CvM
District Court Henderson FP 149/90
[1996] NZFLR 106
24 October; 8 November 1995
Judge Doogue

Practice and procedure — Representation and assistance in Court — **Engagement of a "McKenzie friend"** — Access proceedings — Sexual abuse allegations — Discretion of the Court — Suitability of proposed appointee — Whether to permit friend to assist one of the parties — Family Courts Act 1980; Guardianship Act 1968, s 27.

The applicant father was not legally represented. Instead he wanted to use the services of a Mr K (the proposed appointee) who had a particular interest in the workings of the Family Court. The proceeding involved the determination of access issues against a background of sexual abuse allegations. Mr K had his own personal experience of the Family Court and was critical of its process and officers of the Court. He held a firm belief that a major percentage of sexual abuse allegations were false and that this was so in this case also.
The respondent opposed allowing Mr K to assist the applicant.

Held (permitting Mr K to be present to assist the applicant subject to strict conditions)

(1) The engagement of a "McKenzie friend" vested in the residual discretion of the Judge or judicial officer concerned.

(2) In regulating its own procedure the Court was entitled to establish the suitability of the proposed appointee. Although Mr K was partisan that alone did not preclude him from fulfilling the role of a "McKenzie friend". So long as the Court can be assured confidentiality will be maintained the Court had every confidence that the proceeding could be regulated in a way to ensure it was a just and expeditious hearing for the parties and the children.

Cases referred to in judgment
Collier v Hicks (1831) 2 B & Ad 663
McKenzie v McKenzie [1970] 3 All ER 1034
Mihaka v Police [1981] 1 NZLR 54
O'Toole v Scott [1965] 2 All ER 240
R v *Mitchell* (1992) 9 CRNZ 537,

Application

This was an application by a party to access proceedings to be allowed the assistance of a "McKenzie friend" during the hearing

Applicant in person.
Mr Cropper for the respondent
Mrs Miller for the children
Mr Jefferson, counsel to assist the Court

JUDGE J M DOOGUE.

This proceeding involves the determination of the exact terms and conditions of access by the applicant to his daughter against a background of sexual abuse allegations. However there is a procedural matter requiring preliminary determination.

The applicant is not legally represented by choice as is his right. He has elected instead to avail himself of the services of a gentleman Mr K (the proposed appointee)

who has a particular interest in the workings of the Family Court. He has had his own personal experiences of the Court and an ongoing interest in assisting and empowering others who are subject to its jurisdiction. He denies a particular agenda but is critical of the Court's practices and procedures and comes to this proceeding with a clear sense of grievance for the applicant. The respondent mother does not feel comfortable with the presence of the proposed appointee and she says his presence will not be helpful to the resolution of the issue from the children's point of view.

In deciding how this proceeding could be concluded in the most expeditious and beneficial way for the children who are the subject of the dispute and for the parents who are consumers of the Court I decided to order a review of the authorities by senior counsel appointed to assist the Court. The relevant authorities that I had to hand and provided to counsel to assist were not exhaustive and were largely of application in the criminal law arena. I wanted to ascertain if there were any considerations that may alter their application in the Family Court because of the confidentiality issues and the inherently sensitive nature of a hearing involving allegations of sexual abuse. Those matters were combined with a concern about whether or not these proceedings might be unduly disturbed by political agendas that were not directly relevant to the situation of the particular children who are the subject of the dispute.

The starting point for the Court is the well-known English Court of Appeal case of McKenzie v McKenzie [1970] 3 All ER 1034. That decision affirms the entitlement of a litigant to be accompanied by a friend. Counsel to assist submitted the relevant statement of principle was in fact derived from an earlier obiter dicta of Lord Tenterden CJ in Collier v Hicks (1831) 2B &Ad 663 which reads as follows:

> 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; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretions of the justices

This statement has been affirmed in decisions of the High Court in New Zealand. For instance in Mihaka v Police [1981] 1 NZLR 54. Having affirmed the statement set out above Justice Hardie Boys went on to say;

> The last words of this quotation refer to the third aspect of representation and assistance in Court. Subject to the requirements of statute and of common law, every judicial officer has the right to regulate the proceedings of his own Court. Thus he may allow an accused person a greater measure of assistance or representation than the law requires of him. But that is a matter for him to determine. He will no doubt wish to exercise his discretions in the manner indicated by Lord Pearson, delivering the judgement of their Lordships in O'Toole v Scott [1965] 2 WLR 1160 at 1170; [1965] 2 All ER 240, 247:

It can be exercised either on general grounds common to many cases or on special grounds arising in a particular case. Its exercise should not be confined to cases where there is a strict necessity; it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition and efficiency in the administration of justice

The right of the Judge or other judicial officer to regulate the proceedings of his Court is an essential attribute of judicial independence, itself one of the cornerstones of our liberty. The denial of recognition to other than suitably qualified persons should not be regarded as a protection of any privilege or monopoly. It surely gives effect to the fact that an unqualified and inexperienced person may do more harm to the person he assists: if only because of his ignorance of the law which may support that person's cause. In this age of complexity in the law and specialisation in its practice, this reason is perhaps more cogent than it has ever been.

His Honour also approved in the course of that decision a memorandum prepared by the Chief District Court Judge in order to assist Justices of the Peace should they be confronted with a request by a litigant to be assisted in the conduct of litigation. The instructions were that an unqualified person acting as a friend to the litigant could do the following:

(a) Sit beside him in Court;
(b) Take notes;
(c) Give suggestions to the litigant and give advice;
(d) Propose questions and submissions to the litigant who may put the same but the memorandum expresses the view that the friend should not be permitted to address the Court by way of making submissions or asking questions.

