

Long Overdue and quite restrictive Changes to the "In Camera" Rule in Family Law Courts.

www.liamog.com Liam Ó Gógáin 29th March 2005

Chief Justice Keane (Supreme Court April 2 1998) stated that "the most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy".

Section 40 (5) of the Civil Liability & Courts Act 2004 states that:-

"nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from being accompanied, in such proceedings, in court by another person subject to the approval of the court and any directions it may give in that behalf."

This section of the act will come into force in law on 31st March 2005. It specifically relates to the area of what is known in family law as "the McKenzie Friend". Up until now the whole area of law and the practice in relation to the use of a "McKenzie Friend" has been quite unclear in Ireland. In certain cases people have managed to be able to bring into court with them a friend who was able to sit along with them during the court hearing and to assist them, in terms of sifting through documents, or taking notes, or by listening to the evidence being given or statements being made by the other parties legal team. In relation to these areas they might be able to assist their friend by suggesting questions or strategies to use during the court case. The presence of a friend, particularly in the austere, intimidating and often frightening environment of the secret private family law courts, can be a powerful support, particularly to a lay litigant who is taking on the might of the legal profession when representing themselves in court.

There have been other cases where people have tried to bring in an assistant or a friend into court and this friend has been refused admittance to the court by the judge. Despite some law reports in relation to McKenzie Friends which emanated particularly from England there is reassurance of knowing in advance whether or not this friend would be allowed in court by a particular judge. The

change now being brought about in Section 40 of the Civil Liabilities & Court Act 2004 has the potential to be quite a powerful force for change in terms of exposing potential abuse of process and discriminatory treatment by the judiciary or members of the legal profession against anybody in the Secret Family Courts.

Before looking into some of the potential possibilities of using this modification to the act I must first state a caveat to the possibilities. It says in Section 40(5) that ***“a party”*** may be ***“accompanied, in such proceedings, by another person”***, but then states that it is ***“subject to the approval of the court and any directions it may give in that behalf”***.

At present as there is no further definition or clarification in relation to whether the powers of the sitting judge in each situation are boundless and whether, effectively, a judge can simply decide that, because they dislike someone, they don't want their friend in court. Neither is there guidance on whether the decision-making by a judge, in relation to allowing a person to be accompanied in court should be in some way based on precedent.

However it would be my opinion, that if the opening of this door, which clearly supports the principle of one being able to bring a friend to court, is firmly and continually pushed open and if the records of each opening are reliably and accurately recorded, meshed together and made traceable and readily available (such as on the web), then I believe that it is possible within a very short space of time, that the facility of being able to bring a friend to court, would become a right as a matter of precedent and routine, only to be refused in extreme circumstances, and in situations where it should be possible to successfully require that the judge would put on the record and in writing their clear reasons for refusing to allow a friend in court in a particular situation.

In order to develop and extend the culture of this precedent I would be strongly encouraging everybody going to a family law court from the 1st of April 2005, to insure that they bring a friend with them to be present in the proceedings. Even at this time, if they have no particular role for the individual to play, just the very presence of this person as a witness to the proceedings will: -

- 1) be of benefit in terms of establishing the precedent of being allowed to bring a friend,
- 2) and the reflections of this person with the litigant after the case can be extremely helpful in terms of evaluating the outcome of the case and in terms of decisions made for future hearings.

Bringing a friend to court, who knows a lot about the detail of the family situation, can be very helpful, in terms of the concept of two heads being better than one, particularly when reflecting afterwards on the events of a particular court case. It could also be vital to have a friend in court who knows the family situation, particularly in light of the fact that a statement may be made during the hearing which this friend could be in a position as a witness to give valuable information to the court. Thus, by their being present, the litigant could seek to have their friend give evidence at that time, perhaps in response to statements made during that court hearing by the other side.

