EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2020-090-000453
[2023] NZFC 10396

IN THE MATTER OF	THE PROTECTION OF PERSONAL AND PROPERTY RIGHTS ACT 1988
BETWEEN	[DP] Applicant
AND	[JR] Person In Respect Of Whom the Application Is Made

Hearing:	22 September 2023
Appearances:	J Wain and R Harrison KC for the Applicant A Steele for the Subject Person
Judgment:	22 September 2023

ORAL JUDGMENT OF JUDGE KEVIN MUIR

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[1] [DP] like every litigant has a fundamental right to a fair trial from a manifestly impartial judge.[1]

[2] [DP] is concerned that I am not able to be impartial principally because I have made a number of adverse credibility and reliability findings against him in a judgment in which I found him liable to account for a substantial sum of money.[2]

[3] I must recuse myself from sitting *"if in the circumstances there is a real possibility that in the eyes of a fair minded and fully informed observer, I might not be impartial in reaching a decision"*[3]

[4] [KS] is the property manager for [JR]. In this substantive application, she is seeking orders granting her authority to draft a new will for [JR]. Under s 55 of the Protection of Personal and Property Rights Act 1988, a court may grant that application if the court is satisfied that [JR] lacks testamentary capacity, in which case the court can authorise a will on such terms as the court directs.[4]

[5] It is common ground that [JR] now entirely lacks capacity. However, [JR]'s nephew, [DP] opposes the s 55 application. He seeks an order dismissing the proceedings on the ground the Court has no jurisdiction to determine them. That application will have to be determined before or as part of the s 55 application.

Issues

[6] Today, [DP] is asking me to recuse myself from hearing either his application to dismiss the s 55 application or [KS]'s substantive application under s 55. He says in his application for recusal:

(a) The s 55 application calls or is likely to call into question [DP]'s credibility or his prior conduct towards [JR].

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[1] New Zealand Bill of Rights Act 1990, ss 25 and 27.
[2] *[NP] v [JR]* [2023] NZFC 1477.
[3] "District Court Recusal Guidelines" (3 May 2021) The District Court of New Zealand <https://www.districtcourts.govt.nz/statutory-protocolsguidelines/statutory-protocolsguidelines/district-court-recusal-guidelines/>
[4] Protection of Personal and Property Rights Act 1988, s 55(1).

(b) That I made *"numerous findings and observations adverse to [DP] in relation to his conduct and credibility in my decision following enquiry under s 103 of the PPPR Act into the management of [JR]'s financial affairs by [DP]"*.

(c) That there is thus a real possibility that in the eyes of a fair minded and fully informed observer, I might not be impartial in reaching the relevant decision in this case.

[7] Am I, as a result of my adverse findings, some of which may be on issues relevant to the s 55 application, in a position where there *is "a reasonable apprehension I may not be impartial"*?[5]

The Law

[8] Judicial impartiality is the fundamental principle of justice.[6] In deciding whether I ought to recuse myself a two-stage inquiry applies. First, I must establish the exact circumstances that have a direct bearing on the suggestion that I am or might be seen to be biased. Secondly, I must establish whether those circumstances might lead a fair minded, lay observer reasonably to consider that I might not bring an impartial mind to the resolution of the case.[7]

[9] The fair, lay-minded observer who is to hypothetically assess whether I might not bring an impartial mind to the case is *"presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the Judge's decision. They are taken to be a non-lawyer but reasonably informed about the workings of our judicial system as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias."*[8]

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[5] District Court Recusal Guidelines, above n 3, 2.2(b).
[6] *G v N* [2018] NZHC 2765 at paragraph [5]
[7] *Muir v Commissioner of Inland Revenue* [2017] NZCA 334; confirming *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, a test reflected in the District Court Recusal Guidelines.
[8] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* above n 7, at [5].

[10] The obligation of recusal aims to remove any sense of injustice by ensuring there is not the appearance of partiality in a judge's conduct.[9]

[DP]'s Argument

[11] [DP] says that the application under s 5 of the PPPR Act is *"an entirely new substantive application."* I therefore will not be presiding over a continuation or completion of some previous proceeding I was involved in.

