COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
FAMILY DIVISION
2022/FAM/div/00090

BETWEEN

EF

Petitioner

AND

LF

Respondent

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mrs. Janet Bostwick-Dean and Mr. Tavarrie Smith for the Petitioner**
	Mrs. Lillith Smith-Mackey and Nicholette Burrows for the Respondent
Hearing Date:	**18th July 2022**
Ruling Date:	**16th September 2022**

Family Law – Recusal application – Petitioner's right to a fair hearing by an independent and impartial tribunal

RULING

1. The Petitioner seeks my recusal from these proceedings. Through his Counsel, he initiated the request for my recusal, by letter dated 18th April 2022. The said letter in summary requested the Court's recusal on the basis of actual or apparent bias stemming from the granting of an ex parte order made on an urgent ex parte application which granted care and control to the Respondent arising from inter alia the Petitioner's absence from the jurisdiction. The Respondent also had filed a separate summons to vary the Order made in 2018 granting the parties joint custody with care and control to the Petitioner.

2. Thereafter, the Petitioner alleges that the Court made a decision to prohibit him from leaving the jurisdiction or from removing the couple's minor child from the jurisdiction. The Petitioner further continued that on the initial order made in 2018, there was no restriction on movement placed on the Respondent. Accordingly, there was bias in favour of the Respondent, as the mother. The Petitioner further contended that the Court did not have the jurisdiction to appoint an expert to interview the minor child and that the Court was preventing the child from attending school in person in order to be with the Respondent.

3. The letter additionally contended that at the hearing to discharge the ex-parte Order, the Court in one breath stated that it would not change its order but in another breath stated that it would fully consider the application at an inter partes hearing. He also contended that his Counsel was not given an opportunity to be heard during the same.

4. I instructed Counsel to make a formal application which was made by Notice of Case Transfer and supported by the Fourth Affidavit of EM which exhibited the third Affidavit of EF both filed 28th April 2022 **(the "Recusal Application")**. The basis of the Recusal Application is that a fair and impartial trial cannot be had or might appear not to be had pursuant to the Constitution, the common law and the rules of natural justice.

5. The Respondent opposes the Recusal Application and relies on her affidavit filed 20th June 2022 in support **(the "Respondent's Affidavit")**.

The Recusal Application

6. The Petitioner avers that on 14th March 2022, after an ex-parte hearing on an application made by the Respondent **(the "Ex-Parte Hearing")**, an ex-parte order was made against him which was based on meritless claims and resulted in the immediate removal of his son, EF IV **(the "Child")**, from his care and control to that of the Respondent **(the "Ex-Parte Order")**. He claims the abrupt removal was not justified as the evidence in support of the Respondent's application was lacking.

7. He was shocked at the Ex-Parte Order as he had only recently filed a complaint against the Respondent a week prior due to her failure to return the Child when she was supposed to which caused the Child to miss several days of school. The Petitioner considers the stripping of his care and control of the Child as beyond bias and reckless without any consideration for what was in the best interest of the Child, only what was in the best interest of the Respondent.

8. The Petitioner avers that at the hearing of his application for a stay of the Ex-Parte Order on the 16th March 2022 **(the "Stay Application")**, his Counsel was rushed through the application and that his facts which refuted the Respondent's baseless allegations were ignored. The Court's comments that the Child was with his mother overlooks the fact that a mother could possibly bring harm to her own child.

9. Once he realized that the Ex-Parte Order was not being set aside he sought to arrange to visit the Child. Despite claims that a child progressed better with in person learning as opposed to online learning, the decision was made to allow the Child to remain in Eleuthera with the Respondent where he would be allowed to visit him provided he gave twenty four hours' notice. The Petitioner avers that he has been treated as if he would hurt his Child.

10. He was baffled by it all and found the decision to be very biased against him as a father because the original custody, care and control order made in December 2018 never placed such restrictions on the Respondent who had been given access and visitation of the Child. His reference to a social services report made in 2018 **(the "2018 Social Services Report")** was also ignored which seemed to be based on the Court's perception that the Child was with the Respondent, his mother.

11. On the 17th March 2022, he had filed a Summons for leave to appeal the interim orders made by the Court on the 14th March 2022 and the 16th March 2022 **(the "Leave to Appeal Application")**. Upon writing to the Court for a date for the hearing of the application he was informed by the Court's clerk to seek a date from the judge on duty at the time of the filing. To his mind this meant that the Court had washed its hands of the matter while his Child remained in the care of the Respondent and the interim orders remained in place.

