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IN THE FAMILY COURT
AT HASTINGS

FAM 2015020-000347
FAM 2015-020-000348
[2016] NZFC 3107

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	JOSEPHINE MACY Applicant
AND	BRYON MACY Respondent

On the Papers

Counsel: Mr J McDowell for the Applicant
Mr G Thornton for the Respondent
Ms A Davis as Lawyer for the Children

Judgment: 26 April 2016

RESERVED DECISION OF JUDGE P J CALLINICOS
[Recusal]

Introduction

[1] At a Judicial Conference on 23 March 2016 Mr McDowell, who is the applicant's most recent counsel, requested that I recuse myself from "sitting in further proceedings over the care of children matters".

[2] Given the serious nature of such an application, I directed that if the applicant wished that I be disqualified from further involvement in the proceeding then full submissions ought to be filed in support of what she sought.

[3] I have now received and considered those submissions. As the request is a matter of personal judicial discretion as to my involvement in matters, I did not require or invite submissions from the respondent or the subject children's counsel.

Introductory Background

[4] The request by Ms Macy arises from a hearing conducted on 2 and 5 February 2016 and the subsequent delivery on 26 February 2016 of full reasons for my decisions arising at that hearing. The hearing was to determine her application under the Domestic Violence Act for a protection order against the respondent together with matters of interim care of the subject children under the Care of Children Act.

[5] While the applicant has not challenged my decisions or findings in any appropriate forum, she was upset by my determinations and has therefore sought my disqualification. She has done so upon her stated fear that I will be biased against her in any future stage of the proceedings, being the hearing of substantive matters of parenting.

[6] Without repeating the full text of Mr McDowell's submissions, it is sufficient to say the concerns raised by the applicant pertain not merely to findings of credibility, or lack thereof, in respect of her but also extending to my assessment of her supporting witnesses being her mother, Mrs Vale Bonner and the applicant's close friend, Mr Niles.

[7] In terms of the future proceedings, although the Domestic Violence Act proceedings have now been concluded, there are substantive matters requiring determination in terms of parenting issues between the applicant and respondent. Mr McDowell indicates that both Mrs Bonner and Mr Niles are likely to be witnesses in the determination of the substantive Care of Children Act proceedings.

The Law

[8] Mr McDowell has helpfully referred to various decisions pertaining to recusal and has placed particular reliance upon the decision of the High Court in *R v Bogue*[1]. Although I do not accept that the *Bogue* decision is necessarily applicable, due to the significant differences between the issues in the criminal jurisdiction context in which *Bogue* was decided versus the Family Court process, the decision is nonetheless helpful in presenting aspects of law.

[9] In that decision, Brewer J summarised the hub of the test for matters of recusal. He drew from the Supreme Court decision of *Saxmere v New Zealand Wool Board Disestablishment Co Ltd*[2]. At paragraphs [28] and [29] of the *Bogue* decision his Honour summarised the key legal components as follows:

> [28] In *Saxmere v New Zealand Wool Board Disestablishment Co Ltd*, Tipping J described the test in the following terms:
>
> The crucial question … is whether a fair-minded, impartial, and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased.
>
> [29] It is commonly accepted that the test has two steps. These were detailed by Blanchard J in *Saxmere*:
>
> (a) first, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
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> (b) secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits."

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1 *R v Bogue* [2014] NZHC 1989
2 *Saxmere v New Zealand Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35

[10] A number of other decisions, to which I now refer, provide further guidance as to the legal principles applying to judicial disqualification in the particular circumstances of the current.

[11] The first decision is that of the English Court of Appeal in *Locabail (UK) Limited v Bayfield Properties Ltd*[3] in which the Court stated[4]:

> "…a real danger of bias might well be thought to arise if … in a case where the credibility of an individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion." (Emphasis mine)

[12] The Court added[5]:

> "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is a real ground for doubt, that doubt should be resolved in favour of recusal…every case must be decided on the facts and circumstances of the individual case." (Emphasis mine)

[13] The views of the English Court of Appeal's decision in *Locabail* were endorsed by the New Zealand Supreme Court in *Jessop v R*[6].