The question of being accompanied arises in relation to a litigant who is being represented by a legal team vis-a-vis a lay litigant, someone who is representing themselves without a legal team. In my reading of Section 40(5) it does not in any way discriminate between lay litigants and those who are legally represented. Therefore my clear interpretation of this change to the act is that even if you are being legally represented you are still quite entitled to bring a friend to court with you. So, for example, if you are in the circuit court and you are being represented by a solicitor and a barrister, in my reading of the act, you should still be able to bring a friend with you to court.

Once again this could be extremely beneficial to the litigant who is legally represented, in a number of ways. Firstly, in light of the atmosphere of intimidation and fear (which may be partially due to the legal process itself and also partially due to the emotional and delicate nature of the family law issues and acrimonious matters at hand), it can be a great source of comfort to have a friend along with you who knows how you feel about the situation and who feels sympathetic towards the pressures that you are under. Such a friend could also be very resourceful in terms of discussions surrounding and leading up to the actual hearing itself with one's own legal team and then to be able to continue that involvement throughout the entire series of court cases. In this way the friend is fully up to speed with the details of the events of the case, and can therefore be an effective and useful ongoing resource when discussing the outcomes of a court hearing with one's own legal team.

In some unwritten and unspoken ways such a friend can also act as an independent monitor of the quality of performance of service delivery by the solicitor and barrister that you employ. From my experience of dealing with legal professionals and from the reports of others who have spoken to me over the years, I can see a potential area of difficulty where I think that there could be a lot of pressure put by legal advisors on litigants not to bring a friend to

court as well as their legal team. However, once again I would encourage anybody going to court to insist on bringing a friend, (even in a quiet and unobtrusive capacity) along with them, in the role as a good listener, but most importantly to establish the principle and routine of bringing a friend to court.

Consider also the changes in the Children's Act 1997 which provides a situation where members of extended families, grandparents, aunts & uncles and cousins etc, and in fact anyone who has a meaningful relationship with children, can themselves apply to the courts to seek a direction in relation to contact with these children. Combine the Children's Act 1997 with the changes in Section 40(5) of the Civil Liability & Courts Act 2004. Then this implementation of the 2004 Act could be very helpful in terms of acclimatising members of the extended family to the nature and environment of what goes on in a family law court. For example, if grandparents on the litigants side of the family have an issue in relation to developing or maintaining their relationship with their own grandchild or grandchildren and if they are either thinking of or can see the situation emerging where they will themselves apply to the courts for access and contact to these children, then if they were to attend the court with their own son or daughter, who are litigants in their own family law case, as a friend in court.

This can assist them in a number of ways. Firstly, just by being present in the court room and hearing the events of the family law case, they are automatically informed and up to date with the detail of what actually is being discussed and what tactics are being used in the family law hearing. In a situation for example, where negative statements are being made in relation to the involvement of the litigant's extended family and perhaps grandparents on one side, the grandparents would actually be present in the court and the litigant could then ask for them as witnesses to respond to the negative statements made about them. Furthermore, by being present, the grandparents themselves would be better equipped to prepare their own cases in relation to applications in their own names under the Children's Act 1997. One could possibly extend this to hoping that if grandparents then decided to make an application themselves under the Children's Act 1997, they could seek to have the case heard in front of the original judge who heard the family law case that they attended earlier as a friend. They could then remind the judge about the events and statements made in the initial court case. This seems to be sensible anyway, to keep all of these cases as part of a continuum in front of the one judge.

In many cases where the fathers are the litigants in courts, particularly where a situation has evolved where the mother has

effective sole custody, whether it is that she has secured a barring order against the father of her children, that she has left the house and taken the children with her, or if she has created a situation, whether by manipulation or by threat or even by negotiation the father is no longer resident on a daily basis in the family home, the situation often exists that when a father goes to court he is often quite alone. There is very little culture of practical support for men in situations such as these. For very practical reasons, often their friends are actually working, and because a court hearing can involve waiting aimlessly outside court, sometimes for days on end, to get a hearing, it is quite a lot to ask of your friends to simply take time off work to accompany you to the court building itself but not actually to be allowed to be part of the hearing, and effectively to have a very limited capacity to be able to support you in a court case. At least now, if someone was to take time off work to spend time with you, they would be effectively guaranteed (as long as once again the principle of using a friend in court is firmly established as a normal practise in courts) to make use of their time. I think in those circumstances that one would find it easier to arrange to have friends take time off from work and accompany one to court.

