The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 15 of 2018

B E T W E E N:

KYLE LLOYD CONSTABLE

Appellant

- v -

CASSIE INOIA CONSTABLE

Respondent

Before: **Clarke, President**
Kay, JA
Smellie, JA

Appearances: David Kessaram, Cox Hallett Wilkinson Ltd., for the Appellant; Georgia Marshall, Marshall Diel & Myers Ltd., for the Respondent

Date of Hearing: **10 June 2019**
Date of Reasons: **10 October 2019**

REASONS

Ancillary divorce proceedings – appeal against orders for disposition of interests in matrimonial home – property acquired by funds gifted to wife and by bank mortgage – whether gift to wife to be regarded as matrimonial property – division of equity value in the property having regard to contributions and needs of parties – Assistance by McKenzie friend – whether friend must be a lay person – scope of assistance allowed.

SMELLIE JA:

1. By way of Application to the Supreme Court for Ancillary Relief on 18 August 2017, the Respondent Mrs Constable, sought periodical payments for the child

of the marriage and a property adjustment order in relation to the former matrimonial home (the "FMH").

2. By way of cross- application on 11 December 2017, the Appellant, Mr Constable, sought orders in relation to the sharing of various expenses for the child, for the variation of periodic and maintenance payments for the child, for a pension sharing order and a property adjustment order in relation to the FMH which is held jointly in the names of the parties.

3. By her judgment of 23 July 2018, Justice Stoneham rejected Mr Constable's cross-application in relation to the expenses and payments for the child and ordered instead that the sum of $1000 per month which had been paid by him towards nursery school fees should continue to be paid by him by way of contribution to the child's maintenance, until further order of the Court. In relation to pensions, she held that, given the parties' ages, they should retain their respective pensions without any adjustment.

4. Applying what she described as the "*principle of need*", the learned judge ordered the transfer of title to the FMH, held in the joint names, to Mrs. Constable, together with any net equity in the property, save that Mrs Constable was to pay to Mr Constable a lump sum representing 50% of the sum by which the mortgage had actually reduced as at the date of Mr. Constable's last contribution to the mortgage payments. At the time of the judgment, as the mortgage had been reduced by $55000, this lump sum payment would have been $27500. Thus, save for the even sharing in such value in the FMH as could be ascribed to the reduction of the mortgage, the net value of the property should be awarded to Mrs. Constable alone. This outcome the learned judge considered as also ensuring that the FMH would not have to be sold to raise the funds for the payment to Mr. Constable.

5. The central focus of the learned judge's decision in this regard, was a gift of $313,647 from Mrs. Constable's father for the acquisition of the FMH which, in her decision, was treated as having retained its character as a gift to Mrs. Constable and so as non-matrimonial in nature. This treatment was important to our determination of the appeal and will be the subject of further discussion below.

6. Mr. Constable appealed[1] against the judgment on a number of grounds which challenged the learned judge's decision on the division of the equity in the FMH, as well as her analysis of the respective earning capacities, future financial prospects, needs and contributions of Mrs. Constable and himself.

7. He also appealed against the order for child maintenance payment but, by a letter of 14 June 2018 from his attorney Mr. Kasseram, he informed this Court that an agreement for an order for maintenance of the child of the marriage, Kyle Jr., had been reached between the parties. Terms had also been agreed for the joint custody of Kyle Jr. Accordingly, no further disposition is required from this Court in relation either to his custody or maintenance.

8. Ultimately, the relief sought from this Court by Mr. Constable became:

   (i) An order that he be awarded half of the net equity in the FMH, and
   (ii) A fair consideration of the gifted assets to the parties constituting marital or non-marital property based on the "*sharing principle*" or the "*needs principle*".

[1] This was as of right in relation to the final orders in disposition of the respective interests of the parties themselves, but with the leave of the Court in relation to the periodical orders for maintenance and custody which affect the welfare of the child; orders for periodical payments being generally regarded as carrying liberty to apply and so as interlocutory and non-final in nature. See ***Whayman v Whayman*** , a decision of this Court delivered on 30 November 1989, in separate judgments per Sir Alistair Blair-Kerr P and Sir Denis Roberts J.A, in Civil Appeal No.1 of 1989.

9. However, as the only relevant "*gifted assets to the parties*" was the gift of $313,647 from Mrs. Constable's father towards the purchase of the FMH, these two heads of relief are inextricably linked and had to be considered together.