[12] [DP] does not accept the outcome of my earlier decision, nor does he accept the outcome of an earlier decision by another judge debarring him from participating in the hearing of the s 103 inquiry.[10] He is appealing both decisions and has filed an accompanying application for judicial review. [DP] argues that the s 55 application may involve the Court determining precisely which will and codicil of [JR] is legally valid *"presumably in terms of then mental capacity and allegations of undue influence that may be raised."*

[13] From the application filed, [DP] believes that the justification for the orders sought under s 55 will include *"reliance on findings adverse to [DP]"* in my judgment, the two and a half day hearing before me and an allegation that *"the evidence already before the Court in this matter suggests that [JR] may not have had testamentary capacity. [DP] says that would involve arguing that he is bound or at least burdened by my finding."* It is plain, he says, that the application seeks to have the Court draw on and rely on evidence given at the hearing before me.

[14] He says in relation to the strike out application that it will primarily involve legal arguments but *"it will inevitably be necessary to address the underlying merits"* so that if I am to recuse myself from the substantive hearing I ought also to be recused from the interlocutory application.

[15] [DP] in his submissions then summarises aspects of my judgment including my findings in relation to the competing evidence of two experts who gave evidence

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[9] *Muir v CIR*, above n 7, at [34].
[10] *[NP] v [DP]* [2021] NZFC 5661 per Judge Pidwell.

about [JR]'s capacity at various times. He says my *findings "address if not purport to determine capacity issues in relation to both the will and the codicil."* He says *"your Honour made numerous credibility findings against [DP]. Your Honour also made specific findings of undue influence on [DP]'s part, breach of fiduciary obligations including his self-benefit and indeed the outright dishonesty and theft."*

[16] The essence of his argument is *"it is difficult to see how your honour could place these seriously adverse misconduct findings especially the undue influence findings out of mind."*

[17] I note that [DP] does not argue that any of the findings he summarises were made capriciously or without evidential foundation. He does not seem to be arguing that anything in my previous judgment evidences a closed mind or improper bias. It is clear he disagrees with at least some of my findings but I do not know exactly what his arguments on appeal will be.

[18] I was assured by his counsel that his arguments in the judicial review proceedings will not include any allegations of judicial impropriety such as pre-judgment or the making of capricious or gratuitous observations about [DP].

[19] [DP] accepts that a judge's prior adverse rulings cannot be disqualifying per se. However, he says that my findings as to credibility, dishonesty, undue influence and breach of fiduciary duty *"are so serious and so wide ranging so as to satisfy the primary test of 'a real possibility of bias'"* and that the *"overlap"* between my findings of a lack of capacity by [JR] and misconduct by [DP], the issues likely to be raised in the hearing, and the challenges by way of appeal and judicial review render me incapable of the impartiality a fair-minded observer might expect.

[20] In oral submissions, Mr Harrison KC accepted that if my judgment contained only one or two findings adverse to [DP], the mind of the impartial observer might not be concerned.

Decision

[21] *"The requirement of independence and impartiality is counterbalanced by the judge's duty to sit at least where grounds of disqualification do not exist in fact or law."*[11]

[22] The full quote from the Court of Appeal judgment in *Muir v CIR* reads as follows:

"The requirement of independence and impartiality of a judge is counterbalanced by the judge's duty to sit at least where grounds of disqualification do not exist in fact or law. This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantage through delay or interruption in the proceeding. As Mason J emphasised in Re JRL; ex parte CJL: [12]

> *"It is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*"

[23] I agree with the Court of Appeal's observations in *Muir*.

[24] [DP] relies extensively on the judgment of Courtney J in *AA v Family Court at Auckland*.[13] [DP] did not however cite any part of the Court of Appeal decision in *Newton v Family Court at Auckland* where on appeal from Courtney J's decision, the Court of Appeal took a different view of the facts in that case to the view Courtney J had taken. The Court of Appeal in *Newton* emphasised that *"the rule of disqualification by reason of predetermination must be applied with utmost caution."*[14]

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[11] *Muir v CRI*, above n 7, at [35].
[12] *Re JRL; Ex parte CJL* [1986] HCA 39; and *Muir c CIR*, above n 7, [35].
[13] *AA v Family Court at Auckland* [2018] NZHC 1638.
[14] *Newton v Family Court at Auckland* [2022] NZCA 207 at [258].

