ISLE OF MAN

COURTS OF JUSTICE

HIGH COURT PROCEEDINGS

Notes to assist self-represented parties in disputes concerning children

(Private law cases only, i.e. not care proceedings)

MARCH 2014

www.courts.im

Contents

Frequently Asked Questions

Making an Application

Applications to the High Court in respect of children should be made on form C1. Please use form C2 for existing proceedings or leave to make an application. Form C1 is usually used for applications for a Contact Order, Shared Residence Order, Residence Order, Prohibited Steps Order or Specific Issue Order (e.g. change of name, issues regarding education or religion, disputes over a holiday).

All applications must be filed in triplicate, the Court will then set down an initial ten minute directions hearing. Two copies of the application endorsed with a date for hearing will be returned to the person making the application together with a covering letter. It is the responsibility of the person making the application to serve a copy on the other party. The person making the application may be asked to produce proof of service at the directions hearing, such as a Coroner's Certificate or a Post Office 'signed for' receipt.

The Court will notify the Family Court Welfare Service of the application. It is usual for a Family Court Welfare Officer (see page 21) to be present at all hearings concerning children.

What happens when I get to Court?

Please report to the main reception desk, the receptionist will be able to tell you which Court your case is to be heard in.

If there is good reason why you need a separate waiting area please notify the court in advance, or speak to the clerk or the usher on your arrival

Am I allowed to bring someone with me for support?

Yes, a McKenzie Friend – but friends or relatives will probably have to wait outside the court room. Please refer to page 19 and Annex 1 for more information regarding McKenzie Friends.

Do not bring any children as there are no facilities for them at court.

Will my case be heard at the appointed time?

Maybe not. It helps to come in good time for your appointment in order for discussions with a mediator or the other party or parties to the case to take place. Make sure you do not have any other commitments which mean you are under pressure to leave early e.g. have to pick up children from school or nursery. The Court day usually ends at 4.30 p.m.

What happens at the first directions hearing?

The Court will wish to know at the first hearing whether mediation has been considered. (See later under mediation)

At this court hearing, a judge will assess the case. He or she will try to work out:

- What you can agree
- What you can't agree
- Whether your children are at risk in any way

They will also encourage you to reach an agreement at this hearing if this is in the best interests of the children.

What if I can't reach an agreement at the first court hearing?

If you do not reach an agreement at the first appointment, the court will set a timetable for what happens next. Sometimes, you will be asked to try again to reach an agreement. This may be with a mediator or possibly a Court Welfare Officer. The court can also ask for the case to be "adjourned" (put on hold). This is to provide time for a Court Welfare Officer to write a report on the case. The judge can also schedule a time and date for a final hearing to decide on the orders. If you can reach an agreement at any stage, this will usually stop the process if the judge agrees.

What do I call a Judge or Deemster?

You can't go wrong with Sir, Madam, Your Honour or Deemster.

What are the alternatives to Court?

Mediation - What is mediation?

Family mediation is a process that can be used to resolve disputes that arise before, during or after the breakdown of a family relationship. It can also be used before, during and after court proceedings. It enables parties to communicate their concerns and needs. The role of the mediator, who is an independent and impartial third party, is to facilitate discussions. Mediators work in parallel to the legal profession and, where necessary, will encourage you to make agreements legally binding.

Information can be found at www.mediation-network.im

How much will it cost?

This will depend on the mediator, there is no standard fee for mediation. Those in receipt of legal aid may be eligible for a certificate to cover mediation. Different mediation practices charge different rates, usually by the hour.

My partner will not engage in mediation?

The mediator can contact your partner and discuss the possibility of undertaking mediation. The individual intake meeting provides you with the opportunity to discuss the process of mediation, and the relevance of mediation to you and your situation with a mediator.

What if I don't want to be physically near my partner again?

Mediators must make sure that mediation discussions are fair with each participant able to freely express their views in a safe environment. At the individual intake meeting mediators will undertake checks with each party to see whether there is a problem of violence and abuse which requires special consideration in the mediation process.

Will it take long, this is an emergency?

