

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE <https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT MANUKAU**

**I TE KŌTI WHĀNAU
KI MANUKAU**

**FAM-2014-092-000139
[2024] NZFC 2588**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MARTIN FARRIER] Applicant
AND	[JAMILAH SAAD] Respondent

Decision: 12 March 2024

IN CHAMBERS DECISION OF JUDGE A P GOODWIN

[1] [Martin Farrier] (Mr [Farrier]) and [Jamilah Saad] (Ms [Saad]) are the parents of [Olivia Farrier] ([Olivia]) aged 12. They disagree about [Olivia]’s parenting arrangements and after the filing of further evidence as directed at a directions conference on 27 February 2024, it is anticipated a hearing will be allocated.

[2] On 7 February 2024, Mark Pillay made an “*application for allowance as lay advocate / representative*”.

[3] This chambers decision addresses Mr Pillay’s application. No evidence is filed in support. The application states:

As it pleases the court,

1. I, Mark Pillay, a community supporter, McKenzie Friend, and lay advocate, of Auckland, give notice of my application for an allowance by the court to advocate and/or represent the applicant in the abovementioned proceedings.
2. I seek this allowance relying on the exception under s 27 (1)(b) and (c) of The Lawyers and Conveyancers Act 2006, to represent and/or advocate for the associated respondent in proceedings.
3. To the best of my knowledge, the applicant is currently unrepresented and is either unable or unwilling to access counsel for the purposes of progressing their case.
4. To the best of my knowledge, the unrepresented party lacks the acumen, confidence, and ability to articulate their case and file documents in support.
5. The unrepresented party has sought community support and was not approached, solicited, or given advice about their case, prospects, or representation.
6. I am sufficiently acquainted with the associated respondent, situation and details of the case and the associated respondent is benefiting from community support.
7. I am experienced as a former litigant, McKenzie Friend and Lay Advocate in the Family Court and sufficiently acquainted with rules and etiquette and respectful of the Judge's directions and discretion regarding the extent of the allowance sought and my participation at any time.
8. The applicant and I have previously filed the prescribed McKenzie Friend application and undertaking respectively with the registrar before the start of proceedings which confirms acceptance of limitations and my commitment and respect for the procedural integrity of the court's business.
9. There are no charges or fees associated with my advocacy, representation, or support of the applicant.

As it pleases the court.

[4] Mr Pillay says he is a *McKenzie friend*. There appears to be no application on file for a *McKenzie friend*, nor the required signed undertaking.

[5] The application raises the following questions:

- (a) Can Mr Pillay apply;
- (b) Does the role he applies for exist;

- (c) Does Mr Pillay have a right of audience;
- (d) Can Mr Pillay be appointed as *lay advocate/ representative* pursuant to s 27 of the Lawyers and Conveyancers Act 2006 (LCA); and
- (e) Are the Family Court's inherent powers relevant.

Can Mr. Pillay Apply?

[6] All proceedings in the Family Court must be brought and dealt with in accordance with the Family Courts Rules 2002 (FCRs) unless the Family Law Act that the application is made under provides otherwise.¹ Part 5A of the FCRs sets out special rules prescribing the procedure in the Family Court for applications pursuant to the Care of Children Act 2004 (COCA).²

[7] The rules provide no basis for a person other than a party, or a lawyer, to file an application within proceedings to which they are not a party. Mr Pillay has no standing to file an application in these proceedings. Therefore, there is no jurisdiction to apply to advocate for or represent the applicant.

[8] Mr Pillay says he is a *McKenzie friend*, although that appears not to be the position on the file. In any event, a *McKenzie friend* (or more accurately *lay assistant*) provides no right to make an application, the role is limited and discussed further below. Therefore, if Mr Pillay was a *McKenzie friend/lay assistant*, that provides no standing to make the application.

[9] The application fails at the first hurdle. However, I consider the other questions in anticipation of Mr [Farrier] making the application for Mr Pillay's appointment.

