SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

2021 SCGLW 011

Case Ref: GLW-F570-16

NOTE IN RESPECT OF DECISION RELATIVE TO THE DEFENDER'S MOTION FOR RECUSAL OF SHERIFF IN FAMILY CASE

in causa

AB

PURSUER

against

CD

DEFENDER

NOTE:

(i) relevant procedural history

[1] This action commenced in the Court of Session in January 2016, shortly prior to the defender's return to Scotland from the USA with parties' child who was then 7 years of age. The pursuer had previously commenced proceedings in terms of the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980 (hereafter "the Hague Convention") in the United States District Court for the Middle District of Georgia Macon Division to secure the return of said child from the USA. The defender initially defended the proceedings under the Hague Convention before

signing a Voluntary Return Order and returning to Scotland with said child around 18 January 2016. In the proceedings in the Court of Session the pursuer sought and obtained an interim interdict against the defender or anyone acting on her behalf from removing the said child furth of Scotland. The pursuer also sought a contact order in respect of the said child.

[2] The cause was remitted to this court from the Court of Session in May 2016 following the grant of (i) an interim interdict in the foregoing terms and (ii) an order that the defender surrender said child's passport. Thereafter, at a child welfare hearing on 6 June 2016, I found the pursuer entitled to interim contact in the terms set out in the interlocutor of that date. At a child welfare hearing on 30 August 2016, on the pursuer's motion, of consent of the defender, I varied the previous interim contact order and sisted the cause to allow contact to operate. The sist was recalled on 27 June 2017 and a child welfare hearing assigned for 8 August 2017 before me.

(ii) child welfare hearing on 8 August 2017

[3] At the child welfare hearing on 8 August 2017 the pursuer's agent submitted that, since the action had been sisted in August 2016, contact between the pursuer and parties' child had, generally, operated well. The pursuer, however, remained concerned that the defender's intention continued to be to relocate with the said child to the USA. The pursuer's agent confirmed that she had spoken to a colleague of the agent appearing with the defender at the child welfare hearing and that confirmation had been provided that the defender's intention was, indeed, to relocate to the USA. In fact, the pursuer's agent

had been advised that the defender's agent would be moving to sist the action to enable the defender to apply to the Scottish Legal Aid Board to amend her legal aid certificate to incorporate a crave in respect of relocation to the USA.

[4] The pursuer's agent submitted that, against this background, there had been occasions during recent months when said child had, seemingly, not wished to attend for contact with the pursuer. The pursuer had not sought to force the child to do something that the child did not want to do thereby upsetting the child. However, the pursuer did have concerns that the views of the child were being influenced by the defender.

[5] Further submissions were made by the pursuer's agent in respect of holiday arrangements which had been made by the defender for parties' child and which had interfered with the operation of the interim contact order.

[6] The pursuer's agent made additional submissions that the defender had not supported or encouraged contact between the pursuer and said child but, rather, had rewarded said child if he indicated a wish not to attend for contact with the pursuer. Parties had been unable to agree settlement terms in respect of this action. In all the circumstances, the pursuer sought that I assign another child welfare hearing in several months' time to monitor the operation of contact between the pursuer and said child.

[7] The defender's agent submitted that the defender was well aware of her obligations in terms of the interim contact order and had continued to encourage said child to attend for contact with the pursuer. However, the child had become increasingly distressed and reluctant to attend for contact with the pursuer. The defender considered the child's distress and reluctance might be due to the significant number of contact visits

which the pursuer had failed to attend since the interim order had been made. This had given rise to a lack of confidence on the part of the child in respect of the pursuer's commitment to contact. On one occasion the police had had to become involved in view of the pursuer's comments to the child. The defender's agent submitted that the interim contact order should remain unchanged to provide the pursuer with an opportunity to demonstrate his commitment to contact with the child.

[8] I observed that each party was blaming the other for failing, in some way, to comply with the terms of the interim contact order. I observed that the child welfare hearing was proceeding on the basis of submissions only and invited parties' agents to consider whether they wished to proceed to proof. The defender's agent then moved to sist the action, of new, on the basis that certain negotiations were ongoing with the Scottish Legal Aid Board. I was told that these negotiations related to the cover available under the defender's legal aid certificate as the defences might require to be amended to incorporate a crave for a specific issue order to permit the defender to relocate to the USA with parties' child.

[9] I then made the following observation:-

> "What I'm hearing is that there is another agenda at play here. I understand from the outset that the defender is seeking to take (the child) to America and that remains the position."