Mediation services are usually able to see clients quickly and the mediation information assessment meeting does not take long. However, you may not need to have one if there is an exceptional circumstance.

I don't have an exceptional circumstance; can I still issue an application?

If you decide not to undertake mediation before commencing proceedings and if court proceedings are taken, the court will wish to know at the first hearing whether mediation has been considered and if not, why not.

In considering the conduct of any relevant family proceedings, the court may refer the parties to a meeting with a mediator before the proceedings continue further.

Therefore it may save time and money to attend a mediation information assessment meeting.

Warning about confidentiality

All the documents filed within your court proceedings are confidential to the parties and must be kept in a safe place. The documents or any CD recordings must not be disclosed to any other person other than the parties to the case or a proposed legal adviser or an expert appointed by the Court, save where the rules specifically permit or the Court gives permission. Unauthorised disclosure of the identity of a child involved in court proceedings or confidential documents (for example on Facebook or the internet) is a contempt of court that can be punished by imprisonment.

What the Family Courts expect from Parents

The Courts consider that these guidelines apply to all children and all parents. Please don't think that your case is an exception.

Are you a parent thinking of asking for a court order or have received one?

The court wants you to think about these things first:

- As parents, you share responsibility for your children and have a duty to talk to each other and make every effort to agree about how you will bring them up.

- Even when you separate this duty continues.

- Try to agree the arrangements for your child. If talking to each other is difficult, ask for help. Trained mediators can help you talk to each other and find solutions, even when things are hard. The court staff can give you details.

- If you cannot agree you can ask the court to decide for you. The law says that the court must always put the welfare of your child first. What you want may not be the best thing for your child. The court has to put your child first, however hard that is for the adults.

- Experience suggests that court-imposed orders work less well than agreements made between you as parents.

The court therefore expects you to do what is best for your child:

- Encourage your child to have a good relationship with both of you.

- Try to have a good enough relationship with each other as parents, even though you are no longer together as a couple.

Remember, the court expects you to do what is best for your child even when you find that difficult:

- **It is the law that a child has a right to regular personal contact with both parents unless there is a very good reason to the contrary. Denial of contact is very unusual and in most cases contact will be frequent and substantial.**

- The court may deny contact if it is satisfied that you or your child's safety is at risk.

- Supervised contact at a contact centre should be reserved for those cases where it is really needed to safeguard the welfare of the child. Every effort should be made to agree unsupervised contact, or if needed, contact supervised by mutual friends, relatives or godparents.

- Sometimes a parent stops contact because she/he feels that she/he is not getting enough money from the other parent to look after the child. This is not a reason to stop contact.

Your child needs to:

- Understand what is happening to their family. It is your job to explain and to encourage this.

- You may be separating from each other, but your child needs to know that he/she is not being separated from either of you.

- Show love, affection and respect for both parents.

Your child should not be made to:

- Blame themself for the break up.

- Hear you running down the other parent (or anyone else involved).

- Turn against the other parent because they think that is what you want.

You can help your child:

- Think about how he or she feels about the break up.
- Listen to what your child has to say.
- About how he/she is feeling.
- About what he/she thinks of any arrangements that have to be made.
- Try to agree arrangements for your child (including contact) with the other parent.
- Talk to the other parent openly, honestly and respectfully.
- Explain your point of view to the other parent so that you don't misunderstand each other.
- Draw up a plan as to how you will share responsibility for your child.
- When you have different ideas from the other parent, do not talk about it when the children are with you.

If you want to change agreed arrangements (such as where the child lives or goes to school):

- Make sure the other parent agrees.
- If you cannot agree, go to mediation.
- If you still cannot agree, apply to the court.

If there is a court order in place:

- You must do what the court order says, even if you don't agree with it. If you want to do something different you have to apply to the court to have the court order varied or discharged.

What does the Court consider when making a decision?

The Children and Young Persons Act 2001 (CYPA) makes it clear that the child's welfare shall be the court's paramount consideration. All parents have a right to family life but where there are issues concerning children the child's welfare can 'trump' other interests. The CYPA also requires the court to have regard to the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding, his physical emotional and educational needs, the likely effect on him of any changes in his circumstances, his age, sex, background and any relevant characteristics. The Court also has to consider any harm which he has suffered or is at risk of suffering and the capability of each of his parents to meet his needs.