12. The Petitioner finds this to be unfair and prejudicial towards him. Thirty minutes later, he was informed that the Court would hear him on what he assumed was his Leave to Appeal Application. He felt "whiplashed" and confused as to whether the judge was or was not going to hear him.

13. The Petitioner avers that the Respondent illegally kidnapped the Child which the Court continues to ignore. This claim stems from the Respondent requesting to pick up the Child from school on or about the 24th February 2022 when the Child was not scheduled to visit with her. The Respondent had failed to return the Child by Monday, February 28th 2022 and he had missed school. He was unable to contact the Respondent until Tuesday, the 29th February 2022.

The Respondent's Opposition to the Recusal Application

14. The Respondent avers that the Court made its ex parte ruling based on the fact that the Petitioner had left the island without notifying her of the change in the Child's circumstances and had left the child with his mother, access to the Child was continuously restricted and there were concerns about the Child's psychological disposition. To her mind, the Petitioner saw no fault in vacating his parental duties and delegating them to his mother as he stated that he has been treated as if he had done something wrong. She and the Petitioner shared joint custody which was completely disregarded by him.

15. During the Stay Application there was no evidence that the Court worked against the best interest of the Child. Her understanding of joint custody was that if the child was not with one parent then the other parent had a right to raise him. The decision to have the Child raised by the Petitioner's mother for an extended period of time should have been discussed and agreed prior to his making the decision unilaterally. The Respondent avers that the Court simply transferred care and control from one absent parent to the other. She was not sure about how the Court could be perceived as rushed when the Petitioner admitted that he was out of the jurisdiction and had confirmed that the Child was with his mother. The application was premised on the Respondent's belief that the Petitioner was moving to the United States.

16. The Child was able to continue classes as normal despite not being equipped with the tools needed due to the Petitioner's mother's refusal to return his belongings. The Child instead had to share use of her work computer, despite the Court's order and despite being compelled to by the officers of the Western Police Station. The Respondent disagreed with the Petitioner's accusations that his Counsel was unable to raise a number of issues but instead recalls his Counsel arguing her points robustly. Such issues included the concern about the Child being able to attend school, the opinion of the virtual education being a poor quality and the Petitioner's absence from the jurisdiction.

17. The 2018 Social Services Report was referred to many times in the inter partes hearing, in addition to a police report made by the Petitioner's mother who had claimed that she had kidnapped the Child despite his mother's failure to outline the surrounding circumstances in her communication with the Petitioner. The Court did not rush or ignore the Petitioner's Counsel but made it clear what issues would be addressed at the inter partes hearing. The Court stated that its primary concern was the well-being of the Child over the interests of either parent. The Petitioner was given the right to provide the Respondent with 24 hours' notice of his intention to travel to Eleuthera to spend unsupervised time with the Child and return him to her before he left the island.

18. The emails sent to the Court by the Petitioner's Counsel were improper, despite this, the Court responded and entertained the parties during the hearing of the Stay Application. The Petitioner's concerns were addressed expeditiously. She recalled that the Petitioner's Counsel was given the opportunity to make her accusation regarding the kidnapping and in return her Counsel had clarified for the Court that the Child was not kidnapped but taken by her when she found out that the Petitioner had relocated to another country and had delegated his duties to his mother for an indefinite period of time. The Petitioner acknowledged that he was notified by email.

19. The Respondent was of the view that because the Petitioner failed to comprehend the magnitude of his actions and the degree of his disregard for her as a parent, he was unable to correlate her concern for the Child's wellbeing as his mother to her actions. The Petitioner's claim that the Court breached her son's right to an education seemed groundless as there was never an Order issued which required him to be absent from school. The Child had advised her that he completed makeup work from the assignments he had missed and went on to receive his usual high marks. She was informed by her son's Principal that they hosted students virtually which to her mind deemed that mode of teaching viable.

20. The Child missed one day of school because the Petitioner did not inform them that he would be attending virtually. The Order for the visit spanned from the 9th April to the 19th April as school was to open on the 20th April 2022. The Petitioner gave an undertaking of his own volition that he would remain in Nassau for as long it took as the Court required him to be interviewed by Social Services. Social Services subsequently indicated that they had a challenge contacting him until the Court intervened and ensured that he was interviewed prior to his leaving the jurisdiction again.

