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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF TB

GILLEN J

Background

In this matter TB is the applicant and is the father without parental responsibility of four children. These four children are now the subject of applications for adoption by a Community and Hospital Trust, which I do not propose to identify. His application is that I should recuse myself from hearing the case.

I have heard an application by the applicant TB for a Parental Responsibility Order under Article 7 (Northern Ireland) Order 1995 which I determined in a written Judgment delivered on 25th September 2001. I refused that application. Mr Steer, who appears on behalf of the applicant, submits that I should recuse myself from hearing the adoption proceedings due to bias. Inter alia, he relies upon the fact that at page 13 of my Judgment, I said inter alia;

> "Having considered all the facts in this case I have come to the conclusion that the history of this father's involvement with these children points to his main motivation in mounting this application being to undermine the authority of the Trust and the current carer of these children and prevent adoption".

Mr Steers submits that in doing so, I have stated that the application for parental responsibility was a 'sham' and that one of the reasons for this sham was to undermine the authority of the Trust who are the applicants in the adoption hearing, secondly to undermine the carer of these children who in fact will be the potential adopter in the adoption hearing and finally to prevent adoption which is the precise issue that the hearing has to decide upon. He submits that the link between the two hearings means that the situation is analogous to the decision by Kerr J in Re: McCaffrey's application for Judicial Review (2001) NI 378 to which I shall presently turn.

Principles governing this application

1. In Re: McCaffrey (see above) Kerr J reviewed the previous authorities dealing with bias. He drew attention to the summary in De Smith, Woolf and Jell Principals of Judicial Review Para 11-001:

> "Procedural fairness… requires that the decision-makers should not be biased or prejudiced in any way that precludes fair and genuine consideration being given to the arguments advanced by the parties. Although perfect objectivity maybe an unrealisable objective, the rule against bias thus aims at preventing a hearing from being a sham or ritual or a mere exercise in `symbolic reassurance', due to the fact that the decision-maker was not in practice persuadable. The rule against bias is concerned, however, not only to prevent a distorting influence of actual bias, but also to

> protect the integrity of the decision-making process by ensuring that, however, disinterested the decision-maker is in fact, the circumstances should not give rise to the appearance or risk of bias."

and at Para 11-002:

> "Even though the decision-maker may be scrupulously impartial, the appearance of bias can call into the question the legitimacy of the decision-making process."

In McCaffrey's case Kerr J, dealing with the facts of that case said;

> "Moreover there was in my estimation an inevitable appearance of bias against later plaintiffs by the Judge's pronouncement that he would not be disposed to award compensation to those who failed to establish a pre-disposition to back or neck injury or to demonstrate an objective finding of such injuries. As I have already said, this erected an additional hurdle for plaintiffs that would not have arisen but for the evidence given at proceedings to which they were not a party and whose outcome they had no opportunity to influence. These inevitably give rise to a "real danger of bias" – R v Gough (1993) AC 646".

2. Article 6 of the European Convention on Human Rights also deals with a requirement of impartiality. Clayton and Tomlinson Human Rights Law deals with the matter at Para 11.225:

"For the purposes of article 6 (1) the existence of impartiality must be determined according to two tests"… "A subjective test, that is on the basis of the personal conviction of a particular Judge in a given case, and also according to an objective test, that is ascertaining whether the Judge offered guarantees sufficient to exclude any legitimate doubt in this respect" Fey v Austria I (1993) 16 EHRR 387 para 28. In order to

satisfy the subjective test the applicant must show that the Tribunal in fact had personal bias against them. The objective test requires a finding, not of actual bias but of "legitimate doubt" as to impartiality that can be "objectively justified"- "Hauschildt v Denmark (1989) 12 EHRR 266". Kerr J said in McCaffrey's case that the objectively justified "legitimate doubt" as to impartiality test will now have to be substituted - for the "real danger" of bias test where article 6 rights are engaged.

3. Locabail Limited v Bayfield Properties (2000) 1 AER 65 at page 77J dilated upon the matter as follows:

> "By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved the case; or if the Judge were closely acquainted with any member of public involved in the case, particularly if the credibility of that individual could be significant in the decision in the case; or if, in the case where the credibility of any 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 in any later occasion".