A child's physical needs include a need to be well looked after, cared for and kept safe.

A child has emotional needs, which include:

- The need for secure relationships as a foundation for trust and their ability to form healthy relationships later in life;
- The need for stability, safety and security;
- The need for a sense of belonging and continuity;
- The need for stimulation, exploration and social exposure and experience;
- The need of positive role models for their behaviour, attitudes and morals; and
- The need for validation.

Children have a right to have their physical and emotional needs met by both parents. Both parents have a duty to give their children a happy childhood. Children usually thrive when they live in a loving household. When parents separate and fall out this very often has an adverse affect on children. Children usually do not understand adult issues. Children usually look up to their parents for support and when parents fall out and bitterness and ill feeling exists, the child's world is turned upside down. If children are exposed to parental arguments they will be negatively affected and this can lead to them suffering emotional harm. We all want our children to be well balanced and have successful lives and in due course have their own meaningful relationships. If a child witnesses one parent abusing the other that child may grow up to think that it is how adults behave and this will colour how they themselves behave as they get older.

Here is a summary of some experiences of children where their parents have a broken relationship:

- The child can become the focus of the arguments with the potential of emotional harm.

- The child is used to the parents being in control and the loss of control can create insecurity and anxiety. They expect adults to keep them safe and all of a sudden their world is in turmoil and they feel insecure.

- The child does not always understand why their parents have separated and often feel that they are to blame and this causes the child to have feelings of guilt and low self-esteem.

- They feel that they are no longer loved.

- They experience sadness, a sense of loss and grief when a parent leaves the family unit.

- They feel unsafe and bewildered.

- They have a conflict of loyalty and a fear for the well being of the departed parent. Lack of certainty creates anxiety. They often have a feeling of responsibility for both the resident and departed parent.

- They feel a need to support the resident parent and may feel a responsibility for their brothers or sisters.

- They fear that they may be sent away.

- They may feel anger at the disruption but can they be angry with their only adult carer.

- They worry about the future.

It is very important that parents understand the damage that can be caused to their children if there is conflict between the parents over childcare arrangements. It is the duty of the parents to put aside their differences and work with each other and the court to try and settle proceedings at an early stage and avoid contested hearings. At the first directions hearing the court will, with the assistance of a

mediator or sometimes the Court Welfare Officer, try and assist the parties in coming to an agreement.

There will however be some cases where there are real safety issues. The most common are cases where there are allegations of domestic violence and cases where there are allegations of drink or drug abuse.

The court recognises that when a relationship has broken down there are times in the course of emotional upheaval where one or both parties have behaved badly towards the other. Violence, abusive behaviour and substance abuse are not condoned and if allegations of such behaviour are denied the issue may have to be tried at a contested hearing. It may be necessary for the court to have sight of police call out logs, statements and drug and alcohol reports and hear oral evidence from the parties and other witnesses. If the court makes findings that one or both parents have behaved badly the court will have to weigh up the effect such bad behaviour has had on the other party and the children. In some cases such conduct may determine whether or not a party achieves the order sought.

It is important that if you have behaved in such a manner, you admit to this at the earliest opportunity. Such admissions might restore credibility and will enable the court to consider what steps can be taken to prevent future problems and upset to the other party and the child. Such steps might include attendance on a programme or course. One reason why it is important to tell the truth is that you will have demonstrated some insight into the problem and this will assist the court in helping the parties move forward with appropriate safeguard checks in place for the children. Sometimes a frank admission of past behaviour will provide a sense of emotional release for the other parent and allow matters to move on in a more amicable manner. A violent and abusive parent who shows no insight into his or her past behaviour may well create barriers that may have an adverse effect on their future involvement in a child's life.

Many cases involve allegations about the other party's controlling behaviour. No parent should be controlling the other. Control issues cause friction, fear and upset and only make it difficult for the children to have meaningful relationships with both parents.