The net effect of the decisions in my view is that the engagement of a "McKenzie" friend (which is a general term meaning only a person who seeks to assist another in the conduct of their litigation) rests in the residual discretion of the Judge or judicial officer concerned. But that is subject to any relevant statutory provisions of course.

The Family Court is a creature of statute established under the Family Courts Act 1980 with jurisdiction to hear and determine proceedings by virtue of statutory provisions such as the Guardianship Act 1968. That is the Act that applies in this proceeding. Section 27 is the relevant section. It provides as follows:

> **[27. Proceedings not open to public** — (1) No person shall be present during the hearing of any proceedings (other than criminal proceedings) under this Act except
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> (a) Officers of the Court4
> Page 109; [1996] NZFLR 106
> (b) Parties to the proceedings and their barristers and solicitors:
> (c) Witnesses:
> (d) Any other person whom the Judge permits to be present.
> (2) Any witness shall leave the courtroom if asked to do so by the Judge.
> (3) Nothing in this section shall limit any other power of the Court to hear proceedings in private or to exclude any person from the Court.
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> Counsel to assist the Court submitted I should have regard to the common law entitlement to be assisted by a "McKenzie friend" in exercising my discretion under s 27(1)(d). There does not seem to be any useful practical distinction to be drawn between the right to be accompanied by a "McKenzie friend" in family proceedings or in any other proceedings. I agree with that submission and I also agree that the extent to which the "McKenzie friend" is involved is a matter of judicial discretion to be exercised in the manner indicated in the case of *O'Toole* v *Scott* [1965] 2 All ER 240 as follows;
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> It can be exercised either on general grounds common to many cases or on a special ground arising in a particular case. Its exercise should not be confined to cases where there is a strict necessity: it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition and efficiency in the administration of justice.
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> In regulating its own procedure the Court is entitled to establish the suitability of the proposed appointee. In *R* v *Mitchell* (1992) 9 CRNZ *537* the fact that the proposed appointee was a potential witness led to his exclusion. In the case before me the potential appointee was not aware that he could not perform both roles of "Mckenzie friend" and witness. After conferring with the applicant father whom he seeks to assist the potential appointee informed the Court that he was electing not to give evidence and wished to present himself as a proposed appointee on that basis. As the nature of the evidence he intended to give was of questionable relevance to the Court in any event because it related completely to his own impression of mailers after the relevant events had taken place, I saw no prejudice either to the applicant or to the children arising from the decision not to give evidence.

Counsel to assist argued that it was essential the proposed appointee ubderstood the limitations of the role as outlined in Mihaka and the quintessntial confidentiality attaching to Family Court proceedings
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I consider there must be an additional consideration which is whether or not to proceed in the way proposed is in the best interests of the children who are the subject of the proceeding. After all, the primary consideration for the Court in determining any mailer under the Guardianship Act is just that. I convened a brief hearing to consider the suitability of the proposed appointee Mr K. Counsel to assist lead his evidence and other counsel had the opportunity to cross-examine him.

He has no relevant legal qualifications. He is a trained draughtsman who had worked in that profession for approximately 20 years. He was a waterside worker for a period and a solo parent. He has been involved in Family Court proceedings himself but none are before the Court at this time. He was critical of the Court process and officers of the Court as a result of his own experience in those proceedings. He is critical of the process to date in this proceeding. He has attended a meeting of a group called "Casualties of Allegations of Sexual abuse." He is not an active member but does receive their literature from time to time. He holds the firm belief that a major percentage of sexual abuse allegations are false and that this applies in this case also.

The parties and children are entitled to a just and expeditious hearing. It is important that to the best of the Court's ability the parties are facilitated to participate in the proceedings concerning their children's welfare to the fullest possible extent. In the applicant's case he is of the very strong view that Mr K's services will be of assistance in the course of the case. He feels the system is "stacked against him" and Mr K's knowledge and skills are required to help him to put his case in the best possible fashion. No issue with such a course would be taken in the Criminal Courts because of the fundamental principle that granting the right to have a "McKenzie friend" "should not be confined to cases where there is a strict necessity".

It is also a principle that it is proper to exercise the discretion to "secure or promote convenience and expedition and efficiency in the administration of justice". The principles are no different in the Family Court. While in some quarters because of confidentiality a mystique shrouds the Family Court and suspicion of its operation follows in fact its operation on fundamentals such as those I have identified is no different. The administration of justice lies not only in the reality of the practice and procedure of the Court but also in the perceptions of litigants. For the applicant to feel he has been heard and that justice has been done he simply wants the assistance of the proposed appointee. So long as the Court can be assured confidentiality will be maintained the Court has every confidence that the proceeding can be regulated in a way to ensure it is a just and expeditious hearing for the parties and for the children who are the primary consideration. The respondent mother is legally represented and could suffer no prejudice by the appointment as her counsel has the opportunity to make representation as to procedure throughout the hearing if that were to prove necessary.

While I have formed a clear view that Mr K is partisan I do not consider that he should be precluded from fulfilling the role of "McKenzie friend" for that reason alone. That will be a matter to be mindful of in regulating the hearing in the event that that causes Mr K to infringe any of the boundaries affirmed and set out in the Mihaka decision.

I therefore make the following directions;

(1) Mr K shall be entitled to be present to assist the applicant as "McKenzie friend".

(2) He shall be required to observe the limits of that role as set out in the memorandum approved by the High Court in the Mihaka decision.

(3) He shall not be entitled to retain any copies of any of the pleadings or reports in this proceeding.

(4) He is precluded from being a party to any publication of any part of the pleadings or any details leading to the identity of the children or parties to theproceeding.

(5) No costs shall be awarded on this part of the hearing.