

ADVOCACY

Amateur dramatics

Following the recent guidance from the President's Office, Elissa Da Costa outlines advocacy best practice when dealing with a litigant in person or McKenzie friend



Elissa J Da Costa is a barrister and mediator at Arlington Chambers

'Increasingly, with the ever-diminishing availability of public funding, practitioners are faced with a litigant in person on the other side or a party represented by a McKenzie friend. This can make for a difficult and emotional situation for all concerned.'

There will always be those advocates whose performances in the courtroom demonstrate a natural aptitude for advocacy, but such individuals are few and far between. One has only to frequent the courts to note how poor the standard of advocacy is and how, in the Magistrates' Courts, those who have been making a habit of doing their own advocacy are remarkably good at it, thus proving the old adage that practice makes perfect. That said, the skill and art of advocacy can be taught and practised in such a way that the skilled practitioner will appear to be a natural at it!

Preparation and presentation

It cannot be emphasised strongly enough that the advocacy that is done so effortlessly by the seasoned practitioner is the product of intense research and preparation. It is impossible to advocate well if you do not have a thorough knowledge of your case. Advocacy is merely the end product of reading, creating tables setting out schedules of assets and what is said by whom about which issue, and the development of a general case theory based on knowledge of human behaviour and motivation. It is very often a matter of breaking the case down into smaller and more manageable chunks in order to reconstruct it, in accordance with the client's instructions and the advocate's case theory, into a coherent whole.

It seems that because the tools of the lawyer's trade are books and thus words, other creative methods of presenting facts are often ignored. Sometimes, certain facts lend themselves more to a visual presentation than a written one, and many judges are only too relieved to see some collections

of facts condensed into a picture or a diagram. Document handling is an essential skill for the advocate and the simple action of creating a user-friendly bundle, indexed and with pertinent parts labelled, again reinforces for the advocates where the important documents are, as well as saving time in court at a later stage. These simple, common-sense tips may seem obvious, but it is amazing how little attention they receive in practice and how such small actions in preparing the case can themselves boost the advocate's confidence. It also bears emphasising that effective advocacy is not just about talking but about listening and observing. Much can be learnt about a witness, to the advocate's advantage, by careful observation of them while listening to the manner in which they respond to questions.

Traditionally, little – if any – attention has been paid to how to react to one's opponents, largely because trials and hearings within this jurisdiction are concerned with getting your case across to the judge and not about debating with the other side.

Increasingly, however, with the ever-diminishing availability of public funding, practitioners are faced with a litigant in person on the other side or a party represented by a McKenzie friend. This can make for a difficult and emotional situation for all concerned.

The litigant in person

There is perhaps nothing an advocate fears more than the litigant in person. They seldom know the law, procedure and etiquette to be adopted in the courtroom; at best they are relatively knowledgeable yet innocent players in the courtroom drama, at worst they are practised representatives deliberately

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playing at being helpless and ignorant in the certainty that the court will bend over backwards to assist them for fear of being accused of discriminatory behaviour towards them, and possibly appealed against for not having provided the litigant in person with the 'fair trial'. Furthermore, the represented party's advocate has to overcome the litigant in person's likely stereotypical evaluation of them. Indeed, the litigant

too often conduct themselves according to a preconceived idea that the courtroom experience involves a battle to be won rather than, more appropriately in a family dispute, a problem to be solved. Efforts by the legally qualified opponent to help the litigant in person are often regarded as patronising and condescending, and are met with hostility. However, at last, there does appear to be a solution.

The court may refuse to allow a McKenzie friend to act or continue to act in that capacity where the judge forms the view that the assistance they have given or may give impedes the efficient administration of justice.

in person in the family dispute is often unaware that family proceedings are supposed to be more inquisitorial than adversarial, and will regard even the most well-meaning and courteous of opponents as the enemy to be avoided at all costs, refusing to discuss simply the directions that might prove necessary in the case. Litigants in person all

McKenzie friends

A fairly recent phenomenon in family disputes is the use of the McKenzie friend (MF). There have been difficulties with this in the past in family proceedings, first because such proceedings are held in private, and secondly because it has been unclear to what extent an unrepresented litigant may seek the

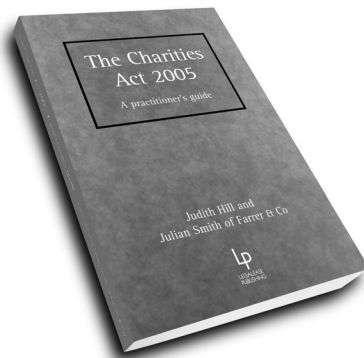
The Charities Act 2005 – A Practitioner's Guide

By Judith Hill and Julian Smith of Farrer & Co

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Powers and limits

McKenzie friends can:

- Provide moral support for the litigant.
- Take notes.
- Help with case papers.
- Quietly give advice on:
 - points of law or procedure;
 - issues that the litigant may wish to raise in court; and
 - questions the litigant may wish to ask.

What they are not permitted to do:

- An MF has no right to act on behalf of a litigant in person. It is the right of the litigant in person to use the assistance of an MF if they so require.
- An MF is not entitled to address the court, nor examine any witnesses. If they do so they become an advocate and require the grant of a right of audience.
- An MF may not attend a closed court unless the litigant has received permission from the court for them to do so at the start of a hearing.
- An MF may not act as the agent of the litigant in relation to the proceedings nor manage the litigant's case outside of court – for example, by signing court documents.

permission of the court to disclose confidential documents and information generated by the court process either to an MF or to other third parties. Fortunately, guidance has now been given from the President's Office. This guidance states that where proceedings are held in open court, it is clear from the principles set out in a number of Court of Appeal decisions that a litigant who is not legally represented has the right to have reasonable assistance from a layperson, sometimes called an MF.