Heavy drink consumption and drug abuse create the following problems:-

- Reduced ability to look after and protect children because a parent reacts slower, can be forgetful and have poor judgement;

- Poor standards at home, money being wasted on drugs or alcohol, missed appointments and mood swings that make parenting a child in a consistent way very difficult;

- Poor physical and mental health, an inability to do things, reduced life expectancy, not co-operating with support services and a lack of understanding about what the problems are; and

- Domestic violence and anger.

If you have a drink or drug problem you should admit it. Unrealistic denials may involve you having to submit to drug and alcohol tests. These can be expensive and if positive may have an adverse affect on your credibility with the Court and the other parent.

Please remember that both parents must put their love for the children above the animosity they feel for the other. Each child has half of his or her genetic makeup from the mother and half from the father.

It is hoped that parents will take account of the matters raised in this note and try and work with each other. The court does not necessarily expect the parents to be friends (although this would be to the children's advantage) but does expect both parents to be civil and polite to the other. If both parents can work together and communicate with each other they will have come a long way in restoring a happy childhood. There will be important events in the child's future life where the child will want both parents to be involved. Examples include school events, prize nights, sports days, degree ceremonies, passing out parades and birthdays. If you can establish a new understanding with the other parent these and other occasions can be happy events. If you choose however to go down the road of conflict the judge may have to decide the issue and you may lose control over the decision.

Communicating with the Court

Please note that for reasons of their impartiality Judges are not able to enter into correspondence with parties and are not able to give parties legal advice. All communications have to be addressed to the Court Manager or relevant Court Clerk.

Parties must copy each other in visibly to **all** correspondence with the Court, including email.

Statements

If there are going to be contested proceedings the Court may order you to file and serve statements. Statements are useful in assisting the Court in determining what the issues are in a case, how serious those issues are and what it is that you would like the Court to order. Statements are usually filed from the parties themselves and any witnesses a party wishes to call to give evidence. Statements can assist the Court in deciding how long a case will last.

The statement will also help you when you give your evidence on oath, as you will be able to refer to it so that you do not forget to mention something that you consider important.

The statement should be typed on A4 size paper. The statement should be headed with the case number and the names of the parties. The statement should end with a statement of truth, the date and your signature.

You may see that the order says that you have to file and serve a statement. This means that you file the statement at Court and serve the other parties with a copy. You can serve the statement by posting it to the other party. Once you have prepared the statement you should make sure that each page and paragraph is numbered. You should keep a copy for yourself, send a copy to the other party and file a copy with the Court. You might want to take legal advice as to the content of the statement before you file and serve it. You should avoid inflammatory wording and remember that in many cases the Court is not trying the breakdown of your relationship with the other party, but has to decide what the best parenting arrangement for your child is. The child's welfare is the Court's paramount consideration.

There is an example of how to set out a statement below:

Case Number: FAM2014/

IN THE HIGH COURT OF THE ISLE OF MAN
CIVIL DIVISION – FAMILY BUSINESS

Between:-
<INSERT NAME> **Applicant**
and
<INSERT NAME> **Respondent**

I, <insert name> make this statement in support of my application for a Contact Order in respect of my child <name of child> born on 21st February 2010 and will say as follows:

(You should then set out in numbered paragraphs):-

- The background to the application including such details as when you and the other party met and when and how you separated;
- Any arrangements that had been agreed for the child following separation;
- Any incidents that you consider important in order of time when they occurred and if possible giving approximate dates;
- Brief details of any current relationship and details of your employment and accommodation;
- You should also respond to any allegations made against you by giving your side of the events;
- The Court may have ordered that you deal with something specific in a statement at a previous hearing, which you should deal with; and
- You should set out what it is you wish the Court to order.)

The statement should end with;

"*I make this statement believing the contents to be true and knowing that it may be placed before the Court and used in evidence*"

Date:
Signature

How to compile a court bundle

This is a guide to assist self-represented parties to comply with the Court rules about the need for a court bundle in private children cases.

A bundle is a file of all the relevant papers in the case. One file will be needed for every party in the case plus one for the Judge and, for a hearing where evidence is to be given, a spare one for the witnesses to use. The purpose is to make sure that everyone can see the same documents during the hearing.

