Ref: **Master 39**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **07/06/06**

IN THE HIGH COURT OF JUSTICE NORTHERN IRELAND

FAMILY DIVISION

Between

McA

Petitioner

V

McA

Respondent

Master Redpath

In this application the parties were married on 21 June 1991. A Decree Nisi was granted on 28 October 2004 as evidenced by the unreasonable behaviour of the Respondent wife but only after a cross-petition had issued. From the very start these proceedings have not been straight forward and even at the Ancillary relief stage an application and a cross-application were issued.

The assets are as follows: -

a) Jointly owned assets

1) Agreed equity in the formal matrimonial home - £156,200.11

2) Endowment policy A16275580 - £2,144.45

3) Endowment policy A13110309E - £12,769.24

4) TD Waterhouse Shares - £2,319.40

b) Solely owned assets

1) Petitioner's pension CETV - £137,377.83

2) Respondent's pension CETV - £26,448.29

3) Respondent's CETV private pension - £272.59

c) The Petitioner's proceeds from a personal injury claim - £37,500

d) The Petitioner's proceeds from a critical illness policy payout - £89,851.28

e) The Petitioner's proceedings from a win from the National Lottery - £6085.00

It was also contended, and accepted by the Petitioner, that at the time of separation he transferred the sum of £8655.35 from their joint savings account and that he dissipated this sum. The Petitioner accepted in his evidence that he owed half of this to the Respondent.

There are three children of the family, aged 16, 13 and 12 one of whom (the 13 year old) presently lives with the Petitioner, with the other two living with the Respondent.

It should be noted that at an earlier stage in these proceedings the Petitioner took active steps to conceal the existence of the payout for his personal injuries claim and the payment from his critical illness policy. I make a finding of fact that he in fact lied in order to do so.

The Petitioner had been represented by solicitors and counsel but dispensed with their services prior to the hearing of the case. He was accompanied to the hearing by a Mackenzie Friend. At the commencement of the hearing the Petitioner applied to be accompanied by the Mackenzie Friend and in the absence of any objection from the Respondent's counsel, permission was granted. He then further applied for leave to allow his Mackenzie Friend to take an active part in the proceedings and to examine and cross-examine witnesses and to make submissions on his behalf. The reason that he advanced for this application was so that there should be equality of arms. Given that this gentleman had previously had the benefit of legal

advisors, had no shortage of money and taking into account the law in relation to Mackenzie Friends and lay advocates, that aspect of the application was refused. I did however allow closing submissions in writing, in the expectation that they would be prepared by his Mackenzie Friend. These were to be filed by the 24 February 2006 in the expectation that I would then give judgment on 21 March 2006 having allowed the Respondent time to reply. The submissions were not in fact filed until the middle of March and accordingly the judgment was delayed. Prior to the Respondent's submissions being filed, the Mackenzie Friend had written to the Respondent's solicitors in the following terms: -

> "I have just spoken to Mr McA and as a result of this conversation I have to inform you that it is his intention to appeal Master Redpath's decision not to admit me as advocate, and seek a rehearing. The grounds for appeal are likely to be that: -
>
> 1) The Master ignored evidence that he ought to have relied on, namely medical evidence (letter from GP) that Mr McA was not up to the rigors of advocacy on a physical or emotional level. He has subsequently had to attend with his GP (letter to follow) who is concerned that this excessive stress is extremely likely to cause further damage to his heart which may have severe consequences to Mr McA's health.
>
> 2) The Master misdirected himself about the authorities governing lay advocates and refused the father's application for myself to act as advocate as he said I was a Mackenzie Friend and therefore could not be an advocate. This is plainly wrong as the test to the exceptional circumstance set out in Re G (a child) (Representation; Mackenzie Friend) [2005] EWCA CIV 347.
>
> 3) Mr McA's Article 6 rights were breached as he did not have a reasonable opportunity to present his case including his evidence under conditions that did not place him at a substantial disadvantage vis-à-vis his opponent per Dombo Beheer BV –v- Netherlands 1993 18 EHRR 213, ECtHR. Mr McA was not allowed to be led through his evidence in chief by his advocate,

> whereas the mother was taken through her examination
> in chief by her Counsel"

This letter was signed by the Mackenzie friend on behalf of the charity Families Need Fathers, and was copied to my secretary.