[14] The views of the Court of Appeal in *Locabail* are helpful in guiding my determination of the present application. While the decision does not assist in indicating what credibility findings of a Judicial Officer may be "outspoken", such word carries no sinister connotation. *The New Zealand Oxford Dictionary*[7] defines "outspoken" as meaning "frank in stating one's opinion". In turn, "frank" means "candid…, undisguised".

[15] Applying those definitions to the present circumstances, I accept, without difficulty, that I have stated my "opinion" (namely my judicial findings of fact) in frank and undisguised terms. A difficulty always arises in decisions where matter of

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[3] *Locabail (UK) Limited v Bayfield Properties Ltd* [2000] 1 All ER 65
[4] At 77 j
[5] At 78 b-c
[6] *Jessop v R* [2007] NZSC 95
[7] *The New Zealand Oxford Dictionary* Deverson & Kennedy, 2005 ed

credibility are at stake as to the degree to which a Judge should, or should not, present findings underpinning determinations of reliability or credibility of a witness' evidence. On one hand, a Judge could simply record that they did not accept the evidence of a particular witness, a course which arguably fails to provide the affected party with the judicial officer's reasoning for that determination. Conversely, the Judge may give fuller reasons for reaching that determination and thereby, as I have, run the real risk that the reasoning for making adverse findings, thereby found a basis for a request for recusal, where silence of reasons may not. Although the presentation of fuller reasons exposes the officer to greater risk of challenge, I have a preference for presentation of full reasons in order that any person affected by the findings has the fairness of the reasons being presented, rather than being left unaware as to the basis for the Judge's findings on important issues affecting them.

[16] The *Locabail* decision emphasises that it is not a basis for recusal that a Judge records matters in a "outspoken" manner as such, but rather there must be the added element that the terms of any outspoken comments must be shown to throw doubt upon that Judge's ability to approach the subject witness' evidence with an open mind on any future occasion. It is this secondary consideration which is the pivotal factor in the present case.

[17] This view is supported by reference to *WAH v WTW*[8] in which the Court of Appeal considered an argument that a Judge of the Court of Appeal be disqualified in a proceeding involving family law issues where he had previously been a member of that Court's panel in an appeal by those parties arising from the criminal jurisdiction. The basis of the request for recusal was an argument that O'Regan J had not accepted the evidence of the two appellants in the criminal appeal. The Court considered the passages I have referred to from *Locabail* and determined there was no basis for requesting that O'Regan J recuse himself, holding that the adverse credibility finding was expressed in 'restrained terms' and not the 'outspoken' terms referred to in *Locabail*.

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[8] *WAH v WTW* [2010] NZCA 577

[18] The Court also considered the views it had earlier expressed in *Muir v Commissioner of Inland Revenue,*[9] a leading decision in terms of circumstances where recusal is sought where a judicial officer has already formed a fixed opinion of a litigant, the Court commenting:

> [98] It has to be accepted that there are occasions when a Judge's prior rulings might lead a reasonable person to question whether he would remain impartial in any subsequent proceedings. That said, this could be relevant to the question of judicial bias only in the rarest of circumstances.
>
> [99] The reasons for this are straightforward. It is common sense that people generally hate to lose, and their perception of a Judge's perceived tendency to rule against him or her is inevitably suspect. As Kenneth Davis has said, "Almost any intelligent person will initially assert that he wants objectivity, but by that he means biases that coincide with his own biases" (*Administrative Law Treatise* (2 ed, vol 3, 1978), at 378). Every judicial ruling on an arguable point necessarily disfavours someone – Judges upset at least half of the people all of the time – and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling. But it is elementary that the Judge's fundamental task is to judge. Indeed, the very essence of the judicial process is that the evidence *will* instil a judicial "bias" in favour of one party and against the other – that is how a Court commonly expresses itself as having been persuaded.
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> [100] The general approach that judicial disqualification is not warranted on the basis of adverse rulings or decisions is also justified by appropriate concerns about proper judicial administration. There is huge potential for abuse if recusal applications were permitted to be predicated on a party's subjective perceptions regarding a Judge's ruling.
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> [101] We know of no common law jurisdiction which accepts that a Judge's adverse rulings are disqualifying per se. The problem is rather whether an aggrieved litigant should be permitted to seek recusal on the basis of rulings that are either so patently erroneous or so disproportionate as to suggest that something untoward must have motivated them. Even a statistical approach cannot obtain here: most Judges will be able without any difficulty to recall trials in which regrettably they have had to endorse every single point which has been advanced against a particular party.
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> [102] Turning now to adverse comments, Judges are duty bound to refrain from making unnecessary comments. The various codes of judicial conduct – including the Australasian ones – call on Judges to be courteous to the litigant, observe proper decorum, and to be particularly cautious and circumspect in their language. And Judges should not issue oral condemnations that are unrelated to the furtherance of the cause to be decided or are simply gratuitous.
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> [103] Comments as such will ordinarily not suffice to warrant recusal. What is important is that commentary should not however demonstrate that the