It is usually the Applicant's duty to provide these bundles but the Court may make a different order in your case. If no such order is made the Applicant must do it. If both parents have made an application to the Court the person who made their application first must do it.

Each page in the bundle must be numbered and care should be taken to make sure that the bundles have the same numbering.

There should be an index at the front of the bundle listing the contents and which section and page they can be found at.

Ideally the contents of the bundle should be agreed with the other party. That means you need to share the draft index well in advance so that the other side can ask you to add in any missing documents and prepare a final index.

The bundle must be divided into different sections and within each section the documents must be in date order (earliest first).

The sections are:

A: Preliminary documents

These are:

- A short case summary, which should be limited to a short background to the case and the issues that the Court will be asked to deal with at the next hearing. This should be one sheet of A4 paper if possible;
- A position statement from each party setting out what order they want the Court to make both at the next hearing and at the end of the case; and
- A chronology i.e. a list of dates that are significant to the case.

All of these must have on them (a) the date on which it was written and (b) the date of the hearing for which it was written.

B: Application forms and orders of the Court

C: Statements

D: Experts reports such as drug tests or doctors' reports and other reports such as those from the Court Welfare Service or the Department of Social Care

E: Any other documents

The file must have the following information on the front and on the spine:

a) The title and number of the case e.g. Smith v Jones FAM2013/
b) The hearing date and time
c) If known, the Judge hearing the case
d) If you need to use more than one ring binder, number the files. The maximum number of pages that may be put in one lever arch ring binder is 350 pages so most cases will only require one file.

The bundle must be filed at Court and be given to the other side in a timescale fixed by the Judge.

Specimen index for a court bundle:

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

CIVIL DIVISION – FAMILY BUSINESS

File Number: FAM2014/

Between

<INSERT NAME>

and

<INSERT NAME>

Index to the trial bundle

Section A Preliminary documents

Page A1	The case summary. (This should set out a brief outline of the background to the case)
Page A2	A chronology of relevant dates

Section B application forms and orders of the court

Pages B1 to B12	A copy of the applicant's application form dated XX
Pages B13 to B16	(Copy previous court orders in chronological order)

Section C Statements

Page C1 to 3	Copy of the applicant's statement dated XX
Page C3 to 6	Copy of the respondent's statement dated XX

Section D Experts reports

Page D1 to D13	Copy of the Court Welfare report dated XX
Page D14 to D18	Copy of the respondent's alcohol test results
Page D19 to D21	Copy of the applicant's medical report of Dr X dated XX

Section E Any other relevant documents

Page E1 to E30	Copy of the police disclosure documents
Page E31 to E32	Copy of the child's school report dated XX

Code of Conduct for McKenzie Friends

1. When someone involved in a court case asks another person to assist, not as a lawyer or a witness but as a friend, the person assisting is often called a "McKenzie Friend".
2. A McKenzie Friend does not have a right to address the Court, they are there to morally support and possibly advise you.
3. Annexed to these notes is a document entitled 'Guidance on McKenzie Friends'. Any person proposed as a McKenzie Friend should read this document carefully.
4. If you wish to have a McKenzie Friend with you in court you should inform the court and the other party as soon as possible. If your proposed McKenzie Friend has a financial interest in the outcome of the case they would not normally assist.
5. Your proposed McKenzie Friend may attend the hearing of the Court unless the Court says they cannot.
6. Your proposed McKenzie Friend may read the papers for the Court case unless the Court says they cannot. Any papers are strictly confidential and must not be shown to anyone else or put on any form of social media or the internet.
7. McKenzie Friends should let the staff at the Court know as soon as they arrive that they have been asked to assist.
8. Your proposed McKenzie Friend should send to the court in advance of the hearing, a short curriculum vitae (CV) and if asked by the Court staff to complete a short set of questions about themselves which should be done in advance of the hearing.
9. If a McKenzie Friend is being paid to assist or if they regularly assist a number of different people as a McKenzie Friend then the Court should be made aware of that.
10. McKenzie Friends may provide moral support, take notes, help with case papers and give advice to the person they are assisting.