The issue of Mazkenzie Friends is one that has exercised the Family Courts a good deal in recent times, albeit generally more in regard to Children Order cases than Ancillary Relief cases. The rise of the Mackenzie Friend in this type of case appears in England and Wales to be closely related to the legal aid situation in that jurisdiction, where it is becoming increasingly difficult to get legal aid for family proceedings.

The then President of the Family Division issued guidance in relation to Mackenzie Friends which is reported in the May 2005 Edition of Family Law at page 405. In that it is stated: -

> "A litigant in person wishing to have the help of a Mackenzie Friend should be allowed to do so unless the Judge is satisfied that fairness and the interests of justice do not so require. The presumption in favour of permitting a Mackenzie Friend is a strong one (Re H (Minors) (Chambers Proceedings; Mackenzie Friend) [1997] 3 FCR 618)."

The guidance continues further down the page: -

> "What a Mackenzie Friend may do (Mackenzie –v- Mackenzie)
> Provide moral support for the litigant;
> Take notes;
> Help with case papers;
> Quietly give advice on:-
> - Points of law or procedure;
> - Issues that the litigant may wish to raise in court;
> - Questions the litigant may wish to ask witnesses.
>
> What a Mackenzie Friend may not do
>
> A Mackenzie Friend has no right to act on behalf of a litigant in person..... A Mackenzie Friend is not entitled to address the Court nor examine any

> witnesses. If he does so he becomes an advocate and requires the grant of a right of an audience (see Rights of Audience below)."

In relation to rights of audience the guidance notes state

> "A court may grant an unqualified person a right of audience in exceptional circumstances only and only after careful consideration."

Following that guidance the issue of Mackenzie Friends has been the subject of further consideration by the English and Welsh Court of Appeal, in particular in the case of In Re O (Children) (Hearing in Private; Assistance) which was heard with two other related appeals. In his judgment, Wall LJ states at 128 (5): -

> "we have already stated that any litigant in person who seeks the assistance of a Mackenzie Friend should be allowed that assistance unless there are compelling reasons for refusing it. The following, of themselves, do not, in our judgment, constitute compelling reasons;
>
> i) That the litigant in person appears to the Judge to be of sufficient intelligence to be able to conduct the case on his own without the assistance of a Mackenzie Friend; and
>
> ii) The fact that the litigant appears to the Judge to have sufficient mastery of the facts of the case and of the documentation to enable him to conduct the case on his own without the assistance of a Mackenzie Friend;
>
> iii) The fact that the hearing at which the litigant in person seeks the assistance of a Mackenzie Friend is a directions appointment, or a case management appointment;
>
> iv) (Subject what we say below) the fact that the proceedings are confidential and that the court papers contain sensitive information relating to the families affairs.

As I have already noted, I took the relevant law into consideration in deciding to allow the Mackenzie Friend to appear in Court.

The issue of lay advocates was considered in the case of Re D (a Child) (Representation; Mackenzie Friend) by the English and Welsh Court of Appeal reported in [2005] CWCA CIV 347. In his short judgment Thorpe LJ states: -

> "those sections [sections 27 & 28 of the Courts and Legal Services Act 1990] do provide the Court with a discretionary power to grant individuals rights of audience, but subject to very stringent restriction. A Court may only grant such a right in exceptional circumstances and after careful consideration."

It is my understanding that the two sections referred to by the Learned Lord Justice in his Judgment do not in fact apply in this jurisdiction. It seems to me however, that the general principle enunciated by Thorpe LJ should however apply.

The situation was also considered by Neuberger J in the case of Izzo –v- Philip Ross & Co (a Firm) [2002] BPIR 310 where he states: -

> "Far from having the right to be represented by a friend of his choice…[it is]…an indulgence that the court will not lightly accord."

This case was referred to in a helpful article set out in the October 2005 Edition page 820 entitled "Mackenzie Friend in Family Proceedings".