[10] I went on to remind the defender of her parental responsibility to encourage and promote contact between the pursuer and the said child. I addressed the defender directly in the following terms:-

> "You will consider quite carefully that in any court process where you are seeking an order from the court to take (the child) to America that the court will, ultimately at proof when evidence is led, look very closely at whether you have been encouraging (the child) or not and if you have not been encouraging (the child) while everyone has been present in Scotland that is bound to have a bearing on the court's decision about whether you should be allowed to take (the child) to America. You should take that into account very clearly."

When I asked the defender if she had understood what I had said she replied: "Absolutely".

[11] I thereafter refused (i) the pursuer's motion to assign another child welfare hearing to monitor the operation of contact; and (ii) the defender's motion to sist the action of new.

[12] On the basis that it appeared the defender would be seeking a specific issue order permitting her to relocate to the USA with the child, I assigned 3 October 2017 as the date of the options hearing and appointed 19 September 2017 as the last date for adjustment of the pleadings.

(iii) defender's motion for recusal of Sheriff

[13] At the options hearing on 3 October 2017, before Sheriff Anwar, the defender made a verbal motion that I recuse myself from these proceedings. The presiding sheriff continued consideration of that motion to call before me at a further child welfare hearing which had been assigned for 19 October 2017 for the purpose of considering the pursuer's motion, No 7/3 of process, which sought an explanation from the defender for her alleged failure to obtemper the interim contact order made on 30 August 2016.

(iv) child welfare hearing on 19 October 2017 - the defender's submissions

[14] At the child welfare hearing on 19 October 2017 before me the defender renewed her motion that I recuse myself from these proceedings. The defender's agent submitted that there was a possibility that either party could form the view that there could possibly be apparent bias on my part against the defender in these proceedings. The defender's agent submitted that the motion for recusal had been made on the basis of a letter sent by the pursuer's agent on 11 September 2017 to Partners in Advocacy in respect of a referral for parties' child to said advocacy service (pursuer's production 5/17 of process refers). The defender's agent quoted the first two sentences of the third paragraph of said letter which are in the following terms:-

> "Please be aware that this matter is before the court and the Sheriff is alert to what he believes is the underlying issue here. The Sheriff acknowledged there is a suggestion that there has been a hidden agenda (to relocate (the child)) throughout the life of this action."

[15] The defender's agent submitted that her firm had required to show the defender a copy of said letter, after which she was deeply distressed at the inference which could be drawn from this letter that I may have prejudged this case because of its history and the reason why the action was raised in the first place. The defender felt that the best interests of the child may have been overlooked in awarding the pursuer contact on the basis that I might believe the defender may possibly have a hidden agenda. I consider this submission to have been without substance. For the avoidance of doubt, the interim contact order which had been made on 30 August 2016 had been made of consent of the defender and, on 8 August 2017, the defender had not sought to vary said contact order

in any way. I pause to observe that the interim contact order granted on 6 June 2016 had, in part, been unopposed by the defender. The contentious issue had been whether the child should have residential contact with the pursuer. I had determined that issue *ad interim* on 6 June 2016, my paramount consideration being the welfare of the child, and had concluded that it would be better for the child that such an order be made than that none should be made at all. I have not been asked to revisit same.

[16] When I asked the defender's agent whether she was suggesting that I had used the words "hidden agenda" she indicated that I had used those words when I addressed the defender at the hearing on 8 August 2017. I confirmed that I had not used those words during said hearing and that the word "agenda" had been used only after it had been confirmed that the defender's agents were in discussions with the Scottish Legal Aid Board to clarify if legal aid cover was available in respect of a crave for a specific issue order permitting the defender to relocate to the USA with parties' child.

[17] The defender's agent referred to the case of *Porter* v *Magill* [2002] 2 AC 357 as authority for the proposition that the defender did not require to show actual bias but, rather, the possibility of bias. Such an inference could be drawn from the pursuer's production 5/17, previously referred to. The defender believed that there possibly could be apparent bias on my part. The defender's agent submitted that the test set out in *Porter* v *Magill* could be met, namely that the fair-minded and informed observer could conclude that there is a real possibility of bias occurring in these proceedings. The defender's agent again referred to the letter from the pursuer's agents (5/17 of process). I observed that the letter had not been issued by the court; that it did not quote *verbatim* what I had said

during the child welfare hearing on 8 August 2017; and that it comprised someone else's interpretation of what had been said during said hearing.