10. The FMH was purchased for $750,000 but the current value as at the date of hearing below and as reported in the jointly instructed valuation assessment, is $575,000. Taking account of the outstanding mortgage obligation of $435,300, this leaves a net equity of $139,700 and this is the sum, 50% of which Mr. Constable says should be awarded to him.

11. The only other significant asset is an interest in a garage business which is jointly owned and managed by Mr. Constable and his brother. Mr. Constable's evidence before the learned judge was that he gets an income of $2,700 per month from this business. This was evidence which the learned judge did not accept, having formed the view that Mr. Constable had failed to give full disclosure of the business records in the proceedings. Instead she found at [75] of her judgment that "*he has more available income and that such income is more than sufficient to meet his current rental accommodation needs and other related monthly living expenses"*. At [76] she found that he stands to benefit from the continued future income and profits of the business (to which Mrs. Constable laid no claim) but that in contrast, her contract of employment would soon expire. Further, she found that Mrs. Constable's future income is therefore far from certain.

12. By the time of the hearing of the appeal before this Court, the prospects for Mrs. Constable's future employment had, however, improved and this became a change of circumstance to be taken into account.

13. On 21 June 2019, we announced our decision that the dispensation of the learned judge should be adjusted to allow Mr. Constable one-third (33%) of the net equity in the FMH. This requires a payment to him by Mrs. Constable in the

amount of $46,101, instead of the amount of $27,500 (or the equivalent of 20% of the net equity in the FMH) awarded by the Court below.

14. We are satisfied that this payment will not require the FMH to be sold, so that it will be retained by Mrs. Constable, who will assume the outstanding mortgage obligation, subject, of course, to the agreement of the bank. The reasonable costs of transfer of title into her sole name will be borne equally by the parties, his half of which may be accounted for in the net payment to be made to Mr. Constable.

15. We granted liberty to the parties to apply to the Supreme Court for the resolution of any matters arising from our order, particularly as regards the settlement of the mortgage obligation.

16. A further ground of appeal was raised by Mr. Constable on the basis that his constitutional right to a fair trial had been impaired by the learned judge's refusal to allow his assistance by a "*McKenzie friend*"[2].

17. Although argued before us, this ground of appeal became moot as it was accepted by Mr. Kasseram that, in any event, a final disposition of the matter should be provided by this Court rather than by way of reference back to the Court below. As significant time and resources would have been spent to raise the argument both before us and below on what is an important point of principle, we promised to provide some guidance on this subject, as well as on the law of the substantive appeal, in written reasons to come.

18. We also awarded Mr. Constable his costs of the matters resolved on the appeal, with those costs to be taxed if not agreed, but no order was made as to costs relating to the proceedings in the Court below.

[2] As explained and approved by the English Court of Appeal per Davies LJ (as he then was) in ***McKenzie v McKenzie*** [1970] 3 All ER 1034, 1036C.

19. We now provide our reasons against the further background of the circumstances of the case.

20. The parties were married on 20 June 2009. Kyle Constable Jr., the only child of the marriage, was born on the 24th May 2013. The decree nisi was pronounced on 30 June 2017 and so the marriage had lasted for some eight years. It had been preceded, we are told by Mrs. Marshall, by some six years of co-habitation between the parties.

21. The parties resided in the FMH up to the conclusion of the hearing in the Court below, by which time, we are told, Mr. Constable had secured rented accommodation for himself and had been visiting the FMH only sporadically for looking after and visiting with Kyle Jr.

22. The parties each filed two affidavits in the proceedings, and Mrs. Constable filed a third party affidavit, that of her father Mr. Jose Andrade. In addition to their affidavits, the parties gave *viva voce* evidence and were cross-examined on oath in relation to their affidavits and disclosure documentation.

23. The evidence which arose was comprehensively considered by the learned judge such that we are satisfied that, other than in relation to their respective interests in the FMH, no adjustment should be made in respect of the payments for their ongoing or future financial needs. This is although it must be recognized that subsequent events have affected the learned judge's finding at [76] of the Judgment, that Mrs. Constable's financial future "*was far from certain*".