I would like to reflect on some considerations that one might have, when choosing who to get to accompany you to court. First of all, Section 40(5) of the act seems to be quite clear (or is it?), when it states "Accompanied ... by another person". The question which arises for me is whether it should be one person, more than one person or why it should be limited to only one person. For example, it seems to me to be quite possible that you could have a lay litigant on one side who is entitled to bring one person to court with them, facing a party on the other side who is represented by a solicitor, barrister, a devil (who is a trainee barrister) and also a friend in court. In other words, one person has one person accompanying them while the other person has three or more people possibly accompanying them in court. Straight away there is an imbalance, in terms of number alone.

Another issue for me is that once the major shift of thinking has been arrived at, which now allows in principle the concept of actually being allowed to have a friend in court (I use the word "friend" quite informally while the act only defines it as "another person"). I would suggest that over time the issue of whether it be one person or more than one person could be teased out through developing precedents in the courts themselves. For example, I would argue that if I was a litigant in a court and I wished to be accompanied by the grandparents on my side of my children, that it would be discriminatory of the courts to only allow one of the grandparents to attend court.

I would also argue that it would not be in the best interests of the children in the long term to have a situation where two grandparents might subsequently apply for contact and access under the Children's Act 1997, in a situation where one of the grandparents had previously had the opportunity to get themselves up to speed and understand the nuance and detail of the case, having been present in the previous family court hearing while the other grandparent did not have the same experience, and furthermore in my understanding of the "In Camera" rule the grandparent who attended the court case would in fact be clearly in breach of the "In Camera" rule if they were to discuss the contents of the family law hearing with their husband or wife. Such a narrow minded decision would be likely to cause confusion and potential acrimony between two grandparents. It could also lead to confusion and misinterpretation in the case of them seeking contact and access themselves, as grandparents under the Children's Act 1997, and cause more unnecessary difficulty for the courts and potentially unnecessary problems for the children also.

In choosing a suitable person to accompany you to court you need to ask yourself what role that you would like them to play?

1. Do you want them there simply as a silent spectator in a court case?
2. Do you want them to act in some way as a recorder of the events that took place in the court case?
3. Do you expect them to be able to recall accurately details of who said what, when and where and/or do you expect them to write this information down in an accurate way?
4. Do you want them to sit physically beside you in the court?
5. Do you want them there as an emotional comfort and support and if they carry out this role will playing that emotional supportive role interfere with their capacity to comprehensively and accurately note and record the details of the court hearing?
6. Do you want this person to participate in the negotiations with your legal team, if you are being represented by a legal team. If you are a litigant in person, do you want this person to participate in negotiations with the legal team on the other side or directly with the respondent in the case?
7. Do you want that person to be involved in such negotiations in the build-up to the court case over the previous number of weeks, on any potential negotiations that might occur on the

steps of the court on the morning of the court (hearing) itself, in terms of any reflection, negotiation or decision making that might take place spontaneously during the trial or hearing itself and do you want them involved in negotiations during the debriefing process after the hearing?

Depending on the answer that you come up with for these questions you really need to think about the person who has the most suitable skills for such a process. Somebody who may be a strong emotional support and can be very empathetic to your needs in terms of getting over your fears of sitting in court etc, may be pretty useless in terms of keeping accurate records of what was said during the hearing. You might also have somebody who is very emotionally supportive of you and supports your every position, without challenge and this person's reflections with you after the court case could potentially purely amplify your own misinterpretations or misjudgements about what actually went on, whereas someone who takes a more detached position might be able to give you a perspective on what was said which is separate from the legal view, but which is fundamentally coming from a position which supports your wellbeing. In this case you will have confidence in that support but it can also help you see things from an angle which, because you are so deeply emotionally involved, you may not be able to see yourself.

