

Practice Note 3/2012

McKenzie Friends (Civil and Family Courts) – Northern Ireland

1) This Practice Note applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Court. It does not apply in criminal cases. It is issued as guidance (**not** as a Practice Direction) by the Lord Chief Justice. It is intended to remind courts and litigants of the principles set out in the authorities¹ and does not change the law. It supersedes any previous guidance. It is issued in light of the increase in personal litigants in all levels of the civil and family courts.

Part I – Reasonable assistance from a McKenzie Friend

2) There is a presumption in favour of permitting a personal litigant to have reasonable assistance from a layperson, sometimes called a McKenzie Friend. Personal litigants assisted by McKenzie Friends remain litigants-in-person. McKenzie Friends have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation. In McA v McA [2006] 10 BNIL 63², Master Redpath held that a McKenzie Friend may be allowed a right of audience in very exceptional circumstances.

What McKenzie Friends may do

3) McKenzie Friends may:

- i) provide moral support for personal litigants;
- ii) take notes with the permission of the judge;
- iii) help with case papers;
- iii) quietly give advice on any aspect of the conduct of the case which is being heard.

What McKenzie Friends may not do

4) McKenzie Friends may not:

¹ McA v McA [2006] 10 BNIL 63, Potter v Potter [2003] NIFam 2, R v Leicester City Justices, ex parte Barrow [1991] 260, Chauhan v Chauhan [1997] FCR 206, R v Bow County Court, ex parte Pelling [1999] 1 WLR 1807, Attorney-General v Purvis [2003] EWHC 3190 (Admin), Clarkson v Gilbert [2000] CP Rep 58, United Building and Plumbing Contractors v Kajla [2002] EWCA Civ 628, Re O (Children) (Hearing in Private: Assistance) [2005] 3 WLR 1191, Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2) [2004] 2 Lloyd's Rep 535, Agassi v Robinson (Inspector of Taxes) (No 2) [2006] 1 WLR 2126, Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note [2008] 1 WLR 2743.

² Master Redpath stated that the principles used in English statute should be applied here. They were originally contained in sections 27 and 28 of the Courts and Legal Services Act 1990, but now see Part III and Schedule 3 of the Legal Services Act 2007, which replicates the court's general discretion to grant a right of audience or right to conduct litigation in particular proceedings. The factors set out in this Practice Note will be relevant to the exercise of this discretion.

- i) Conduct the litigation, acting as the personal litigant's agent in relation to the proceedings;
- ii) Manage the personal litigant's cases outside court, for example by signing court documents; or
- iii) Exercise a right of audience by addressing the court, making oral submissions or examining witnesses unless this has, in very exceptional circumstances, been authorised by the court.

It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or with leave of the court. The very exceptional circumstances in which a McKenzie Friend can apply for rights of audience or to conduct litigation are set out in paragraphs [14-18] below.

Confidentiality

5) A McKenzie Friend must observe strict confidentiality in relation to any documents they have sight of and any information they hear in relation to the proceedings. Breach of such confidentiality will usually amount to a contempt of court, giving rise to sanctions including a fine and imprisonment.

Exercising the Right to Reasonable Assistance

5) While personal litigants ordinarily have a right to receive reasonable assistance from McKenzie Friends the court retains the power to refuse to permit the giving of such assistance. The refusal may occur on initial application or at any time during the hearing.

6) A personal litigant may be denied the assistance of a McKenzie Friend or a particular McKenzie Friend because its provision might undermine or has undermined the efficient administration of justice. Illustrations of circumstances where this might arise, which are not exhaustive, are:

- i) the assistance is being provided for an improper purpose;
- ii) the assistance is unreasonable in nature or degree;
- iii) the McKenzie Friend is subject to an order such as a civil proceedings order or a civil restraint order or has been declared to be a vexatious litigant; by a court in Northern Ireland or in another jurisdiction of the United Kingdom;
- iv) the McKenzie Friend is using the case to promote his or her own cause or interests or those of some other person, group or organisation, and not the interests of the personal litigant;
- v) the McKenzie Friend is directly or indirectly conducting the litigation;

vi) the court is not satisfied that the McKenzie Friend fully understands and will comply with the duty of confidentiality.