24. More particularly, it is in this context that we note that Mrs. Constable's terms of employment had, since the hearing below, become more established. As recorded at [42] of the Judgment, the learned judge found that Mrs. Constable's income effective 1 April 2018 was $72,000 per annum ($5,700 per month) as confirmed by a letter dated 31 March 2018 from her employer, JLT Insurance Management. This letter was by way of amendment to Mrs. Constable's

Statement of Employment which defined the contract term as "*initial 2 year contract which reverts to continuous employment upon completion of 2 years".* At the date of the hearing below, Mrs. Constable had completed just over one year of the initial term with no guarantee that she would complete her second year, and the uncertainty of her position was submitted by Mrs. Marshall to have been "*heightened by the well-publicized mergers and acquisitions within her employer's industry"*, a premise which the learned judge appeared to have accepted in her finding at [42], that "*This contract ends February 2019*".

25. At the hearing this Court was, however, informed by Mrs. Marshall that JLT Insurance Management had been acquired by another company and that Mrs. Constable's employment continued on more permanent terms, even though, as Mrs. Marshall still contended, "*the wife works in an industry that is in a state of flux - there is no guarantee to the wife as to her income*".

26. But however indeterminate Mrs. Constable's employment may be, the conclusion that it could (or would) end in February 2019, is now shown to be a wrong premise on which to resolve the competing claims of the parties in the division of the available assets. That wrong premise, when taken with the misdirection in law as to the treatment of the father's gift to which we next turn, required this Court to reconsider[3], especially, the resultant apportionment of the equity in the FMH.

27. Having extensively considered the evidence and the veracity of the witnesses at [23] to [53] of the Judgment, the learned judge found, incontrovertibly, that but for the father's gift[4], purchase of the FMH would have been outside the reach of the parties and that his gift allowed them to have a "*good start*". She went on however, to find that the monies given to Mrs. Constable retained their character as a gift to her and as non-matrimonial in nature. Taking into account Mr.

[3] See dicta explaining the strict basis on which this Court will set aside a discretionary decision and reconsider a matter, again from ***Whayman v Whayman,*** (above) per Sir Alastair Blair-Kerr P. at pp16 and 18.
[4] Which in the Judgment is erroneously stated as $375,000.

Constable's retention of his one-half interest in the garage business and the value of his vehicles and boat, she arrived at her determination that he should be awarded only the afore-mentioned 50% of the amount by which the mortgage principal had been reduced.

28. Mrs. Marshall urged us to uphold this decision as correct in law and as reflecting a fair division of the matrimonial assets. For this contention she relied especially upon the decision of Mostyn J. in ***JL v SL (No.2) (Appeal: Non-Matrimonial Property)*** [2015] EWHC 360 (Fam) in which he decided that the wife's inheritance of £465,000 was non-matrimonial property and should be excluded from the divisible pool of assets. It appears from the judgment that Mostyn J. had regard to the fact, among other things, that the inheritance had been acquired toward the end of the marriage and proceeded on the basis that "*matrimonial property*" generally so called, is defined as the product of the joint efforts of the parties during the marriage. It is clear however, from [18] and [19] of his judgment, that he also recognized that depending on the circumstances of the case, such an inheritance which he described as "*pre-marital property*", would not uncommonly become part of the economic life of the spousal partnership "*giving rise to a (not necessarily equal) sharing claim in relation to it".* For these purposes, he noted at [20], in terms applicable to the facts of the present case that, for obvious reasons, "*the span of the partnership is looked at de facto and not de jure. It is not looked at from the date of the marriage to the date of decree absolute. Rather it is measured from when the cohabitation began on a permanent basis until the date of the separation.*"

29. For the uncontroversial proposition that the courts should take account of the source of the assets, reference was also made by Mrs. Marshall to the decision of this Court in ***Astwood v Astwood*** *[2012] Bda LR 70.* There the Respondent was given credit, upon the division of the assets, for the value of the land on which the matrimonial home was later built because it was a gift to the Respondent alone from his father and grandfather prior to the marriage. That was of course, a decision reached on the particular facts of the case where the

petitioning wife was also awarded the sum of $250,000 for the purchase of a home, having regard to her reasonable requirements and the Respondent's ability to find a lump sum.

30. ***Astwood v Astwood*** does not stand for the proposition that assets gifted to one party to a marriage may never come to acquire the character of matrimonial property. Rather, the case proceeded on the basis that the award of $250,000 to the wife was a fair, albeit unequal division, of all the assets of the parties, having regard, among other things, to the fact that the Respondent husband who would keep the real properties, would remain indebted to a bank in the amount of $500,000.