[9] *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495, [98] – [103]

> Judge has formed a fixed opinion as to the ultimate merits of the matter pending before him or her. It has to be shown, in short, that the Judge does not have an open mind. (Emphasis mine)

[19] Accordingly, the collective view of leading authorities on the issue of recusal draws from the pivotal concern that Tipping J expressed in *Saxmere* as to whether a fair-minded, impartial and properly informed observer could reasonably have thought that the Judge might have been unconsciously biased. In addition, I take particular note of the view held by the English Court of Appeal in *Locabail* that if in any case there is a real ground for doubt, then the doubt should be resolved in favour of recusal. If the judicial officer was marginal or uncertain on the position then, in my view, the safe course of action for the maintenance of justice is to accept that recusal is appropriate in those circumstances.

[20] Matters of the process in respect of which recusal is sought cannot be ignored. This aspect was recognised by the Court of Appeal in *Muir* where the Court emphasised that there must be some consideration given to proper judicial administration[10] otherwise there is:

> "huge potential for abuse if recusal applications were permitted to be predicated on a party's subjective perceptions regarding a Judge's ruling."

[21] Similar views were expressed by the Supreme Court in *Saxmere*[11] where Blanchard J commented upon the need for the "fair-minded lay observer" to be reasonably informed about the "workings of our judicial system". The Supreme Court indicated that the assessment of whether disqualification was, or was not, appropriate needs to be assessed from what a fair-minded lay observer might apprehend the situation to be. Blanchard J stated that the fair-minded lay observer is presumed to be intelligent and to view matters objectively, that they were neither unduly sensitive or suspicious, nor complacent about what may influence a Judge's decision. He emphasised that the lay observer should be reasonably informed about the nature and issues of the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias.

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[10] At [100]

[11] *Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1),* above n 2, at [5]

[22] That observation by the Supreme Court indicates that in the context of a Family Court proceeding, which often involves a sequence of hearings, both interim and substantive, the assessment of disqualification or recusal may have regard to that particular process of our Judicial system. Accordingly, in determining how the fair-minded lay observer may assess matters, it is fair to expect that such observer will be aware that Judges are able make findings that a particular witness' evidence is not to be preferred, but may quite properly proceed to determine ongoing hearings involving assessments of that same witness or party. The key issue becomes one as to whether the Judge has formed such a view of the witness as to impact on the fundamental requirement to be impartial.

Analysis

[23] Applying the key legal principles to the facts and circumstances of the instant case, the hub of the determination lies not in the fact I have made adverse credibility findings against the applicant and her supporting witnesses, but rather in whether the basis of those findings are "so patently erroneous or so disproportionate as to suggest that something untoward must have motivated" me. Were those findings unnecessary to the furtherance of the cause to be decided, or were they simply gratuitous?

[24] I am informed that in the hearing of substantive matters, the applicant will again be calling evidence from two supporting witnesses called by her in the interim hearing. As such, I must assess my approach to the credibility findings pertaining to the applicant and those two supporting witnesses. Accordingly, I ask whether my findings of credibility were expressed in such outspoken terms as to throw doubt upon my ability to approach those "person's evidence with an open mind on any later occasion"[12].