Does the role exist?

[10] Mr Pillay says he is Mr [Farrier]'s *McKenzie friend*, which appears not be the case, but that could be a registry error. The term *McKenzie friend* and *lay assistant* are

¹ Family Court Rules 2002, r 5.

² Family Court Rules 2002, r 6 (2).

terms often used in an interchangeable manner. To be appointed, a party files the application, and the proposed *lay assistant/McKenzie friend* signs an undertaking. The role is limited to sitting beside the party, taking notes, quietly making suggestions, and giving advice, and assisting the party with questions and submissions for the party to put to the Court or witnesses. The role does not allow the *McKenzie friend / lay assistant* to address the Court or take any active part in the proceedings.

[11] The role Mr Pillay seeks goes beyond a *McKenzie friend / lay assistant*. He wants to be appointed a “*lay advocate / representative*” as set out in the application. He describes the role as including representation and advocacy.

Lay Advocate

[12] The role is defined in law and only available within the Oranga Tamariki Act 1989 (OTA).³ It is a limited role; its principal function being about providing the court with awareness as to cultural matters and representation of a child or young person’s interest. These proceedings are pursuant to COCA. There is no such defined role or person described or named in COCA. Similarly, there is no such role in the FCRs beyond the Oranga Tamariki Act.

Representative

[13] Rule 8 of the FCRs (the Interpretation Rule) defines representative as follows:

representative means—

- (a) a person treated as appointed as a next friend for a minor under rule 90B; or
- (b) a person appointed as a litigation guardian for a minor under rule 90C; or
- (ba) in relation to a child as defined in section 8 of the Family Violence Act 2018 and to whom section 62 or 140 of that Act applies, an authorised approved organisation; or
- (c) in relation to a person lacking capacity to whom section 67 of the Family Violence Act 2018 applies, a person appointed under rule 90D as a litigation guardian, or an approved organisation authorised by section 74 of that Act, to take proceedings under that Act on behalf of that person; or

³ Oranga Tamariki Act 1989, ss 163 and 164.

- (d) a person appointed under rule 90F as a litigation guardian for an incapacitated person; or
- (e) in relation to a person to whom section 69 of the Family Violence Act 2018 applies who is unable to make an application personally by reason of physical incapacity, fear of harm, or other sufficient cause, a litigation guardian appointed under section 69 of that Act, or an approved organisation authorised by section 74 of that Act, to take proceedings under that Act on behalf of that person; or
- (f) a person appointed under section 13 of the Harassment Act 1997 as a representative of a person who is unable or unwilling to make an application personally by reason of physical incapacity or fear of harm or other sufficient cause; or
- (g) a person appointed as a guardian ad litem for a person under section 10(1)(i) of the Protection of Personal and Property Rights Act 1988; or
- (h) a person appointed as an attorney for another person under an enduring power of attorney for the purpose of Part 9 of the Protection of Personal and Property Rights Act 1988 (but only if that enduring power of attorney authorises the attorney to bring or defend proceedings on behalf of the person, and only in a proceeding to which that authority extends)

[14] Mr Pillay is neither a next friend, or a litigation guardian, and he does not apply pursuant to the other stated legislation. There is nothing within this role that can be the basis of Mr Pillay's application as a *lay advocate / representative*.

[15] Therefore, there is no such role as *lay advocate / representative*. It does not exist.

Does Mr Pillay have a right of audience?

[16] In his application, Mr Pillay seeks to advocate for Mr [Farrier]. Section 107 District Courts Act (2016) (DCA) states:

107 Right to appear

- (1) A natural person who is a party to a proceeding in the court may—
 - (a) appear and act for himself or herself; or
 - (b) be represented by a lawyer.
- (2) A corporation may—
 - (a) appear and act through any officer or attorney of the corporation; or
 - (b) be represented by a lawyer.
- (3) In special circumstances and with the permission of the court, a person (P), whether a natural person or a corporation, may be represented—
 - (a) by an agent authorised in writing by P, if P is in New Zealand or carries on business in New Zealand; or

- (b) if P is not in New Zealand or does not carry on business in New Zealand, by an agent authorised by a person holding P's power of attorney to become a party to the proceeding in P's name.
- (4) An agent who represents a person under subsection (3) is not entitled to receive any fee or reward for doing so.