[25] [DP] also relies on the decision of Courtney J in *G v N* with emphasis on paragraph [8].[15]

[26] *"It is not possible to exhaustively identify the factors that might lead to the conclusion that there is a real possibility of bias. Relevantly, however, it is clear that:*

> *The mere fact that a judge, earlier in the same case or in a previous case had commented adversely on a party… would not without more found a sustainable objection … But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."*

[27] *G v N* was cited by [DP]'s counsel as an example of the case where a judge's earlier adverse findings against the party ought to have resulted in a recusal. However, in *G v N*, the High Court was concerned about statements and observations the Judge had made during hearings as to the outcome, should there be future conduct for events including the prospect that a mother might lose care of her daughter or might be imprisoned. The recusal in that case was not based on findings of fact, credibility, reliability and liability which had been made following an analysis of relevant facts before the Judge.

[28] In *G v N*, Courtney J also emphasised the importance of a single judge being able to case manage a complex case throughout its entirety, as was my intention here.[16]

[29] Mr Harrison could not guide me to a decision where a judge had been recused from hearing case B because they had sat earlier in case A involving the same party and had made findings - even numerous findings - against the party, where other factors such as gratuitous adverse comments or capricious findings were also not alleged.

[30] The proposition [DP] is arguing is that because I have made findings against him in relation to some matters that may be relevant to s 55 application, I should not hear it because the paradigm fair-minded lay observer might think I will arrive at the same conclusions. Of course, if I am considering the same evidence and if no new legal arguments are presented to me, the lay observer would expect me (or indeed any

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[15] *G v N* [2018] NZHC 2763.
[16] At [24].

other impartial judge) to arrive at the same conclusion. Consistency is also an important principle of justice.

[31] [DP]'s case on appeal and review, as I understand it, is in good part that I erred in essence because all of [DP]'s side of the story was not before me; he was not given an opportunity to be heard.

[32] However, [DP] will be appearing on the s 55 application. There may well be other or new evidence presented. The impartial, informed lay observer would expect me to be able to consider that new evidence or weigh any new arguments and, if appropriate, arrive at a different decision.

[33] That is almost a daily task in some context for busy District Court judges. For example, a defendant who has been emphatically denied bail may come back with changed circumstances and a fresh bail application. To require another judge to consider that application may well be impracticable, and it is not as a matter of law required.

[34] Parties who have been restricted to supervised contact with their children because of a without notice application with no opportunity to be heard are sometimes granted unsupervised contact or shared care once their position and their evidence is before the Court. Again, that presents no difficulty for the judge, nor would it be viewed as strange in the mind of the impartial, fair-minded observer.

[35] Occasionally, courts make decisions by way of formal proof where another party has not yet engaged or participated in, for example, Care of Children Act cases in this Court. It is not uncommon for the same judge to later make a decision which sets aside or significantly varies the decision that was made once the party who was absent engages and is able to present their position to the court.

[36] Again there is no rule, no practice, no expectation, that another judge ought to consider the new evidence or ought to reconsider the case. The fair-minded, lay observer would not expect that to happen.

[37] Judges are not required to be a blank slate. *"Complainants cannot lightly throw the bias ball in the air."*[17]

[38] But I must not be distracted by my own view of my own judicial purity. I have no doubt about what [DP]'s view is of my ability to be impartial, but he is not the barometer.

[39] I am not persuaded that there is anything in my decision that would lead the lay observer to consider that I cannot put my past findings aside and consider the evidence that is actually and relevantly before me in the future. Losing a case, even losing every significant point in a case, cannot, in and of itself, justify an application for recusal for future related cases even where some of the issues may be relitigated.

[40] In *Muir*, the Court of Appeal said *"we know of no common law jurisdiction which accepts that a judge's adverse rulings are disqualifying per se."*[18]

[41] There is nothing in my decision that was highlighted as *"either so patently erroneous or so disproportionate as to suggest something untoward may have motivated (*me*)."*[19]

[42] Put simply, this case is not one where those *"rarest of circumstances"* arise where my prior rulings may lead a reasonable person to question whether I can remain impartial.

[43] It follows that the application for recusal is declined.

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[17] *Muir v CIR*, above n 7, at [62].
[18] *Muir v CIR*, above n 7, at [101].
[19] At [101].

Directions

[44] If there is any application for costs, it is to be filed by 6 October, limited to five pages plus any relevant schedules or invoices. Any responses are to be filed by 20 October, limited to five pages plus any relevant schedules or invoices.

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Judge K Muir
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 26/09/2023