There is a world of difference between a Mackenzie Friend and a lay advocate. A lay advocate is given the opportunity to cross-examine witnesses who in Family Proceedings are often in a most vulnerable situation. If a Court were lightly to allow unqualified advocates to cross-examine such witnesses, the risk of harm is self evident. Whilst the court can endeavour as best is can to control any such cross examination this may not be sufficient to prevent harm to the witness. It therefore seems to me, in Family Proceeding at least, that applications to grant rights of audience to lay advocates should only be accorded in the most exceptional of circumstances.

I note in passing that in this particular case, the argument for the lay advocate was based on the equality of arms argument and no special circumstances other than the medical report which was filed, were outlined to me during the course of the application.

The medical report filed did indeed refer to Mr McA's medical condition. It has to be borne in mind however that in this case, Mr McA had legal representation up to a fairly late stage in the proceedings and that he also, as I pointed out when the application was made, had more than sufficient assets to continue to pay for that representation. In those circumstances, I cannot see how any special circumstances exist in this particular case. Had he not had any assets to pay for legal representatives, given his medical condition, I may have come to a different view, but on the particular facts of the case, I could see no reason in justifying a lay advocate to act in the matter.

This was a eleven year marriage with, I understand, a period of 2 years co-habitation prior to the marriage. It could be described as a marriage of medium duration. In financial terms there is no doubt that the financial contribution of the Petitioner to the marriage was greater than that of the Respondent. Duckworth at B3 [13] sets out nine principles that emerge from White –v- White [2001] 1AC 596: -

(1) Although the Matrimonial Causes Act 1973, Section 25 is couched in terms of the widest discretion, guidelines are needed to ensure consistency of judicial decision making and to limit peoples' exposure to costs;

(2) The implicit objective of Section 25 is to achieve a fair outcome, giving first consideration to the welfare of any children;

(3) Fairness is a flexible concept that can move with the times, but in current conditions, it means that at the very least, there can be no discrimination between husband and wife in their respective roles;

(4) The mere fact that one spouse stays at home while the other goes out to work (whilst any other division of labour is agreed upon) is immaterial;

(5) Fairness generally implies equal division, although not invariably so. There will be many situations where having carried out the Section 25 exercise, the Judge's decision means that one party will receive a bigger share of the assets;

(6) There is however, no presumption of equality as there is in the Scottish system;

(7) Moreover, there is no warrant on the statute for elevating needs above resources in so far as earlier authorities limited a wife's claim to the ceiling of her reasonable requirements, they were wrong to do so;

(8) There is no rule of law that a party's wish to leave property to the next generation is irrelevant under Section 25. On the contrary the Court should respect the wishes of both parties in this regard;

(9) It follows that the Duxsbury calculation (which amortises a wife's income needs over her assumed life expectancy) is of limited relevance in the Family Division other than to capitalise an income stream where that is strictly required.

It is quite clear from the relevant authorities, that the proper approach for a case such as this where you have an eleven year marriage with three children and where virtually all the assets were accumulated during the course of the marriage, is to approach the case from the point of view of equality. There are certain aspects of the case to which this is quite clearly applicable and the first of these is the equity in the matrimonial home.

Before the marriage the Petitioner owned a property which he sold to his mother in consideration of her paying off the mortgage. It was alleged that the Petitioner agreed to this and this was not disputed. This property was subsequently bequeathed to a daughter of the family with a life interest to the Petitioner who collects rental for it. The value of this life interest was not a factor in the case except as to income.

Although the matrimonial home was purchased using in part the proceeds of an endowment policy which had been originally financed by the Petitioner, I can see no reason for holding other than that the Respondent is entitled to 50% of that property. The case was made on behalf of the Petitioner that he had been maintaining that property since the date of separation in 2002 and that he has therefore entitled to a greater share of that property as a result of having done so. He has also maintained the policies. I was given no historical valuation for the policies at the date of separation. As a result of this he argued that he was entitled to more than 50% of the nett equity. This is a case which is frequently made in front of me.

