NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION PLEASE SEE www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications

IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA **FAM-2017-079-000008**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN AXEL SCHMIDT
Applicant

AND LISA HOPFENGARTNER
Respondent

Date: 4 May 2020

Appearances: Applicant appears in Person
Respondent appears in Person
T Gunn as Lawyer for the Child

CHAMBERS DECISION OF JUDGE S J COYLE
[IN RELATION TO APPLICATION FOR RECUSAL]

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[1] Dr Schmidt, the father of Clara Larissa Schmidt (born 3 July 2007), has filed an interlocutory application seeking that I recuse myself from any further involvement in these proceedings. The proceedings were commenced by applications seeking a return of Clara to Germany, under the provisions of the Care of Children Act 2004 which enact the Hague Convention. I declined to issue an order for her return.[1] Following an uplift of Clara from her school and a subsequent without notice application by Ms Hopfengarter, I made an Interim Parenting Order in favour of Ms Hopfengartner on 28 September 2017. Dr Schmidt then filed an application seeking care/contact with Clara. That application remains unresolved.[2]

[2] My decision to refuse to make an order for the return of Clara was upheld by Davison J on appeal. The Court of Appeal overturned those decisions.[3] Dr Schmidt has sought leave to appeal the Court of Appeal decision to the Supreme Court. That leave application is awaiting determination by the Supreme Court. Dr Schmidt has now filed an application that I recuse myself from any further involvement and/or determinations in relation to the day to day care/contact Family Court proceedings.

Legal Principles

[3] The guiding principle is that a Judge is disqualified from sitting and determining a case if in the circumstances there is a real possibility that in the eyes of a fair-minded and fully informed observer the Judge might not be impartial in reaching a decision in the case.

[4] The test is a two-step one. First, it requires ascertainment of the relevant circumstances which might possibly lead to a reasonable apprehension that the Judge might decide the case other than on its merits. Secondly, it requires consideration of whether there is a logical and sufficient connection between those circumstances and that apprehension. The leading authority is the Supreme Court decision *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd.*[4]

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1 *Schmidt v Hopfengartner* [2017] NZFC 69293.
2 That application has, in effect, been stayed, for the reasons set out in my minute of 14 February 2020.
3 *Schmidt v Hopfengartner* [2019] NZCA 579.
4 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

[5] It is also a well-established principle that a Judge who has previously determined issues between the parties will not automatically recuse him or herself from hearing any subsequent application, and/or be considered biased.[5] This principle is particularly relevant in this case given that Dr Schmidt did not give evidence in the Hague Convention proceedings before me, and no issues as to credibility were determined by me in relation to Dr Schmidt.

Basis of Recusal

[6] Dr Schmidt advances a number of grounds which he submits are reasons as to why I should recuse myself. They are assertions that:

(a) I have a limited knowledge of the applicable law;

(b) I have no understanding of the concept of best interests of children;

(c) I am unable to properly control expert report writers;

(d) I have improperly influenced the New Zealand Psychological Board;

(e) I am prejudiced against Dr Schmidt's ability to competently determine what is in Clara's best interests;

(f) I have a general prejudice against Dr Schmidt; and

(g) I am unable to properly manage the Court processes.

Do I have a limited knowledge of the applicable law?

[7] I reject the assertion that I had a limited knowledge of the relevant law. Rather, the passages of my judgment set out by Dr Schmidt in support of his recusal application show a detailed analysis of the law. As the Court of Appeal held, my decision was an exercise of a discretion. The central issue the Court of Appeal had with my decision was its belief that I did not place significant weight on adherence

5 See *Lyttelton v R* [2018] NZCA 243 at [5] and *Stiassny v Siemer* [2013] NZHC 154 at [12].

to the aims and objectives of the Convention in exercising that discretion. What Dr Schmidt will not appreciate is that that appeal decision potentially has significant implications for the development of Hague Convention jurisprudence in New Zealand, as the Court of Appeal appears to be suggesting that in exercising the discretion, a judge should ensure strict adherence to the Convention, and this should be prioritised over all other considerations, including the particular welfare and best interests of, in this case, Clara. If the Supreme Court does grant leave to appeal, no doubt one of the issues for the Supreme Court will be whether it agrees with the Court of Appeal's decision, and if it disagrees, whether my initial decision is reinstated.

Do I understand the concept of best interests of children?

[8] When I consider the submissions of Dr Schmidt in support of this ground, it appears that the central issue here is that Dr Schmidt simply disagrees with all the interlocutory decisions and directions that I had made as recorded in my 14 February 2020, in relation to which he has filed an application for leave to appeal.[6] Dr Schmidt therefore appears to disagree with my decision to stay the COCA proceedings until the Supreme Court determines whether the grant leave to appeal, and if so, until the outcome of the appeal is known. Further Dr Schmidt asserts that in granting the stay, I am undermining the Court of Appeal's decision. I reject that assertion. The reasons for not progressing the matter were clearly set out in my Minute of 14 February 2020, and were squarely centred around what I determined were:

(a) Jurisdictional barriers to my progressing, in a judicial conference (as opposed to a hearing), what was sought by Dr Schmidt; and

(b) Clara's best interests and welfare.

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6 Which for the reasons set out in my Minute of 23 April 2020 (*Schmidt v Hopfengartner* FAM-2017-079-000008, 23 April 2020) I dismissed his application for leave to appeal, suggesting an application for judicial review should have in fact been filed.

[9] Just because I have reached a decision that Dr Schmidt disagrees with, does not mean that have not considered Clara's best interest and welfare, or that I am biased and should be recused from any further involvement in this file.