31. It is in that context that the following passages from the judgment in ***Astwood*** appear, relying on principles from the leading case of ***White v White***, [2000] UKHL 54; [2001] A.C. 596 and implicitly recognizing that the duration of a marriage can affect the treatment of gifted property, in terms which we fully accept and adopt (from page 3 [21] to [23]):

> "21. *Simmons J [the trial judge] found as a fact, with which we agree, that the land on which the building was erected was contributed by the Respondent alone. As stated by Lord Nicholls of Birkenhead in* ***White v White*** *supra at page 610F:*
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> > "*Property acquired before marriage and inherited property acquired during marriage come from a source wholly external to the marriage. In fairness where this property still exists, the spouse to whom it was given should be allowed to keep it. Conversely the other spouse has a weaker claim to such property than he or she may have regarding matrimonial property.*"
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> *Bearing in mind the duration of the marriage (this) is not a proper case where equality is equity and a 50/50 division would be appropriate.*

> *22.Counsel for the appellant (wife) submitted that* ***White v White*** *supra transformed the Court's approach to cases concerned with the financial aspects upon divorce and that the principle that the Court should follow is that marital property is to be treated with equality in mind and be shared equally between the parties.*
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> *23. We do not read* ***White v White*** *as having that effect. It is not an authority in support of the principle that all matrimonial property should be divided equally. Such an approach would be to nullify the effect of the considerations listed in section 29 of the Matrimonial Causes Act 1974 [(and, we would add, the wide judicial discretion vested by that section)]. It teaches that one should strive for a fair outcome and that there is no place for discrimination as to respective roles. Further, a departure from equality should only be made with good reason.*"

32. Such good reason will likely be found in circumstances where valuable assets have been brought into the marriage by one party from a source external to the marriage, as was the case with the father's gift to Mrs. Constable in this case. But this is far from holding that such assets may never become amenable to being treated as matrimonial property.

33. Indeed, especially as regards the matrimonial home, there is stated to be a presumption to the opposite effect. In ***Miller v Miller; McFarlane v McFarlane*** [2006] UKHL 24, [2006] 2 AC 618, Lord Nicholls declared that the matrimonial home should normally be designated matrimonial property, whatever its source. He stated at [22] that "*the parties' matrimonial home, even if this was brought into the marriage at the outset by one of the parties, usually has a central place in any marriage. So it should normally be treated as matrimonial property for this purpose.*"

34. However, an equal division of the matrimonial home is not necessarily the fair outcome; an unequal division can be justified if unequal contributions to its acquisition, including from outside sources, can be shown. And especially where there has been mingling of assets in keeping with the common intention of the

parties to foster their family's well-being, the importance of the unequal contributions will diminish over time. The longer the marriage subsists, the easier it becomes to find that by virtue of the mingling of non-marital assets with the product of the parties' marital endeavours, the contributor of the non-marital asset has implicitly agreed to treat it as marital property. As Lord Cooke stated in ***White v White*** at [62][5]:

> "*In the present case, bearing in mind that it was a marriage of more than thirty years, that there were three children and that the wife was an active partner in the farming business as well as meeting the responsibilities of wife and mother, the only plausible reason for departing from equality can be the financial help given by the husband's father. I agree, however, that the significance of this is diminished because over a long marriage the parties jointly made the most of that help and because it was apparently intended at least partly for the benefit of both. As Lord Simon of Glaisdale said, in delivering the judgment of the Privy Council in a case under the former New Zealand legislation:*
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> > *"Initially a gift or bequest to one spouse only is likely to fall outside the Act, because the other spouse will have made no contribution to it. But as time goes on, and depending on the nature of the property in question, the other spouse may well have made a direct or indirect contribution to its retention.":* ***Haldane v Haldane*** *[1977] AC 673, 697."*

35. Having regard to the foregoing principles and to all the factors listed in section 29(1) of the Matrimonial Causes Act 1974 from which the jurisdiction derives, fairness required the Court to take into account all the circumstances of the case. Indeed, section 29 (1) expressly so directs.

36. Accordingly, the questions for this Court became, first, whether, in the particular circumstances of this case, the treatment of the gift from Mrs. Constable's father was such that as between the parties over the duration of their eight-year

[5] [2000] UKHL 54

marriage (and against the background also of their prior six-year co-habitation), the gift had come to be regarded as a marital asset by virtue of its application for the acquisition of the FMH to which they both contributed by way of their equal mortgage payments.