[17] Mr Pillay is not a self-represented party nor is he a lawyer. Can he be considered an agent in special circumstances? Section 107 of the DCA applies to the Family Court as it is not in conflict with any provisions of the Family Court Act 1980.⁴ In *Accident Compensation Corporation v Carey*, Grice J considered s107; although this was a Civil High Court case, and provides no guidance as to the application of s 107 in the Family Court, it provides a useful distinction in the terminology for the term “agent” in the section as *principal / agent* from *lay advocate / client relationship*.⁵

[39] Section 107 of the District Court Act prohibits an agent or attorney “who represents” approved person from receiving a fee or reward. However, that must be read in context. Section 107 (3) allows the Court to give permission to a person to be represented by an agent authorised in writing or an agent authorised by a person holding a relevant power of attorney to become a party to the proceeding in the name of the litigant. The reference to “agent” here indicates a principal / agent relationship, rather than a lay advocate / client relationship. This is reinforced by the reference to appointment under a power of attorney. The donee of a power of attorney subject to the terms of appointment steps into the shoes of the donor. That contrasts with the nature of representation contemplated....

[18] The term *agent* is specifically contained in certain legislation, for example, the Family Proceedings Act 1980 where a person authorised in writing can apply as an *agent* on behalf of another person for maintenance (see ss 155 and 157) and the Child Support Act 1991 where an *agent* can seek exemption from Child Support or for a formal assessment (see ss 89ZE and 238). Therefore, the term *agent* is contained within specific legislation. There is no such term in COCA. Given there is no role of *lay advocate / representative*, that role would not come within the term *agent*, which has its own meaning.

[19] Therefore, the term *agent* in s 107 DCA does not allow Mr Pillay advocacy rights.

⁴ Family Court Act 1980, s 16.

⁵ *Accident Compensation Corporation v Carey* [2021] NZHC 748 at [39].

Jurisdiction Pursuant to Section 27 Lawyers and Conveyancers Act 2006 (LCA)

[20] Mr Pillay relies on s 27 as jurisdiction for his application. Section 27 states:

- 27 Exceptions to sections 21, 22, 24, and 26
- (1) Sections 21, 22, 24, and 26 do not prevent—
 - (a) any person from representing himself or herself in proceedings before any court or tribunal; or
 - (b) any person from appearing as an advocate, or representing any other person before any court or tribunal if the appearance or representation is allowed or required—
 - (i) by any legislation; or
 - (ii) by the court or tribunal; or
 - (c) any person who may, in accordance with paragraph (b), appear in any proceedings as an advocate or representative from—
 - (i) giving advice in relation to those proceedings; or
 - (ii) giving assistance in drafting, settling, or revising documents for filing in those proceedings.
 - (2) Sections 21, 24, and 26 do not prevent any person who works in a community law centre or who is employed by a community law centre from giving to a person who is or intends to be a litigant in person in any proceedings—
 - (a) advice in relation to those proceedings; or
 - (b) assistance in drafting, settling, or revising documents for filing in those proceedings.
 - (3) A person does not commit an offence against any provision of sections 21, 22, 24, and 26 by reason only of filling in, on behalf of any other person, a printed form required for the purposes of any proceedings before any court or tribunal if—
 - (a) the printed form is either—
 - (i) a form prescribed for the purpose of the proceedings; or
 - (ii) a form prepared by a person who, at the time when it was prepared, was an authorised person within the meaning of section 26(2); and
 - (b) it is reasonable to expect that the form could be properly completed by persons who were not authorised persons within the meaning of section 26(2); and
 - (c) no charge is made, directly or indirectly, for the filling in of the form or any service in relation to the filling in of the form.
 - (4) Sections 24 and 26 do not prevent a statutory officer or Crown organisation, or any employee of a statutory officer or Crown organisation,—
 - (a) from discharging any of his, her, or its duties, or exercising any of his, her, or its powers, under any enactment; or
 - (b) from doing anything that is intended to facilitate, or is conducive or incidental to, the discharge of the functions conferred on the statutory officer or Crown organisation by any enactment.
 - (5) Section 24 does not prevent a conveyancing practitioner from providing conveyancing services.