The limits of what an MF may do are detailed in the box above.

The guidance mirrors the decision in *O (children)*, *W-R (A Child)*, *W (Children)*, handed down by the Court of Appeal on 22 June 2005.

The President's guidance also details the circumstances under which an MF may be appointed, what they may do and what rights of audience they have. A summary of the President's guidance is detailed in the box opposite.

O (children), W-R (a Child), W (Children)
[2005] EWCA Civ 75

Confidentiality

The very important issue of confidentiality was dealt with in *O (Children)* by deciding that judges must ensure, as a matter of practice, that whenever an application is made by a litigant in person for the assistance of an MF, both the litigant in person and the MF express their clear understanding to the judge of the role of the MF. They must understand in particular the responsibility which the MF has in ensuring that the documents to which they have been permitted access are being disclosed to them for the sole purpose of assisting the litigant in person present their case in the proceedings. Thus, the court

should seek and be given an assurance from both the litigant in person and the MF that the documents will only be used for the purpose of the proceedings and to enable the litigant in person to obtain advice about how best to run their case.

Their Lordships were clear that they meant an assurance and not a formal undertaking on the basis that a litigant in person, in preparation of their case and prior to the court giving permission for them to be assisted by an MF, will often have disclosed court papers for the purpose of seeking initial advice and assistance. This, they said, is entirely legitimate, in the same way that parties often consult Citizens Advice Bureaux or Families Need Fathers, in which circumstances their Lordships held that such conduct is not a contempt where the

documents are disclosed to the person from whom advice is sought.

Conclusion

It seems that the latest authority and guidelines from the President mean that neither courts nor practitioners need be quite so fearful of coming up against a litigant in person if they are seeking the assistance of an MF. Indeed, such assistance should be welcomed as it assists the court and also the opposition.

It may be worthwhile for practitioners to consider the preparation of a leaflet on MFs, setting out their role and what they can and cannot do, in order to make those wishing to represent themselves aware that they can obtain free assistance and that they need not pursue or defend litigation entirely alone and without help. ■

McKenzie friends: the guidance from the President's Office

1. A litigant in person wishing to have the help of an MF should be allowed to do so unless the judge is satisfied that fairness and the interests of justice do not so require. The presumption in favour of permitting an MF is a strong one. The Court of Appeal decision in *O (Children)* makes it clear that the request to have one should only be refused for compelling reasons and that should a judge identify such reasons, these must be explained fully to both the litigant in person and the proposed MF. *O (Children)* sets out what **do not** constitute compelling reasons:

- (a) That the litigant in person appears to the judge to be of sufficient intelligence to be able to conduct the case on their own without assistance. (Indeed, if that were so, would intelligent parties be banned from having legal representation?)
- (b) The fact that the litigant appears to the judge to have a sufficient mastery of the facts of the case and of the documentation to enable them to conduct the case on their own without the assistance of an MF.
- (c) The fact that the hearing at which the litigant in person seeks the assistance of an MF is a directions appointment or a case management appointment.
- (d) Subject to the court being satisfied as to issues of confidentiality, the fact that the proceedings are confidential and that the court's papers contain sensitive information relating to family affairs (see *O (Children)* for detailed consideration of the issues of disclosing confidential case papers to an MF).

2. A litigant in person should inform the court at the outset of a hearing that they intend to exercise their right to an MF. They should also indicate who their MF will be. In *O (Children)* it was also said that:

... in the same way that judicial continuity is important, the McKenzie friend, if he is to be involved, will be most useful to the litigant in person and to the court if he is in a position to advise the litigant throughout.

Thus the courts will clearly welcome the litigant in person having assistance with their case even if not from a qualified practitioner. Indeed, this approach opens opportunities for litigants and trainee

solicitors or budding barristers alike to cut their teeth while at the same time assisting a litigant and gaining some very useful experience. In the early days of the Free Representation Unit, aspiring yet not quite qualified advocates were encouraged to take on cases on the basis that the good they did by representing a party far outweighed any damage that might be caused by their inexperience. Whilst as an MF they will not be 'representing' the litigant in person, I would submit that any help received by them in respect of evidence gathering, advocacy, case preparation and court procedure can only be beneficial.

3. The court may refuse to allow an MF to act or continue to act in that capacity where the judge forms the view that the assistance they have given or may give impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance. *O (Children)* also considers that where decisions are being taken in court about the use of an MF, the MF should be present. Indeed, the rather trite point is made that where the application is being made to have the assistance of an MF, it is not good practice to exclude the MF from the courtroom, because the:

... litigant who needs the assistance of an MF is likely to need the assistance of such a friend to make the application for his appointment in the first place.

The judgment also states that it is helpful for the MF to be present to assuage any fears about them and also that it:

... will always be helpful for the court if the proposed MF can produce either a short curriculum vitae or a statement about himself, confirming that he has no personal interest in the case and that he understands both the role of the MF and the court's rules regarding confidentiality.

4. If a judge decides in the exercise of their discretion to refuse to allow an MF to assist the litigant in person, they should give the litigant reasons for their refusal. The litigant may appeal that refusal but the MF has no standing to appeal such a refusal.