37. The irresistible conclusion was that this was clearly the case.

38. The next question then became what should be the fair division of the net equity in the FMH. This was found at the time of trial, to be $139,700, the result of a very significant diminution in value due to the vagaries of the property market. The learned judge, having erroneously concluded that the gift from Mrs. Constable's father should be attributed solely to her and that Mrs. Constable's employment was unstable, allowed Mr. Constable the sum which represented only his one-half contributions to the reduction of the mortgage. In effect, this was a treatment of Mr. Constable's relationship to the FMH as that akin to a rent-paying tenant acquiring no interest in the equity.

39. These mis-directions in the exercise of the learned Judge's discretion required this Court to take a fresh look at the matter. We concluded that Mrs Constable's agreement to registration of title in their joint names, their joint assumption of the mortgage obligation and their occupation of the property as the FMH during the marriage, all pointed to the FMH having come to be regarded as a marital asset of the parties so that there was no basis for departing from the ordinary presumption in that regard. This however, did not mean in this case, that there should be equality of division of the net equity. The appropriate treatment of property from a non-marital source is very fact-specific and widely discretionary. In an appropriate case, the nature and value of the property and the time when and circumstances in which the property was acquired, will be among the relevant matters to be considered. In the ordinary course, the fact of acquisition from an external source can be expected to carry diminished weight in a case where a spouse's financial needs cannot be met without recourse to such

property. See again to this effect, ***White v White*** (above, per Lord Nicholls at [43]).

40. The fact remained though, that Mrs. Constable's monetary contributions, when her father's gift is taken into account, were far greater. And while the future needs of both parties must be considered, Mr. Constable's income from the garage business is likely to be secure, and in light of the evidence elicited in cross-examination by Mrs. Marshall, not vastly, if at all, less than that of Mrs. Constable. In this regard we are obliged to note that while Mr. Constable provided disclosure of the financial records of the business, these were unaudited and so its income generating potential was never ascertained. We therefore saw no basis for disagreeing with the learned judge's conclusions as to the relative actual incomes of the parties. In the final analysis we saw a fair outcome as one which assured that Mr Constable should be enabled to make a deposit on a home of his own, a home where Kyle Jr – whose needs are of paramount importance - would also be assured of having settled access to his father. With all of the fore-going factors in mind, as well as being satisfied as already mentioned that the FMH would not have to be sold, we arrived at our decision to award to Mr. Constable one-third of the net equity, expressed as the sum of $46,101 mentioned above.

41. By way of post-script, we note our rejection of a further contention argued on behalf of Mr Constable. This was to the effect that the likely ongoing beneficence of Mrs. Constable's father assured her financial security and was a proper consideration for granting Mr Constable an equal division of the net equity in the FMH. As was recognized in ***TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)*** [2006] 1 FLR 1263; [205] EWHC 2860 (Fam), it would not be proper or principled to make an award that ranged outside the assets or income of the parties as of right. While, if satisfied on the balance of probabilities, that an outsider (such as a wealthy relative or a trustee), would provide money to meet an award that a party could not meet from his own

property, the court could make an order on that footing, the court should not make orders relying upon a possible bounty which could properly be withheld.

The McKenzie friend issue.

42. It was submitted by Mr. Kessaram, that the learned judge erred at the outset of the hearing by denying Mr Constable the right to receive assistance from his proposed *McKenzie friend* on the basis that the friend, a non-practising attorney, was not a "lay person"**.** We accept this submission**.**

43. The starting point is to recognize what is meant by a "*McKenzie friend*". The term is now associated with the case of ***McKenzie v McKenzie*** (above) but the principle which it embodies was settled in 1831 by Lord Tenterden CJ in ***Collier v Hicks*** (1831) 2 B& Ad 663 at 669, in the following terms, which the Lord Justices of Appeal in ***McKenzie v McKenzie*** came to adopt and apply:

> "*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 discretion of the justices.*"

44. The refusal of the learned judge to allow Mr Constable's friend to assist him on the basis that the friend is not a lay person but a trained (albeit unlicensed) attorney at law, is shown to be, in principle, wrong by ***McKenzie v McKenzie*** itself. There the refusal of the trial judge to allow a young barrister to voluntarily assist the unrepresented husband Mr McKenzie, seems to have been because the firm of solicitors who had sent him, although formerly, were no longer on the record for Mr McKenzie. The Court of Appeal made it clear that the friend's standing as barrister was no disqualification, but, rather, would have been a positive advantage for the friend's assistance to Mr McKenzie, which should have been allowed. In the words of Davies LJ (at pp1035e- 1036a):

