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The Role Of The McKenzie Friend In Family Cases

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Litigants are feeling the credit crunch too, and now more than ever will be anxious to do all they can to reduce their legal fees. "Do-it-yourself divorce" has become increasingly popular, as legal fees diminish the resources available to the whole family. Such litigants need not find themselves totally without legal assistance, however, as Heather Mills McCartney has recently shown. Her use of "McKenzie friends" in her divorce proceedings earlier this year raised the profile of what was to many people a hitherto unknown option.

A "McKenzie friend" is a friend or advisor (frequently unqualified) who assists litigants acting in person.

The phrase "McKenzie friend" derives from the 1970 Court of Appeal case of *McKenzie v McKenzie* ([1970] in which a husband acting in person in divorce proceedings was denied the use of an assistant to take notes, and advise and prompt him in court.

When May a McKenzie Friend assist?

Helpful guidance on when a person may be allowed to act as a McKenzie friend was issued by the President of the Family Division earlier this year (President's Guidance: *McKenzie Friends* [2008] 2 FLR 110 issued 14 April 2008), which draws together the established principles of the earlier case law in this area.

Generally, there is a strong presumption in favour of a McKenzie friend being permitted (specified in the President's Guidance), including private hearings. The ability for a litigant to be assisted by a friend to provide moral support, note taking, helping with references and papers and quietly advising is "well established" per Lord Woolf, in *Clarkson v Gilbert* [2000], where a husband was permitted to assist his litigant wife and address the court on her behalf. This is scarcely surprising, as courts are generally keen to protect litigants in person from disadvantage, and, as the President's Guidance makes clear, a person's right to a fair trial (Schedule 1 Part 1, Article 6 of the Human Rights Act 1998) is engaged in this area.

However, the opposing party must also be entitled to a fair trial and if the court takes the view that a would-be McKenzie friend will obstruct the efficient administration of justice, then the court can refuse to allow them to take on that role. Equally, an existing McKenzie friend can be removed from that role by the court.

There have been a number of cases involving "professional McKenzie friends", from support groups, and who have some experience of helping litigants with court 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.

Advice not Advocacy

As stated above, McKenzie friends may assist a litigant by providing quiet advice and support. However, they are not entitled as of right to address the court. Provisions exist for an unqualified person to be granted rights of audience at the court's discretion, under s28 of the Courts & Legal Services Act 1990. The same act allows the court discretion to permit such a person to conduct litigation (s27).

If a litigant wishes their McKenzie friend to be granted rights of audience under s28 of the act, the President's Guidance makes clear that the application must be made at the start of the hearing. The President's Guidance also indicates that the right of audience may be granted "in exceptional circumstances and after careful consideration".

The principle that the s28 discretion is only to be used to confer rights of audience in "exceptional circumstances" was laid out by Lord Woolf MR in *D v S (Rights of Audience)* [1997], refusing to allow the aforementioned Dr Pelling to act as an advocate McKenzie friend.

This issue has more recently been considered by Mr Justice Munby in August this year, in *Re N (A Child) G -v- A* [2008] EWHC 2042). The father objected to the mother's McKenzie friend being granted a right of audience, despite both parties having used McKenzie friends (who had addressed the court) at an earlier hearing. The mother's McKenzie friend was a family friend, the father's was the ubiquitous Dr Pelling.

Mr Justice Munby reviewed the case law and clarified that the requirement that the circumstances 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, such as in Clarkson v Gilbert (mentioned above) where a husband seeks to assist his unwell wife. Mr Justice Munby appears to interpret the restrictive wording in the President’s Guidance to the former rather than the latter circumstances.

Conclusion

A McKenzie friend can be a valuable resource to a litigant in person. The number of such litigants in the family courts are growing not least, as Munby J observes in Re N, because of the reduced availability of legal aid. But whether it be a legal aid dispute, or a multi-million pound divorce, where a genuine request for assistance by a friend is made by a litigant in person, it is likely to be viewed favourably by the court.

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