7) The following factors are NOT of themselves sufficient to justify the court refusing to permit a McKenzie Friend to assist a personal litigant:

(i) The case or application is simple or straightforward, or is, for instance, a directions or case management hearing;

(ii) The personal litigant appears capable of conducting the case without assistance;

(iii) The personal litigant is unrepresented through choice;

(iv) The other party is not represented;

(v) The proposed McKenzie Friend belongs to an organisation that promotes a particular cause;

(vi) The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs

8) A personal litigant who wishes to exercise this right should inform the judge as soon as possible indicating the identity of the proposed McKenzie Friend. The proposed McKenzie Friend should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no personal interest in the case and understands the McKenzie Friend's role and the duty of confidentiality.

9) The court may refuse to allow a personal litigant to exercise the right to receive assistance at the start of a hearing. The court may also circumscribe or remove the right during the course of a hearing, where the court forms the view that a McKenzie Friend, or a particular McKenzie Friend, may give, has given, or is giving, assistance which impedes the efficient administration of justice. The court may in the first instance issue a firm and unequivocal warning to the personal litigant and/or McKenzie Friend. It is likely that the court may give reasons for refusal and the personal litigant, but not the McKenzie Friend has a right to appeal the decision.

10) Where a personal litigant is receiving assistance from a McKenzie Friend in care proceedings, the court should consider the desirability of the McKenzie Friend's attendance at any joint consultations directed by the court and, if he or she is to attend, the most effective and appropriate way in which that person should be involved in the joint consultation, bearing in mind the limits of their role, and should give directions accordingly.

11) Personal litigants are in general permitted to communicate any information, including filed evidence, relating to the proceedings to McKenzie Friends for the purpose of obtaining advice or assistance in relation to the proceedings. In the case

of proceedings involving children, however, this may only be done with the permission of the judge³. This requires an application to the judge for permission and if the judge grants it then ordinarily conditions will be imposed giving further protection to confidentiality.

12) Legal representatives of other parties should ensure that documents are served on personal litigants in good time to enable them to seek assistance regarding their content from McKenzie Friends in advance of any hearing or advocates' meeting.

Part II - Rights of audience and rights to conduct litigation

13) Rights of audience and the right to conduct litigation on behalf of another are not part of the function of a McKenzie Friend but the following paragraphs apply to a McKenzie Friend, or to another individual, who wishes to apply for such a right. Unlike an application for reasonable assistance from a McKenzie Friend, there is no presumption in favour of granting these rights. Application should be made at the earliest possible opportunity and preferably before the hearing.

14) Courts should be slow to grant any application from a personal litigant for a right of audience or a right to conduct litigation to any lay person, including a McKenzie Friend. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.

15) Only very exceptional circumstances will justify the grant of a right of audience to a lay person, including a McKenzie Friend. Examples are health problems or disability issues which preclude the personal litigant from addressing the court or conducting litigation where qualified legal representation is not available to the personal litigant.

16) The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional McKenzie Friends or who seek to exercise such rights on a regular basis, whether for reward or not, will equally **only** be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.

17) Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.

³ To avoid contravening s. 12 and Schedule 2 Part II of the Administration of Justice Act 1960 and, Art. 10 (2) of the Children (NI) Order 1995

Remuneration

18) Personal litigants can enter into lawful agreements to pay fees to McKenzie Friends for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.

19) Fees claimed to have been incurred by McKenzie Friends for carrying out the conduct of litigation, where the court has not granted such a right, cannot lawfully be recovered from either the personal litigant for whom they carry out such work or the opposing party.

20) Fees claimed to have been incurred by McKenzie Friends for carrying out the conduct of litigation after the court has granted such a right are in principle recoverable from the personal litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.

21) Fees claimed to have been incurred by McKenzie Friends for exercising a right of audience following the grant of such a right by the court are in principle recoverable from the personal litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: Rules of the Court of Judicature 1980 Order 62 rules 18(1) and 18(2).

Signed

The Right Honourable Sir Declan Morgan
Lord Chief Justice of Northern Ireland

5 September 2012