[18] The defender's agent submitted that "no formal evidence" had been presented and that the defender believed there was some factor which would "prevent bringing an objective judgement and fairness to the best interests of the child". The defender's agent was unable to explain what she meant by the immediately preceding submission.

[19] The defender's agent submitted that there were doubts in the defender's mind due to the views which I was said to have expressed during the hearing on 8 August 2017. I pressed the defender's agent to identify those views. The defender's agent submitted that I had expressed a view the defender may have an agenda. I pointed out that I had been told at the previous hearing that the defender may be seeking an order from the court to relocate with parties' child to the USA. The defender's agent submitted that the pleadings had not been amended to incorporate a crave for a specific issue order but accepted that I had been told at the hearing on 8 August 2017 that the defender might seek such an order.

[20] The defender's agent submitted that the defender felt that previous issues whereby the defender took the child to the USA in the first instance which do not form part of these proceedings may influence me in the manner in which I would judge this case going forward. I observed that the defender's conduct in taking the child to the USA and remaining there with the child was a matter of fact which, I understood, the defender to have accepted. I indicated that I would expect the defender's previous conduct in going to the USA and later returning to Scotland to form part of a joint minute in due course. The defender's agent did not suggest the position was otherwise.

[21] The defender's agent confirmed that I had been advised on 8 August 2017 that the defender might lodge a minute of amendment in these proceedings to seek a specific issue order permitting her to relocate to the USA with parties' child, subject to clarification being obtained from the Scottish Legal Aid Board in respect of legal aid cover. The defender's agent confirmed that I had been told that enquiries were being made with the Scottish Legal Aid Board as to whether an amendment to the defender's legal aid certificate would be required. Since the previous hearing it had been clarified that legal aid was already in place for the defender to seek such a specific issue order. The defender's agent had exhibited the legal aid certificate today to the pursuer's agent. Formal instructions were now going to be taken from the defender in respect of amending her defences to seek such an order.

(v) child welfare hearing on 19 October 2017 - the pursuer's submissions

[22] The pursuer's agent confirmed that her firm had used the words "hidden agenda" in their communication to the advocacy service but those were not the words which I had used at the hearing on 8 August 2017. I had said at that hearing that I had been told there was "another agenda" which had just been disclosed, namely that the defender was in discussions with the Scottish Legal Aid Board in respect of legal aid cover for seeking a specific issue order for relocation with parties' child to the USA. This was being pursued by the defender. The options hearing in the cause had taken place on 3 October 2017. On defender's motion said hearing had been continued until 31 October 2017 to allow the defences to be amended to include a relocation crave. The pursuer's agent submitted that

this gave credence to her submission that there was, and always had been, an agenda on the defender's part to relocate with parties' child to the USA.

[23] The pursuer's agent confirmed that she had just been provided with a copy of the defender's legal aid certificate which confirmed that legal aid had been in place for a specific issue order since 19 July 2016. The pursuer's agent expressed surprise that the specific issue order had not, thus far, been craved by the defender.

[24] The pursuer's agent referred to the decision of the High Court of Justice in Northern Ireland, Queen's Bench Division, in *Marcail's (a pseudonym) Application for Judicial Review* [2012] NIQB 68 where, at paragraph 6, the court referred to the applicable legal principles in respect of the test for apparent bias in the following terms:-

> "The test which I seek to apply in relation to apparent bias is that set out in *Porter* v *Magill*. I start with a quotation from *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700
>
> '85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R* v *Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'
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> In *Porter* v *Magill* Lord Hope, having quoted that passage from *In re Medicaments and Related Classes of Goods (No 2)* continued:
>
> 'I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg

> court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'"

[25] In the context of this case it would be helpful to set out part of paragraph 7 of the court's judgment in the *Marcail's* case:-

> "[7] The application of that test has been considered in the context of family law proceedings where there is a need for judicial continuity and where the context is the changing dynamics of individuals within a family. In that context there may be a need to decide a number of issues over a number of years before the same judge. Lack of judicial continuity can do damage in the family law context…"