4. Lockabail's case is also authority for the proposition that every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

Conclusion

I have decided in this case that this application must fail and that there is no reason for me to recuse myself from hearing the adoption proceedings. I have come to this conclusion for the following reasons:

1. The issues being determined in the adoption case now before me and the issues to be determined in the application for parental responsibility which I refused are quite different both factually and conceptually. By virtue of my decision, TB is not a parent within the definition of Article 2 of the Adoption (Northern Ireland) Order 1987 as amended by Paragraph 138 of Schedule 9 of the Children (Northern Ireland) Order 1995. Accordingly under Article 17(6) of the 1987 Order as amended, before making an adoption order, I must satisfy myself that in the case of a child whose father does not have parental responsibility for him (as applies in this case), the person claiming to be the father;

   (a) has no intention of applying for an order under Article 7(1) of the Children (Northern Ireland) Order 1995 or (2) a residence order under Article 10 of that Order or

   (b) if he did make any application, it would be likely to be refused.

   Accordingly I do not have to dispense with his consent. However Re H; Re G (Consultation of Unmarried Fathers) (2001) 1 FLR 646 is authority for the proposition that in an adoption application, even

though the father may have no right to consent or to refuse to consent to a freeing for adoption under the terms of the Order, nonetheless the position of the natural father should be considered. That is what I will have to do in this case. Accordingly the father must be informed of the proceedings and his views need to be canvassed and he should be given an opportunity to indicate whether he wished to be heard. Re S (a child) (Adoption Proceedings: Joinder a Father) 2001 1 FCR 158 is further authority for the proposition that although his representations will not have the same force as those as a father with parental responsibility, nonetheless I should take into account those representations if he chooses to appear. That I intend to do in this case. I have already granted leave for him to be made a respondent and I have indicated clearly that I intend to take into account his representations. Overarching all of this of course will be the test contained in Article 9 of 1987 Order which obliges me in deciding in any course in relation to the adoption of a child, to have regard to the welfare of the child as the most important consideration taking into account the various steps set out in Article 9 of the 1987 Order. I regard this as a wholly different exercise from the exercise that I performed in refusing the applicant parental responsibility. The fact that I made an adverse finding to his point of view in that case was confined to the issues then before me. Whilst I did not accept his arguments in that instance and I concluded that his main motivation at

that stage was to undermine the authority of the Trust, the current carers and prevent adoption this does not in anyway prevent me properly taking into account any representations he may now make about the adoption. In terms I find nothing in that earlier Judgment that could possibly render me unpersuadable as to his views in the context of the 1987 Order.

2. Ms McGaughey, who appeared on behalf of the Guardian ad litem, helpfully drew the analogy with care order proceedings. She drew my attention to Re G (2001) 1 FLR 872 in which the Court of Appeal extolled the virtues of the same Judge hearing both parts of a care order when there has been a split trial. At page 873 Dame Elizabeth Butler-Sloss said:

> "But in principal it seems to me that it is very important in a case such as this… that the same Judge dealing with the same child, as it happens, should hear the case throughout if it is possible to do so. I would ask the Bar and Solicitors to have this in mind in order to make certain that when directions are given for two parts of a split trial, the directions indicate that it should come if possible, be heard by the same Judge. The Judge should be requested to make sure that the order at the end of the first part of the split trial should indicate that it should be reserved to him or her if available".

In an application for a care order, the court must first consider whether or not the criteria for making a care order have been satisfied ie the threshold criteria. This may often involve findings adverse to the respondents and conclusions based on the fact that the Judge did not

believe their assertions. But that does not preclude the Judge then moving onto the second stage namely to consider the matter in light of the care plan and the criteria contained in the welfare check list in Article 3(3) of the Children (Northern Ireland) Order 1995 and then determine whether it is proper to make a care order. The two stages should be heard by the same Judge to ensure continuity of approach. I consider that there is a clear analogy in this instance. Two different disciplines are involved in the two aspects of this case and I find nothing in the decision that I have arrived at about parental responsibility which would give the slightest reason for anyone to conclude that there is a real danger of bias or that there is a legitimate doubt as to my impartiality in hearing the applications for adoption.

I therefore reject the application.

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JUDGMENT

OF

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