Have I failed to control the s 133 report writers?

[10] The next ground relied upon by Dr Schmidt is his assertion that I have a limited ability to control expert reports, particularly the reports of Ms Lightfoot and Dr Calvert. If I had attempted to control the processes or outcome of either report writer, then Dr Schmidt may have had a valid complaint. For as the High Court has held in the *K v K* decision, the Court has no ability to control either the process, outcome or the conclusions/opinions of expert report writers.[7] Again, Dr Schmidt's objection appears to be a disagreement as to decisions I have reached, and that cannot lead to a conclusion of judicial bias. I also reject his assertion that I support the ongoing alienation of Clara.

Have I attempted to control the decision of the New Zealand Psychologist's Board?

[11] The next ground is Dr Schmidt's assertion that I have tried to influence the opinion of the New Zealand Psychological Board. That is an implied accusation of judicial corruption and is rejected by me. I have no ability to influence the opinion of the New Zealand Psychological Board, it being an independent statutory body responsible for the administration of registered psychologists, including resolution of issues of complaint. In accordance with the practice note issued by the Principal Family Court Judge, I was invited by the Board to provide a response.[8] The decision to uphold or dismiss the complaint was an independent decision reached by the New Zealand Psychological Board. At no stage did I attempt to control or influence the decision that the Board ultimately reached. As Dr Schmidt sets out what I did state to the Board was that the complaint was principally an attempt by Dr Schmidt to relitigate issues that Dr Schmidt did not agree with. I suggest the recusal application is similarly such an attempt.

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7 *K v K* [2005] NZFLR 28, (2004) 23 FRNZ 534.

8 At [16.10], Practice Note: Specialist Report Writers, 3 April 2014.

Am I prejudiced against Dr Schmidt?

[12] Dr Schmidt asserts that I am prejudiced in relation to his competency to consider the best interests of Clara and prejudiced towards him in general. He refers to a decision of mine dated 28 September 2017 in which I determined that Dr Schmidt has shown no respect for the law in New Zealand and no insight as to what is best for Clara. I respectfully suggest that those comments have some accuracy given Dr Calvert's view that Clara has suffered post-traumatic stress disorder as a consequence of Dr Schmidt's uplifting her from school. I reject Dr Schmidt's allegation in this regard; a number of my minutes reference empathy towards Dr Schmidt and I reject his allegations that I am in anyway prejudiced towards him; my focus in the day to day care proceedings has always been on what I believe to be in Clara's best interests and welfare.

Have I failed to manage the Court processes?

[13] Dr Schmidt asserts that I have acted against his best interests through the inconvenient scheduling of teleconferences, and a refusal to accept for filing an affidavit.

[14] In relation to the first issue, a judicial conference was arranged by way of teleconference on 17 December 2018 at 4.00 pm (NZT), which was 4.00 am in Germany. The responsibility for scheduling of matters rests with the registry, and not with judges and I had therefore no control over the scheduling of that particular conference. However, in my Minute of 13 February 2019, I have reiterated to the registry that because of the time difference between New Zealand and Germany, conferences should be arranged in consultation with me so as to avoid any inconvenience to Dr Schmidt and ensure that it is not the middle of the night in Germany when the conference occurs. Thus, Dr Schmidt's complaint is mischievous and since that time to the best of my recollection, all conferences have occurred at 9.00 am or 10.00 am New Zealand time so as to minimise any inconvenience for Dr Schmidt.

[15] In relation to the recent decision by the registry to refuse to accept for filing an affidavit filed by Dr Schmidt's, the registry rejected the affidavit because it did not comply with the statutory and regulatory requirements for the proper swearing of affidavits. However, in my 23 April 2020 chambers decision, in relation the application for leave to appeal, I overturned that decision by the registry pursuant to reg 24 of the Epidemic Preparedness Act 2006. Thus, in relation to both issues raised by Dr Schmidt as a ground for recusal, I in fact directly addressed the concerns of Dr Schmidt and responded in a manner favourable to him. I accordingly also reject this ground for recusal.

Conclusion

[16] Having rejected all the grounds advanced by Dr Schmidt, I see no legal or principled basis upon which I should recuse myself. A fair and fully informed observer would not reach the conclusion that I am in any way biased in my dealings with Dr Schmidt. The fact that an Appellate Court reaches a different conclusion to mine does not mean that I am fundamentally incompetent as a Judge as asserted by Dr Schmidt. The fact that I have at times made decisions which Dr Schmidt does not agree with is not a ground for recusal.

[17] However, it is clear that my ongoing involvement in this matter is an issue for Dr Schmidt. There is a clear pattern developing in these proceedings of Dr Schmidt complaining about or seeking to neutralise the ongoing involvement of anyone who holds an opinion, or expresses a view, with which he disagrees. My ongoing judicial management of this file clearly opens up the potential, if recent events are considered, for Clara to be the subject of ongoing appellate litigation either by way of appeal or judicial review. It is my determination therefore that in terms of Clara's best interests and welfare, and particularly to protect her from any further delay of a determination of her day to day care and contact arrangements, occasioned by Dr Schmidt's potential relitigation (by way of appeal or judicial review) of every decision I make, that I should voluntarily recuse myself.

[18] Accordingly, on my own motion I recuse myself from any further involvement or decision-making in relation to this file. I ask that the registry now

refer the proceedings to her Honour Judge Cook as the Regional Liaison Judge for consideration as to which Judge should now be assigned responsibility for managing this file, as it is clearly a complex file and needs to be managed by one Judge.

Judge SJ Coyle
Family Court Judge

Date of authentication: 04/05/2020
In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.