[26] In the *Marcail's* case the court proceeded to summarise the principles in the family law context in relation to an application for recusal as those principles were set out in the case of *F (Children Contact: Change of Name)* [2007] 3 FCR 832. These principles included that, although justice must be seen to be done, that does not mean that judges should too readily accept suggestions of appearance of bias thereby encouraging parties to believe that they might thereby obtain someone more likely to favour their case. Further, the fact that a judge had commented, adversely, on a party or witness or found them to be unreliable would not found an objection unless there were further grounds. A judge should resist the temptation to recuse himself simply because it would be more comfortable to do so as, for instance, when the litigant appears to have lost confidence in the judge. A real danger of bias might well be thought to arise if there was personal friendship or animosity between a judge and any member of the public involved in the case; if the judge was too closely acquainted with such a person; if the judge had rejected the evidence of such a person or expressed views in such extreme or unbalanced terms

such as to throw doubts on their ability to approach the person or the issue with an open mind; and if for those or other reasons they cause doubt in the ability of the judge to ignore extraneous matters or prejudices and bring an objective judgment to bear. In the case of *F* it was stated that the test remains, having considered all the circumstances bearing on the suggestion that the judge could be biased, whether those circumstances would lead a fair-minded and informed observer, adopting a balanced approach, to conclude that there was a real possibility that the tribunal was biased.

[27] The pursuer's agent submitted that there was nothing in the correspondence issued by the pursuer's agents to the advocacy service which provided a basis for the defender to make a motion for recusal. The communication issued by the pursuer's agents to the advocacy service had been prepared by someone in the office of the pursuer's agents and contained a summary of the pursuer's agents' interpretation of what occurred during the child welfare hearing on 8 August 2017. It did not contain a direct quotation of anything said by me and stated only that I had acknowledged the suggestion made by the pursuer's agent that the defender had had an agenda throughout the life of this action. The pursuer's agent failed to see that there was a real possibility that I was biased. The pursuer's agent submitted that there was no basis for the defender's motion and that it was an attempt to interfere with the court process. The pursuer's agent submitted that I ought not to recuse myself and submitted that she did not consider that a fair-minded and informed observer would or could conclude that I had been biased or that there was a real possibility that I was biased.

(vi) child welfare hearing on 19 October 2017 – the defender's response

[28] In response, the defender's agent submitted that an inference of bias could be drawn from the views which I had expressed; the same inference could be drawn from the contents of the letter from the pursuer's agents to the advocacy service; and this accorded with the defender's own view. When pressed on what views I had expressed, the defender's agent, again, referred to the words: "hidden agenda". I did not use those words and had understood the defender's agent to have previously conceded that point.

[29] The defender's agent went on to submit that no evidence had been led that the defender was not encouraging or promoting contact. I could not see that this submission supported the defender's motion as I had acknowledged that to be the case when I addressed the defender at the child welfare hearing on 8 August 2017, making reference to evidence ultimately being led at a diet of proof.

(vii) Discussion

[30] Article 6(1) of the European Convention on Human Rights (ECHR) provides *inter alia* as follows:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[31] In *Porter* v *Magill*, *supra*, at paragraph 88 of the judgment, Lord Hope referred to the judgment of the European Court in *Findlay* v *United Kingdom* [1997] 24 EHRR 221 wherein, at paragraph 73, the European Court said, of the concept of impartiality:-

> "As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."

[32] In *Porter v Magill*, *supra*, Lord Hope went on to make clear that not only must the tribunal be free from actual bias but it must also not appear, in the objective sense, to lack the essential quality of impartiality. At paragraph 103 of the judgment in *Porter* Lord Hope said that, in assessing the issue of apparent bias, the question is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[33] Lord Hope, delivering the judgment of the Supreme Court in *O'Neill v HM Advocate* [2013] UKSC 36, referred to the test for apparent bias as laid down in *Porter v Magill*, *supra* (para 47 of *O'Neill* refers) before going on to consider a number of cases in which it was the judge's decision not to recuse himself that was in issue (paras 49-52 of *O'Neill* refer). In his consideration of these cases a number of factors were identified by Lord Hope which would be taken into consideration by the fair-minded and informed observer when considering the issue of apparent bias. In particular, said observer would have regard to: (i) the context of the remarks made by judges; and (ii) the fact that such remarks are made by professional judges, with relevant training and experience, after having taken the judicial oath.

[34] In the case of *Helow v Secretary of State for the Home Department* 2009 SC (HL) 1 (to which Lord Hope refers at para 52 of *O'Neill*) consideration of these factors led to the

conclusion that there was not any real possibility of bias on the part of the judge. Following consideration of these factors, amongst others, the same conclusion was reached by the Court in *O'Neill* (paras 53-57 refer).