This approach overlooks the fact that the party in occupation has enjoyed the occupation of the premises whereas the party not in occupation has had to make other arrangements and pay for them. In this particular case, the Petitioner was paying at the date of her first affidavit, rent of £325 per month, whereas the Respondent at the date of the swearing of his first affidavit was paying mortgage of £340 per month, a virtually identical figure. I also have to bear in mind that very often the party leaving the matrimonial home has done so as a result of matrimonial violence or other abuse and has no option of making any contribution to the mortgage or otherwise maintaining the property. To deprive that person of any benefit of the increase in the

value of the property since the date of the separation would in my view be quite unfair.

In this particular case, on the 22 October 2002 both the Petitioner and the Respondent were granted Interim Non-Molestation Orders which on 25 November 2002 were converted in each case to full Non-Molestation Orders.

Chadwick LJ stated in Oxley –v- Hiscock [2004] 2FLR 2669 at page 706: -

> "In a case where there is no evidence of any discussion between the [parties] as to the amount of the share which each was to have…each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property and, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home."

In this particular case given the fact that the Respondent has not had access to the matrimonial home since the date of separation and has had to pay her own rent at a similar figure to the mortgage on the property I can see no reason to deprive her of her share in the increase in the value of the property. The payments to the endowment policies can however, be viewed as a separate matter, and I think the Petitioner is entitled to the benefit of the increase in the value of those policies since the date of separation. I have no figures which allow me to make an exact calculation but given that endowment policies have not done terribly well in the last few years, I will allow a figure of £3000 to be credited to the Petitioner's share out of a total value of the polices as at May 2005 of approximately £14,000.

On the figures available to me there was a disparity between the parties pensions of £110,656.95. The petitioner has been a serving police officer since 1986 and presently holds the rank of constable. He accordingly has 20 years service of

which approximately 11 years took place during the currency of the marriage. Both parties were prepared to deal with the disparity in pensions on foot of a cash adjustment, but there were, of course, disputes as to what that adjustment should be. Clearly part of the pension was a pre-marital asset and part of it is post-separation. I am never convinced that a party can be properly compensated for loss of a pension right by the relatively small lump sum as might be available in this particular instance. No pension report was available to the court but the court can take notice of the fact that a police pension is of greater value to the policeman than to the spouse, for the simple fact that it can be claimed at age 55 by the policeman, whereas the spouse can make no claim to it until she is 60. In previous cases I have dealt with this has led to a skewing in the percentage awarded to the spouse to make up for the difference. The parties have been married for approximately half the pensionable service of the petitioner. He will continue to pay into his pension fund for some years to come, although the effective date of splitting the pension will be the date of the order of this court. Allowing for the present pension entitlement of the respondent I intend to order a 25% pension share in her favour given the length of time the parties were together during the Petitioner's pensionable service.

I now turn to the issue of the personal injuries payment in the sum of £37,500. It is clear from the authorities, particularly Wagstaff v Wagstaff [1992] 1 FLR at 333, that damages of this type fall to become part of the pot to be dealt with in an Ancillary Relief application. At page 340 of the report Lord Donaldson of Lymington states:

> "The reality, of course, is that the compensation is a financial asset which, like money earned by one spouse by working excessively long hours under disagreeable circumstances, is (subject to human selfishness) available to the whole family before the break-down of the marriage and, like any other asset, whether financial or otherwise, has to be taken into account when the court

> comes to exercise its powers in accordance with Section 25 of the Matrimonial Causes Act 1973."

Butler-Sloss LJ states earlier in the judgment at 338:

> "The needs, both immediate and long term, of the husband have priority and no order should be made for the wife which would interfere with providing, within reason, for those needs."

In this case the petitioner has suffered a back injury for which it would appear he will require ongoing physiotherapy. It is also not improbable that at some future stage it may affect his capacity for work. In all the circumstances I intend to take £12,500 out of this payment and include £25,000 in the pot for distribution.