If you decide to bring someone to court with you with the intention that they will act as a witness and recorder to the details and events of the court hearing, then it is my suggestion that: -

1. Such a person should have proven note-taking skills,
2. Have a high level of accuracy of recall,
3. Possess an ability to concentrate for protracted periods of time on detail,
4. The person should be well acquainted with all documentation that exists in relation to the hearing prior to the court hearing itself.

For example the person should have read all of the affidavits pertaining to the case and should be briefed on the nuances and the details of what the application is about. Given that most people do not spend their time in any type of court and that in many cases of family law this is the first time that either the litigant themselves, or a member of their family or friends, will have any experience of the family courts, then the question arises as to whether any one of ones' friends or family would possess the cold, clinical, proven skills to carry out the accurate note-taking and reflection role. It may be

that within a range of support groups that it might be a good idea to try and develop a few people with the skills of accurate note-taking who would, over a period of time, build up a bank of knowledge and skills to play this role effectively.

I am seeing here a new role in family law, someone who is different to a solicitor or barrister and also someone who is quite different than a full-scale professional stenographer. One of the thoughts that I have here is of utilising mind mapping software resource, using features such as rapid fire and audio recording tools within mind mapping software. Using this software such a person in court could be an effective recorder rather than simply a word-accurate transcriber, whose contribution could be to capture a lot more than just what is said in the court.

In the event that you are a lay litigant in a court hearing and you have brought someone along to accompany you who is going to keep an effective record of the details of what is going on in the court hearing, I think that it would be very important to have such a person placed by your side throughout the hearing. In order to ensure that you give them the maximum opportunity to accurately record whatever detail they need, then it would be worth while for the lay litigant to proceed at a slower pace in terms of delivering information, so that their friend can record it comprehensively.

There are many situations in family courts where either a particular person speaks in very inaudible tones, or where somebody says something which is not either audibly clear or easy to understand. In this case I think it is important that the lay litigant develop the technique to ask someone to either repeat themselves or to explain it more clearly, even to the extent of explaining to the judge that the purpose of this is to allow your friend to get an accurate recording of what is being said. Whilst my experience to date with the family law court suggests that either judges, and/or solicitors and barristers would find it quite unsettling that there would be someone outside of their sphere of influence and control who would be taking reusable records about what has been said in the court. Initially they might be very unreceptive to this change of court practice. I don't believe that there is any statutory or legal basis that they could use to reasonably block the requests for the hearings to proceed, in such a way that the notes and records taken can be of the maximum level of accuracy.

It is important to be able to point out to everybody involved in a court case, judges, barristers and solicitors etc. that if they are acting in an ethical and professional manner, then there is nothing that an accurate recording will ever do which can bring them or their reputation into disrepute.

A question arises as to how one can give legitimacy and status to the notes recorded by one's friend in court. It is my suggestion that a copy of the notes, and any typed up version of the audibly recorded version should be bundled together and packaged as soon as possible after the hearing. I would suggest that it be either done on the same day as the court hearing or within, say, 48 hours. This information in whichever format it is available, should then be sent by registered letter to the clerk of the court, with a covering note enclosed, asking that the information contained, as contemporaneous notes of the details of the court hearing, are formally inserted into the court file at the appropriate position. Subsequently, in any future hearing, a litigant can make the argument that these notes, being contemporaneous or at least produced within the following 48 hours should have a high level of integrity associated with them, bounded only by: -

- a) The technical accuracy of the recorder.
- b) The personal integrity and trustworthiness of the recorder.
- c) The ability of the recorder to understand and interpret what was being said.