11. McKenzie Friends may not address the Court, make oral submissions or examine witnesses. McKenzie Friends should be aware that the Judge has power to terminate permission to act at any stage.
12. McKenzie Friends must always follow any instructions given by the Judge.
13. McKenzie Friends should be courteous at all times to everyone else.
14. McKenzie Friends should try to ensure that the way in which they assist does not cause any disruption or distract others. This is particularly important when someone else is speaking to the Judge or the Judge is speaking.
15. McKenzie Friends must behave with honesty and not do anything that might mislead the Court or anyone else.
16. Please remember at all times that McKenzie Friends are there to assist someone else, and not on their own behalf.

For more guidance on McKenzie Friends please refer to Annex 1, page 24 onwards.

Commonly Used Terms

Applicant/Respondent

A person who starts legal proceedings or makes an application for separation or divorce. This person then becomes "a party" to the proceedings. Once papers are sent to the other parent and their advocate, they are referred to as "the Respondent" (to the application). Once proceedings have begun, the other party can make an application which will be referred to as 'The Respondent's Application'.

Court Welfare Service

When the court requires additional information, this independent government organisation assigns a court welfare officer to investigate and report on the children, their wishes and feelings and the ability of the various adults to provide for them. This report will go to the judge and will generally have a significant impact on the final order.

Contact Order

Formerly referred to as 'access', 'contact' means the time that the non-resident parent (the parent who does not have the children living with them most of the time) will spend with the children. Occasionally a contact order may apply to other significant adults in a child's life such as grandparents. It can also include specific guidelines of how other forms of communicating (for example, letters, email, telephone calls etc.) will take place. In most cases, courts prefer not to define these arrangements too closely.

Legal Aid

Also known as 'public funding', this is state assistance with legal costs, available in limited circumstances in private cases and to those on benefits or a very low income. Contact details:- www.gov.im/registries/legal

McKenzie Friend

You can ask the Judge for an independent friend to help and support you in court, but they cannot speak for you or represent you (see page 19).

Parental Responsibility

All the rights, duties, powers, responsibilities and authority that go with being a parent. It means that you have a duty to care for and protect a child and that you have a right to make decisions regarding that child's future, such as choosing his or her school. It does not mean you have to pay maintenance – child support and parental responsibility are not connected in any way. It is also not connected to any right you have about contact with the child, or to have him or her live with you. Mothers have parental responsibility automatically, as do married fathers (only when the child has been born after the marriage has taken place). From 1st November 2013 the Children and Young Persons (Amendment) Act came into force, fathers who are named on their child's birth certificate automatically have parental responsibility.

Prohibited Steps Order

A Prohibited Steps Order restricts parents from taking certain actions in relation to their child/children, (for example removing a child or children from the Isle of Man or the UK or from the care of a certain person).

Residence Order

Formerly referred to as 'custody', this outlines arrangements about where a child should live primarily. Shared residence is the type of order used when a child has a home with each parent. It usually also provides guidelines for how that type of arrangement will work.

Specific Issue Order

When parents are unable to come to a mutual agreement about certain parenting issues this type of order is used to provide direction and resolve matters (for example, where she/he should go to school). When appropriate, the Court may also assign certain responsibilities to one parent.

The welfare checklist

A list of factors that a court has to consider before making decisions related to a child. The Court will always consider the best interests of the child first and foremost.

The law says judges must always put the welfare of children first. They will think about the:

- Child's wishes and feelings (bearing in mind their age);
- Child's physical, emotional and educational needs;
- Effect any changes may have on the child;
- Child's age, gender, background and other relevant characteristics;
- Possible risk of harm to the child;
- Ability of parents to meet the child's needs;
- Orders the Court has the power to make; and
- A judge will only make an order if they think it is in the child's best interests

ANNEX 1 – GUIDANCE ON McKENZIE FRIENDS

Guidance on McKenzie Friends

This is not a practice direction

Right to have an assistant sitting with you. These notes explain what "McKenzie Friends" are and their legal basis.

Background: what are McKenzie Friends?

