ensuring that the hearing is fair and the litigant has not been unfairly prejudiced. Additionally, it can be a practical benefit in encouraging the smooth running of a hearing. However, a *McKenzie* friend is not intended to be a replacement for a lawyer.

Provided the efficient administration of justice is unlikely to be compromised, and the circumstances of the case do not render it unfair, a genuine request by a litigant for assistance is likely to be considered favourably. The nature of the proposed *McKenzie* friend will influence the court in reaching a decision on whether to allow the assistance. A *McKenzie* friend's role must not overshadow the litigant in person's own key role.

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