What are the implications in terms of the maintenance or breach of the "In Camera" rule, of having had another person in court with you and subsequent discussions that might take place in terms of the contents of the family law hearings? Under the present application of the "In Camera" rule no one is allowed to discuss the contents of a family law hearing outside of the hearing itself. What this is taken to mean is that a litigant cannot just go off and talk to their friends or family about what is going on in the court hearings and certainly cannot talk to the public at large or the media about the contents of what went on in court. Much more importantly the litigant in a family law court cannot discuss the details of the court case or the standard of justice or professional conduct even with the legislators, the elected representatives in the Dáil or in the Seanad who themselves are expected to be competent, in terms of evaluating and passing legislation in relation to the "In Camera" rule, a conundrum which in itself I suggest makes the legitimacy of the "In Camera" rule in its present form preposterous and impractical and actually undermines the legitimacy of the democratically elected Dáil and Seanad. A suggestion that I would make is that the litigant going to court should invite their local TD to sit in on the court hearing, and basically challenge TDs' that if they really want to know what is going on in the family law courts and if they really want to do their job competently and properly, then they should avail of these opportunities to sit in on family law cases, as the other person in court.

Furthermore, by inviting journalists along as the other person in court, the opportunity arises to educate journalists and those people who inevitably inform public opinion, to have first hand knowledge of what is actually going on in the courts. It is true that Section 40(5) enables the court to set down certain directions in relation to the other person being in court. However there is no reason why a reasonably competent and honourable journalist could not come to an agreement with the judge in relation to hearing the details about what is going on in the family court, and perhaps after hearing a number of similar court cases, they could produce valuable journalistic output which could give the public at large insights into the factual side of family law, rather than anecdotal stories that have permeated the media to the present time. Journalists could well do this, without in any way exposing or identifying particular parties or individual children in any of these cases. Choosing journalists with a track record of credibility in relation to the courts, and who have perhaps reported to a satisfactory level on sensitive court cases, such as rape trials, or other cases, where the judge has given directions, as, regards to the extent of what can actually be published in the papers and can develop the level of professional competence and awareness among journalists and hopefully help to bring the light of public scrutiny into the private family courts.

I have considered the elements of Section 40 of the Civil Liberties & Courts Act to be a very small and conservative move away from the blatant injustice and corruptible culture of the Secret Family Courts. However, I still believe that it is necessary to use this minor modification as a wedge and to keep pushing for further transparency and accountability, in order to provide a quality assured and ethical judicial system, within the family courts.

The next question that arises for me is:- "What is the necessary step from bringing a friend to court to the implementation of fully recorded hearings?" For example, if I bring a friend to court with me who equips themselves with a digital voice processor and a suitably specified microphone, and they set this voice processor up in such a way that ensures that all the voices are properly picked up and recorded, and offers to provide for the court an exact copy of the recorded information, then based on the argument that all that can be recorded is what was actually said in the court, which presumably from the perspective of justice is what we should all be trying to achieve, and that the friend would use this recording as a means of effectively supporting the litigant in question, then I believe that the argument for producing factual and accurate recordings of the details of what is going on in court would be moved one step further along the ladder.

I believe that the other elements of Section 40 that relates to the production of documents, or records of what transpired in the family courts, can be used to support this argument. I am not in any way here suggesting that these records would or should be used to breach the "In Camera" rule, but that in producing accurate records while simultaneously applying pressure, using other sections of the act, particularly in relation to the monitoring of, and properly dealing with allegations of professional misconduct, whether by the judiciary, members of the legal profession or other expert witnesses, would enhance the argument for full recording of all hearings.

If a litigant is to make effective use of their friend in court during the actual hearing, by seeking their feedback and opinions, in relation to how to proceed during the court hearing itself, then I suggest that the litigant would consider communicating this wish specifically to the judge at the outset of the hearing. My experience, in general, has been that there seems to be an incredible reluctance to allow reflective dialogue to take place between litigants and their legal team, or even between the members of the legal team itself during a hearing. One can often see people speaking in hushed tones in court, almost like bold schoolboys at the back of the classroom, when in fact if cases are to be competently prosecuted then I suggest that it is perfectly reasonable that people should be able to call for time-out to consider a nuance, a point of law or some new information that has suddenly emerged. There is no rationale that I know of, in terms of legislation and court rules that prevents a situation where the litigant would ask a judge for some time to reflect with their friend, whether that be while the judge and the other parties remain present or by seeking an adjournment for a couple of moments.