In relation to the critical illness payment there are relatively few authorities that deal with this type of payment. In the case of C v C [No. 3 of 2005] which I heard last year, there was such a payment. In that case out of a payment of £150,000 I put £100,000 into the sum of money to be divided and left £50,000 untouched. In that case, however, it should be noted that the respondent who had claimed this payout was suffering from multiple sclerosis and the medical evidence in that particular case indicated that as a result of his illness he would not be able to go back to earning the type of figure he had done in the past. In this case, as in that case, the policy was taken out during the lifetime of the marriage and was presumably intended to provide for the entire family in the event of the illness of the petitioner. Late evidence was produced to show that at some stage stem cell treatment may become available to treat the petitioner's heart condition and the inference was that the petitioner would have to pay for such treatment. Whilst such treatment may well be available at some stage, it is fairly clear from the medical report that was tendered on the petitioner's behalf that such treatment would not be recommended for some years. There remains, however, a risk that the petitioner's condition might affect his ability

to work and accordingly I intend to include £75,000 from this payment into the overall figure for distribution.

The payment made from the National Lottery to the petitioner is a relatively small matter in the overall context of this case. Again there is remarkably little authority on this particular point. One such authority is J-v-C (Child; Financial Provision) [1999] 1FLR 152. In that case the father had won 1.4m on the National Lottery. It does, however, raise an interesting point. The application was made in relation to a child of the marriage under Section 15 and Schedule 1 to the Children Act 1989. In that case the court ordered financial provision for the child. I am not convinced that this particular authority is of much assistance in this case. This lottery win appears to have taken place after the separation and is a relatively minor aspect of the case. Accordingly I intend to disregard it for the purposes of the Ancillary Relief application.

Some issues were raised in relation to the withdrawal of £8,665 from the joint account which were alleged to have come from an inheritance. However, as the petitioner conceded in his evidence that his wife should receive half of this amount I do not intend to go beyond that concession.

Finally, we come to issue of the respective incomes of the parties, one of the matters that the court is bound to consider under Article 27 of the Matrimonial Causes Order (Northern Ireland) 1978. It would appear that the petitioner has a net income at present including Working Family Tax Credit from his rental property and child benefit of approximately £27,415 per annum. The respondent has a net income of just under £20,000 per annum. There is presently a spousal maintenance order made at Magherafelt Domestic Proceedings Court on 14 February 2003 in the sum of £550 per month. From March to November 2004 the petitioner reduced payments to the

sum of £225 per month and thereafter has paid nothing. The amount of arrears now outstanding at the date of the hearing was £10,304.56 and the matter stands adjourned before Magherafelt Domestic Proceedings Court. It had been my original intention to order ongoing spousal periodical payments of £300 per month limited for 5 years commencing on 31 May 2006 and to leave the matter of the arrears of Magherafelt Domestic Proceedings Court. Having considered the matter further I am not sure that I have the power to deal with the case in that way. Given the fact that there are arrears of maintenance which are before another court and concerning which I heard little or no evidence, I do not intend to interfere with the order of Magherafelt Domestic Proceedings Court and will leave the matter of ongoing spousal maintenance and the arrears thereon to be dealt with by that court. I should make it clear that I am dealing in this case with capital division only and any decision I make is entirely without prejudice to any decision that the Magistrates Court may come to.

Other issues were raised about jewellery and household furnishings. I have had no valuations for any of these items. This court is acutely aware that household effects rarely have a very large intrinsic value and in any event the court was not provided with any inventory or valuation for those effects

Accordingly the divisible assets in the case are as follows:

1. Equity on former matrimonial home - £156,200.11
2. Endowment policies less the £3,000 I have deducted for the petitioner's contribution post- separation - £11,913.68
3. Shares - £2,319.40
4. Personal injuries claim - £25,000
5. Critical Illness Policy - £75,000
6. Money taken from the joint account - £8,655.35

Total - £279,088.54

50% of this figure equates to the sum of £139,544.27.

I also of course have to take into account the needs of the children in the case and the financial burden that they have and will continue to have on the parties. In the particular case the Respondent has care of two of the children including the youngest and the Petitioner one of the children. Accordingly I intend to increase the lump sum payable to the Respondent to £150,000.

As I have already said in addition to this there shall be a 25% pension sharing order in favour of the Respondent and that I will also leave the matter of ongoing spousal maintenance and the arrears thereon to Magherafelt Domestic Proceedings Court.

I will now adjourn the case to the 1 June 2006 for the parties to consider this judgment and for argument as to costs.