> "*..The important point from which this appeal arises is this. The husband no longer had legal aid; but at the actual commencement of the hearing there was sitting beside him a young man called Hanger who was an Australian barrister who was putting in some time in this country in the offices of Jeffery Gordon & Co who had been the last of two or more firms of solicitors who had been acting for the husband previously in the litigation. Mr Hanger was there voluntarily in order to assist the husband in conducting his case. No doubt Mr Hanger's assistance would have been of great value to the husband in the hearing of his case, which was complicated and lasted some ten days or so. There was a very long history, and it was a difficult case for a man with an untutored mind to conduct. In addition to having no effective knowledge of legal affairs, there was a good deal of difficulty in communication and in understanding these parties... There was the husband to conduct his case, and there was Mr Hanger to help him in the manner I have described. The judge referred to that:*
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> > *'I ought to have said that on the first day [the husband] appeared with a young man who said that he represented one of the firms of solicitors who had once acted for the [husband] and was obviously concerned to prompt the [husband]. I then discovered that that firm was no longer on the record and I hope believe I rightly said that I did not think [Mr Hanger] could take part in the proceedings and he did not appear.'*
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> *Counsel for the husband has submitted to this court, in my opinion quite rightly, that the learned judge was wrong in taking that course. Mr Hanger was not there to take part in the proceedings in any sort of way. He was merely there to prompt and to make suggestions to the husband in the conduct of his case, the calling of his witnesses and perhaps more importantly, on the very critical and difficult questions of fact in this case, to assist him by making suggestions as to the cross-examination of the wife and her witnesses."*

45. As we gather from the submissions, that was the kind of assistance proposed to be given to Mr Constable by his friend in this case, notwithstanding that the friend is a trained lawyer, and notwithstanding that it was suggested to the judge

below and before us in arguments, that there may also have been a personal relationship between them.

46. The learned judge expressed her reasons for refusing Mr Constable the assistance of his friend by reference to the friend's legal training. In so doing, she had regard to, but in our view derived too literal a meaning from, the guidance given by the Senior Courts of England and Wales in the ***Practice Note (McKenzie Friends: Civil and Family Courts)*** [2010] 1 WLR 1881. There at Items 2, 3 and 4 it states:

> "*The right to reasonable assistance*
> 2. *Litigants have the right to have reasonable assistance from a lay person, sometimes called a McKenzie friend ("MF"). Litigants assisted by MFs remain litigants in person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.* [Emphasis added]
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> *What McKenzie friends may do*
> *3. MFs 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.*
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> *What McKenzie friends may not do*
> *4. MFs may not (i) act as the litigant's agent in relation to the proceedings; (ii) manage litigants' cases outside court, for example by signing documents; or (iii) address the court [we would add exceptionally only with leave] make oral submissions or examine witnesses."*

47. While we would generally endorse these and the other provisions from the Practice Note, in the light of ***McKenzie v McKenzie*** itself and subsequent cases where lawyers have been allowed to assist as *McKenzie* friends[6], the notion that the assistance must come from a lay person, must be understood to mean someone assisting as such, as distinct from acting in a professional capacity, even if trained or qualified so to act. We agree with Mr Kessaram that the term

[6] See for instance ***Craig v Slater*** [2017] NZHC 874 where a practicing barrister was allowed to assist as a McKenzie friend.

"*lay person*" in this context, includes a lawyer who does not have a right of audience in the case, even if otherwise legally entitled to conduct litigation as an advocate.

48. Here the learned judge held that the friend did not qualify as a *McKenzie friend* because "*she possesses a law degree and therefore has specialist and professional knowledge*" and because of her "*professional expertise*."

49. On the assumption that what was intended was nothing more than the kind of assistance recognized in ***McKenzie v McKenzie*** (above) and more fully explained in the ***Practice Note*** (above), that was an erroneous conclusion.

50. For the reasons already explained, this was not, however, to result in the matter being returned for a retrial. The issues were taken and resolved as explained above at the invitation of the parties in the exercise afresh of our discretion, and any deficiency in the presentation of Mr Constable's case below was very ably remedied by his representation by Mr Kessaram before this Court.

51. Indeed, we wish to recognize the able and helpful submissions of counsel on both sides.

Smellie JA

Clarke P

Kay JA