If you are representing yourself in court (i.e. you are not using an advocate to represent you), you may be entitled to have someone sit next to you. He/she can take notes, offer advice to you (in whispers) and prompt you to ask particular questions etc., but cannot address the court directly or question witnesses. He/she has no independent right to provide assistance. He/she is usually called a "McKenzie Friend".

Most people don't use McKenzie Friends, and they are not meant to be a substitute for an advocate.

It is possible that a court may refuse to allow you to have a McKenzie Friend to sit with you.

The legal basis of McKenzie Friends

McKenzie Friends have no official legal status: they have no *particular* right to sit next to you in court. You have a right to such assistance that may be reasonably required, and that is the basis for allowing the McKenzie Friend. The name comes from the particular case which established this right (see below).

McKenzie v McKenzie, *1970*, which was a divorce case. The husband had been initially legally aided, but by the time the case came to trial, he was no longer on legal aid, and had therefore decided to represent himself. At the start of the trial, a young Australian barrister (Mr Hanger) had wanted to assist Mr McKenzie for free. The judge then said that the barrister could take no part in the proceedings, so he left the court and did not reappear.

The conclusion of all three judges in the appeal court was that Mr Hanger (the McKenzie Friend) should have been allowed to remain, to "sit quietly beside the husband and give him from time to time some quiet advice or prompting" (Lord Justice Sachs, at page 477H). The judgment also quotes (approvingly) the comment made in an earlier case, *Collier v Hicks, 1831:*

> *Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice.* (Lord Tenterden CJ, in *Collier v Hicks*, page 669).

The R v Leicester City Justices case

This was a case about non-payment of poll tax. Leicester City Council had taken Mr and Mrs Barrow to court for non-payment, and wanted to get a 'liability order' against them. When their case came to court (Leicester City magistrates' court), the Barrows wanted to have the help of Robert John, to act as a McKenzie Friend. The magistrates ruled that, because it was a straightforward case, they did not require a McKenzie Friend, and they would not be allowed one. This decision was upheld on appeal to the Divisional Court, but overturned by the Court of Appeal.

The Court of Appeal established a right to have a McKenzie Friend, unless the need to maintain order and do justice dictates otherwise.

The case also contained comments on situations in which an assistant could properly be refused: if security demanded it, or if the McKenzie Friend is disorderly or is disrupting the court.

In the conjoined appeals reported as In the matter of the children of Mr. O'Connell, Mr Whelan and Mr. Watson [2005] EWCA Civ 759 the Court of Appeal in the UK took the opportunity of emphasising that the presumption in favour of permitting a McKenzie Friend is a strong one. They also pointed out that the right to a fair hearing under article 6.1 of the European Convention on Human Rights is engaged on any application by a litigant in person for the assistance of a McKenzie Friend.

The court observed in particular that –

- The purpose of allowing a litigant in person the assistance of a McKenzie Friend is to further the interests of justice by achieving a level playing field and ensuring a fair hearing. The presumption in favour of allowing a litigant in person the assistance of a McKenzie Friend is very strong. Such a request should only be refused for compelling reasons and should a judge identify such reasons, he/she must explain them carefully and fully to both the litigant in person and the would-be McKenzie Friend.

- Where a litigant in person wishes to have the assistance of a McKenzie Friend in private family law proceedings relating to children, the sooner that intention is made known to the court and the sooner the court's agreement for the use of the particular McKenzie Friend is obtained, the better. In the same way that judicial continuity is important, the McKenzie Friend, if he/she is to be involved, will be most useful to the litigant in person and to the court if he/she is in a position to advise the litigant throughout.

- It is not good practice to exclude the proposed McKenzie Friend from the courtroom or chambers whilst the application by the litigant in person for his/her assistance is being made. The litigant who needs the assistance of a McKenzie Friend is likely to need the assistance of such a friend to make the application for his/her appointment in the first place. In any event, it is helpful for the proposed McKenzie Friend to be present so that any concerns about him can be ventilated in his/her presence, and so that the judge can satisfy himself/herself that the McKenzie Friend fully understands his/her role (and in particular the fact that disclosure of confidential court documents is made to him/her for the purposes of the proceedings only) and that the McKenzie Friend will abide by the court's procedural rules.