Conclusion:-

In my vision of what could be achieved by using the breakthrough in Section 40(5), I envisage the following situation: -

One could have a litigant who goes to court and retains the services of a solicitor and barrister, recognising their practised professional technical legal skills, knowledge of the detail of court rules and their skills in strategies and methods of prosecuting a particular case. The litigant would also be accompanied by one or more persons, who would accompany them throughout the proceedings. For example, one of the people could be there for

purely emotional support, to enable the litigant to overcome or deal with their nervousness, or sense of intimidation and fear. Another person could be there, who is skilled in the area of effective recording and capturing the overall sense of what is happening in court, along with the relevant and critical details of what is said during the court hearing. One might also be accompanied by a member of one's extended family who may themselves be either preparing for, or even already party to their own application under the Children's Act 1997 in relation to contact and access to children. Subsequent to the court case the litigant and friends could then debrief with the legal team to analyse and interpret the outcome of the court hearing and to make decisions in relation to future court hearings or developments with the benefit of the actual knowledge of what went on in court. After the court hearing the litigant could reflect with their friend who accompanied them, who was the effective recorder of the hearings, produce a contemporaneous record of what had actually transpired in the courts and insure that this record is sent by registered post to the clerk of the court and request that the record is actually placed on the file in the court system. The litigant could also be accompanied by either/and journalists, educationalists, religious leaders and public representatives as part of a process of informing these people about the facts of what transpires in the family courts, so that the informing of the opinions of these people of influence in our society could be based on factual experience rather than anecdote as it presently is.

Liam Ó Gógáin

29/03/05

"Good Law Makes Good Sense, Bad Law Makes Bad Sense"

.....SeanLaw

Late breaking news:-

On Friday April 1st 2005, after 5pm, the Courts Service posted Practice Directions as a temporary measure (since the rules were not completed on time) to facilitate the implementation of Section 40(5) among other sections in the courts immediately. Link to <http://www.courts.ie/directions.nsf/High%20Court?OpenView&Start=1&Count=30&Expand=3.3#3.3> to see the "Practice Directions"

information. A sample form from the site at courts.ie is included below.

Note:- The practice laid down sets out a 7 day notice period which must be given to the court and to the other party, if one intends to be accompanied.

"that party shall, unless the Court otherwise directs, by motion on notice to the other party or parties returnable not later than **seven days prior** to the date fixed for the hearing of any such proceedings, apply to the Court to approve the accompanying of the party by such person and for such directions as the Court may give under section 40(5) of the said Act"

The form requires the applicant to set out their relationship with the person who intends to accompany them and the wording suggests either familial or friendship ties. I argue that this is a narrow interpretation of "another person" as defined in the Act and should possible be challenged.

In spite of these typical restrictions which may serve to inhibit monitoring the quality of justice meted out in the courts, I still believe that a positive and assertive approach by litigants, who are mindful of the Act should

Relationship or connection of person referred to in paragraph 2 to *Applicant/Respondent (*e.g. parent, brother/sister/ family friend etc*).....
.....
.....

successful begin to break down the culture of secrecy that has damaged the reputation of our family court system

Liam Ó Gógáin
1st April 2005

APPENDIX

THE HIGH COURT
FAMILY LAW

In the matter of the _____ Act 19 ____ (as the case may be)
and in the matter of section 40(5), Civil Liability and Courts Act 2004

Between

A.B.

the Applicant

and

C.D.

the Respondent

**Request for Court’s permission to be accompanied by a person at the hearing of
proceedings**

1. Name of party applying to be accompanied at hearing.....
.....*Applicant/Respondent
nt

2. Name and address of person who it is proposed will accompany the *Applicant/Respondent
.....
.....

3. Relationship or connection of person referred to in paragraph 2 to *Applicant/Respondent (*e.g. parent, brother/sister/ family friend etc*).....
.....

4. I *have/*have not previously obtained the permission of the Court to be accompanied in these proceedings. (If permission has previously been granted, give details of the person who was permitted to accompany you).....
.....
.....

Dated: 20

Signed: _____
*Applicant/Respondent