[21] The exceptions referred to in s 27 are:

- (i) Section 21, which says that it is an offence to provide Legal Services unless a lawyer.
- (ii) Section 22, which says it is an offence to hold yourself out as providing legal services or willing to provide legal services under the description of lawyer or practitioner, legal practitioner barrister, solicitor, barrister and solicitor, attorney at law or counsel.
- (iii) Section 24, which says it is an offence to carry out work reserved and described within s 6 whether for gain or reward, or not. Reserved areas of work are defined within s 6 (interpretation).
- (iv) Section 26, which says it is an offence to draft court documents for gain or reward, not otherwise being an authorised person to do so.

[22] The application by Mr Pillay relies on the exemption provided by s 27(1)(b) (ii).⁶ There are two reasons why this is an erroneous approach:

- (i) Section 27 is not an enabling provision. The section provides no power or discretion to make an appointment, it operates where one has been made. In any event, as established, there is no such role for which Mr Pillay seeks to be appointed.
- (ii) Section 27 is a protective provision for persons already appointed in a representative role in compliance with a legislative provision that allows that role or is permitted by the Court. The title of s 27 (ss 21, 22, 24 and 26) is an exemption to prosecution where offences are committed pursuant to those sections. It does not create an exemption as in a permission to act contrary to ss 21, 22, 24 and 26. Again, as established above, the role sought by Mr Pillay is not

⁶ Application by Mark Pillay dated 7 February 2024.

a role established by legislation or the courts or permitted by the court.

[23] There is no jurisdiction pursuant to s 27 LCA for the application.

Inherent Powers

[24] Does the Family Court have inherent powers to create the role of lay advocate or representative with advocacy rights?

[25] Rule 15 of the FCRs provides:

- 15 Matters not expressly provided for in rules
- (1) The Judge must deal with any matter not provided for by any enactment (including any of these rules)—
- (a) under provisions of these rules dealing with similar matters if that can be done; or
- (b) in a way decided by the Judge, in the light of the purpose of these rules, if the Judge considers the matter cannot be dealt with under provisions of these rules dealing with similar matters.

[26] However, r 13 of the FCRs limits the power and overrides rr 14 to 16. The rule states:

- 13 Practices must be consistent
- (1) A practice that is not consistent with these rules or a family law Act must not be followed in the court.
- (2) Subclause (1) overrides rules 14 to 16.

[27] The creation of a role that does not exist in either the FCRs or the COCA cannot be consistent with that legislation. To do so goes beyond a consistent practice.

[28] Therefore, inherent powers are unavailable to create a role that does not exist.

Conclusion

[29] With respect to the application:

- (a) Mr Pillay has no standing to make the application;
- (b) The role Mr Pillay seeks does not exist;

- (c) There is no advocacy right pursuant to s 107 District Court Act 2016;
and
- (d) There is no jurisdiction to apply pursuant to s 27 LCA 2006.
- (e) Inherent powers are not relevant to the application.

[30] The application is declined. Mr Pillay can remain a *McKenzie friend / lay assistant* if appointed, or Mr [Farrier] can make an application for Mr Pillay to assume that role if not.

Judge A Goodwin
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 12/03/2024