- In this context it will always be helpful for the court if the proposed McKenzie Friend can produce either a short curriculum vitae or a statement about himself/herself, confirming that he/she has no personal interest in the case, and that he/she understands both the role of the McKenzie Friend and the court's rules as to confidentiality.

- The following do not, of themselves, constitute 'compelling reasons' for refusing the assistance of a McKenzie Friend:

    (1) That the litigant in person appears to the judge to be of sufficient intelligence to be able to conduct the case on his/her own without the assistance of a McKenzie Friend;

(2) That the litigant in person appears to the judge to have a sufficient mastery of the facts of the case and of the documentation to enable him to conduct the case on his own without the assistance of a McKenzie Friend;

(3) That the hearing at which the litigant in person seeks the assistance of a McKenzie Friend is a directions appointment, or a case management appointment;

(4) That the proceedings are confidential and that the court papers contain sensitive information relating to the family's affairs;

(5) That the litigant in person has chosen not to have legal representation;

(6) That the case is simple or straightforward;

(7) That the other party is not represented;

(8) That the proposed McKenzie Friend belongs to an organisation that promotes a particular cause.

What McKenzie Friends may do

McKenzie Friends may:

i) Provide moral support for litigants;

ii) Take notes;

iii) Help with case papers;

iv) Quietly give advice on any aspect of the conduct of the case.

What McKenzie Friends may not do

McKenzie Friends may not:

i) Act as the litigants' agent in relation to the proceedings;

ii) Manage litigants' cases outside court, for example by signing court documents; or

iii) Address the court, make oral submissions or examine witnesses.

What to do if a McKenzie Friend is requested

While litigants ordinarily have a right to receive reasonable assistance from McKenzie Friends the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.

A litigant who wishes to exercise this right should inform the Deemster or the High Bailiff or Deputy High Bailiff or Clerk to the Magistrates (as the case may be) as soon as possible indicating who the McKenzie Friend will be. The proposed McKenzie Friend should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the McKenzie Friend's role and any relevant duty of confidentiality.

Potential refusals to allow a McKenzie Friend

If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a McKenzie Friend, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.

When considering whether to circumscribe the right to assistance or refuse a McKenzie Friend permission to attend, the right to a fair trial is engaged. The matter will be considered carefully. The litigant will be given a reasonable opportunity to argue the point. The proposed McKenzie Friend will not be excluded from that hearing and will normally be allowed to help the litigant.

Where proceedings are in *closed court,* i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the McKenzie Friend's presence in court. The presumption in favour of permitting a McKenzie Friend to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.

The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the court forms the view that a McKenzie Friend may give, has given, or is giving, assistance which impedes the efficient administration of justice. However, the court will also consider whether a firm and

unequivocal warning to the litigant and/or McKenzie Friend might suffice in the first instance.

A decision by the court not to curtail assistance from a McKenzie Friend should be regarded as final, save on the ground of subsequent misconduct by the McKenzie Friend or on the ground that the McKenzie Friend's continuing presence will impede the efficient administration of justice. In such event the court will give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. McKenzie Friends have no standing to do so.

A litigant may be denied the assistance of a McKenzie Friend because its provision might undermine or has undermined the efficient administration of justice. Examples or circumstances where this might arise 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 a civil proceedings order or a civil restraint order;

iv) The McKenzie Friend is using the litigant as a puppet;

v) The McKenzie Friend is directly or indirectly conducting the litigation;

vi) The court is not satisfied that the McKenzie Friend fully understands the duty of confidentiality.

Where a litigant is receiving assistance from a McKenzie Friend in care proceedings, the court will consider the McKenzie Friend's attendance at any advocates' meetings directed by the court.

The High Court can, under its inherent jurisdiction, impose a civil restraint order on McKenzie Friends who repeatedly act in ways that undermine the efficient administration of justice.

Communications to the McKenzie Friend

Litigants are 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.

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

Rights of audience and rights to conduct litigation

McKenzie Friends do **not** have a right of audience or a right to conduct litigation. It is an offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so.