The Applicant

[25] In respect of the applicant; for the reasons recorded in my decision of 26 February 2016, there is no question I did not accept her evidence at the interim

[12] *Locabail (UK) Limited v Bayfield Properties Ltd*, above n 3, at 78 a

hearing. I was concerned as to the reliability of her evidence because; she had made a sequence of material non-disclosures of matters that ought to have been disclosed by her in her affidavits, I was troubled by her repeated pattern of seeking to avoid the heart of the questions being put to her. That dynamic was of such level that it was reasonable for me to have concluded that she was not wishing the true picture to be disclosed to the Court. I determined her to have been manipulative in her approach, both to the Court and to persons to whom she sought support.

[26] While I accept those findings were 'outspoken' in the sense they were frank, I must ask whether those findings were in such terms as to throw doubt upon my ability to retain an open mind on any later occasion.

[27] There are occasions in performing the judicial role where a Judge may have made findings against witnesses which are candid and frank for the very purpose of ensuring that in future hearings such witness will disclose all material matters and not display the same avoidance tactic in their examination. I was not so firm in my view with regard to the applicant that I had reached a point where I could not likely believe anything she might say on a future occasion.

[28] However, the issue is not merely how I would view matters, but what a fair-minded, intelligent and objective lay observer might think. A lay observer possessed of the requisite characteristics as outlined by Blanchard J could perceive that I may not be able to adopt a wholly objective approach to that witness on a future occasion. That perception may be marginal but, as indicated in *Locabail*, any doubt must fall in favour of recusal. The applicant is entitled to the benefit of any doubt that the reasonably informed lay person might hold.

[29] On that basis I am satisfied that, notwithstanding my own views, it would not be appropriate for me to determine future factual disputes arising from the applicant's evidence.

Mr Niles

[30] In respect of the supporting witness, Mr Niles, although I did not accept his evidence due to a determination that his evidence was driven by a high sense of

loyalty to support the applicant, my record of concerns regarding him were not such that I believe a lay observer could reasonably apprehend that I might not bring an impartial mind in matters of assessment of that witness in the future.

[31] I have no pre-conceived concerns as to his reliability on any future occasion and would assess his evidence in the normal way applying to any witness, namely follow the witness' consistency during examination, measured against the witness' statements in their affidavits and against any external corroborative evidence.

The Applicant's Mother

[32] The situation with regard to the applicant's mother, Mrs Vale Bonner, is the key aspect which leads to me a view that disqualification is clearly appropriate. Mrs Bonner was an unusually unreliable witness, where corroborative correspondences authored by her were at significant odds with statements she made in examination. She was so locked to her daughter's position on matters that she was unable to see that her position was contradictory to her own proven approach to matters. These matters are fully recorded within my decision and need not be repeated here in full.

[33] Such were my findings of the unreliability of her evidence that, in terms of the requisite test for recusal, I conclude it would be difficult for me to assess her evidence on any later occasion in a way which was truly impartial.

[34] While I am open to the possibility that Mrs Bonner might have suddenly gained some capacity for objectivity, my impression of her at the first hearing was such that this is unlikely. Given I hold this perception of her reliability as a witness, it follows that a fair-minded lay observer would clearly apprehend that I might not bring in an impartial mind to matters insofar as Mrs Bonner is concerned.

Decision

[35] It follows from my analysis of the law and the circumstances of this case that, notwithstanding the findings in the interim hearing have not been challenged in the available forum, I determine it would not be proper for me to continue presiding in future stages of the proceeding involving assessment of the evidence.

[36] I reach this determination not on the basis that my findings in the interim hearing were expressed in a disqualifying degree of frankness, or that they were discourteous or lacked ‘proper decorum’. Rather, in respect of the applicant the reasonably informed lay observer may hold a doubt as to whether I would be impartial on a future occasion, whereupon such doubt must fall in favour of recusal. In respect of the applicant’s mother, I would struggle to reach a conclusion that the causative deficiencies in her ability to give reliable evidence are likely to improve over time.

[37] I therefore recuse myself from presiding over any future hearing requiring the determination of matters of fact between these parties or involving these witnesses. Consequent upon this determination, the registrar will need to record that I am disqualified from such involvement and arrange for another Judge to regulate matters from this point forward.

Delivered at pm April 2016

P J Callinicos
Family Court Judge