[35] The context in which I made the remarks set out above is important. During the child welfare hearing on 8 August 2017 I summarised each party's submissions by saying that the pursuer had alleged that the defender was not encouraging parties' child to attend for contact with the pursuer and that the defender had alleged that the pursuer was not demonstrating a commitment to maintaining contact with said child. The defender's agent had moved to sist the cause on the basis that clarification was being sought from the Scottish Legal Aid Board regarding the extent of cover under the defender's legal aid certificate with a view to considering whether the defences should be amended to incorporate a crave for a specific issue order permitting the defender to relocate to the USA with parties' child. The pursuer suspected that the defender was failing to encourage contact between said child and the pursuer and was rewarding said child for refusing to have contact with the pursuer as a means of strengthening her case for seeking a specific issue order from the court permitting her to relocate to the USA with said child.

[36] On the basis that (i) the interim contact arrangements appeared to be breaking down; (ii) there were disputed matters of fact in respect of the potential causes for said breakdown; and (iii) the defender had now indicated she was intending to seek a specific issue order in the aforementioned terms, I refused the pursuer's motion to assign another child welfare hearing to monitor the operation of contact between the pursuer and the

said child. I also refused the defender's motion to sist the cause. I assigned an options hearing for 3 October 2017.

[37] On the basis that any diet of proof ultimately assigned would not take place for many months, I then reminded the defender of her parental responsibility to encourage said child to attend for contact with the pursuer. I commented that, for the first time, I had been advised that there was another agenda in that the defender may now be intending to seek permission from the court to relocate with said child to the USA. I observed, in addressing the defender, that she should consider quite carefully that, in any court process where she sought an order from the court permitting such relocation, that the court would ultimately, at proof when evidence is led, look very closely at whether or not the defender had been encouraging said child to exercise contact with the pursuer while all parties were resident in Scotland. I went on to observe that if the court found that the defender had not been encouraging said child to exercise contact with the pursuer while all parties were resident in Scotland that would be bound to have a bearing on the court's decision about whether the specific issue order for relocation with said child to the USA should be allowed. I observed that the defender should take that into account and she confirmed that she understood.

[38] The text of the communication sent on 11 September 2017 from the pursuer's agents to the advocacy service does not contain any quotation of my words. The interpretation is that of a solicitor within the pursuer's agents' firm. I observe that the communication does not appear to have been prepared by the solicitor who was present

at the child welfare hearing on 8 August 2017. I made no reference to there being a hidden agenda to relocate said child throughout the life of the action.

[39] In addition to considering the context of my remarks, a fair-minded and informed observer would also take into account that I am a specialist sheriff at Glasgow Sheriff Court tasked with managing family and child proceedings; that such a role requires an interventionist approach to case management; that this approach often involves inviting parties to consider their positions in respect of certain relevant issues prior to hearing evidence; and that issuing such invitations does not mean that those issues have been summarily determined at a preliminary stage in the proceedings.

[40] In the Court of Appeal (Civil Division) in the case of *Re Q (Children)* [2014] EWCA Civ 918, at paragraphs 47 and 48 of the judgment, Lord Justice McFarlane puts it thus:-

> "The task of the family judge in these cases is not an easy one. On the one hand he or she is required to be interventionist in managing the proceedings and in identifying the key issues and the relevant evidence, but on the other hand the judge must hold back from making an adjudication at a preliminary stage and should only go on to determine issues in the proceedings after having conducted a fair judicial process.
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> There is, therefore, a real and important difference between the judge at a preliminary hearing inviting a party to consider their position on a particular point, which is permissible and to be encouraged, and the judge summarily deciding the point then and there without a fair and balanced hearing, which is not permissible."

[41] Taking into account the context in which I made the above comments at the child welfare hearing on 8 August 2017 and the fact that I did not summarily decide any issue in the case, I consider there is no basis for concluding that the circumstances of this case give rise to a reasonable apprehension of bias on my part. I do not consider that the fair-

minded and informed observer, having considered the facts, would conclude that there was a real possibility that I was biased. Having considered the remarks which I made in the context of the issues raised by parties during the child welfare hearing on 8 August 2017, I do not consider, looking at the matter objectively, that the defender has been able to demonstrate a real possibility that I am biased against the defender.

[42] Finally, I would respectfully endorse the comments made by the High Court of Justice in Northern Ireland, Queen's Bench Division, in paragraph 7 of the Court's judgment in the *Marcail's* case set out above. In my view, there is a need for judicial continuity in the context of family law proceedings, particularly where those proceedings relate to the welfare of children and where the context is the changing dynamics of individuals within a family. In that context there may be a need to decide a number of issues over a number of years before the same judge.

Decision

[43] On the foregoing basis I refused the defender's motion for recusal.