21. The Respondent did not believe that the Court's letter to Social Services was biased as it did not provide any description of the Petitioner as a parent, nor was there any accusation of abandonment as alleged. As the circumstances of the Child had changed, an update was necessary. The letter confirmed that the Petitioner was out of the jurisdiction and that the Child was living with the Petitioner's mother. The Petitioner's perception of bias was unfounded and likely as a result of his displeasure with the Court being updated with a new report given his current circumstances. She could not see how the Court's attempt to obtain objective, qualified information from an independent professional report could be biased.

22. The Court ruled both for and against both the Petitioner and the Respondent on separate occasions and did so based on the law. Numerous times it was stated that the sole concern was for the welfare of the Child. Moreover, the ex-parte Order was set aside after an inter-partes hearing and care and control was again granted to the Petitioner. The Recusal Application is unwarranted as the Child would have remained in the mother's care and control if the Court was biased against the Petitioner and fathers generally.

SUBMISSIONS

Petitioner's Submissions

23. The Petitioner submits that by the Constitution, the various international human rights instruments affecting a person's rights and obligations and by the rules of natural justice, a

person has a right to a fair trial before an independent and impartial court. He relies on **Article 20 (8) of the Constitution** which states: -

> **"(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given o fair hearing within a reasonable time."**

24. A recusal application is not based on the idea that the Court is actually biased, which is nearly impossible to prove, but that there may be the perception of an apparent bias, which he submits is the case in this instance. The Court's conduct gives the appearance of bias. In **Stubbs and Others v Regina [2018] UKPC 30,** the Court of Appeal set out the general rule for the test of bias,

> **"a judge should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so and the burden of proving that bias exists falls upon the party raising the objection."**

25. In **R v Bow Street Metropolitan Stipendary Magistrate and others, ex parte Pinochet Ugarte (No 2 [1999] 1 All ER 577** and **Porter v Magill [2001] UKHL 67** it was established that there were two separate and distinct doctrines to consider when dealing with the issue of bias. These are the doctrines of automatic bias where a judge must not sit and apparent bias where the judge ought not to sit. In **R (on the application of Kaur) v Institute of Legal Executives Appeal Tribunal [2012] 1 ALL ER 1435**, the Rix LJ stated,

> **"In these circumstances, it seems to me that by now it may be possible to see the two doctrines.....as two strands of a single over-arching requirement: that judges should not sit ot should (... recusal or disqualification where there is a real possibility on the objective appearance of things, assessed by the fair-minded and informed observer (a role which ultimately, when these matters are challenged, is performed by the court) that the tribunal could be biased. On that basis the two doctrines might be analytically reconciled by regarding the automatic disqualification test as dealing with cases where the personal interest of the judge concerned, if judged sufficient on the basis of appearances to raise the real possibility of preventing the judge bringing an objective judgment to bear, is deemed to raise a case of apparent bias."**

26. In **Mengiste and another v Endowment Fund for the Rehabilitation of Tigray and other [2013] EWCA Civ 1003**, Lady Justice Arden made it clear, where there is an issue of apparent bias, the test established in **Porter v Magill** ***(supra)*** must be "fearlessly applied". This accentuates the legal principle that justice must not only be done but must be seen to be done.

27. In **El Farargy v El Farargy [2007] EWCA Civ 1149,** a family law case, the Petitioner had claimed that the judge had shown apparent bias towards the other party because of comments he made during a pre-trial review hearing. After reviewing the comments, Ward LJ rejected the submission that the judge had a closed mind about the case but accepted that some of the remarks made by the judge could be seen as "mocking and disparaging" the Petitioner's status and faith resulting in a perception of unfairness. The appeal was therefore allowed.

28. Ward LJ set out his thoughts on the correct procedure that should be followed if a judge be approached to recuse him or herself:

> **"It is an embarrassment to our administration of justice that recusal applications, once almost unheard of, are now so frequently coming to this Court in ways that do none of us any good. it is, however, right that they should. The procedure for doing so is, however, concerning. It is invidious for a judge to sit in judgment on his own conduct in a case like this but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal. Most judges must heed the exhortation in Locabail not to yield to tenuous or frivolous objections, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able lo do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment af its own behaviour."**

29. The Court's order that the Petitioner had to travel to see the Child was much more onerous since the Child would not have been able to see him and he could not remove the Child from the Respondent's custody even though he still had joint legal custody. The comments made by the Court during the Stay Application left the Petitioner feeling uncertain as to its intention. The Petitioner contends that there was no date set for the summons to discharge the Ex-Parte Order and the Court seemed to be concerned with the variation of the original order.

30. Despite the fact that the application concerned the welfare and best interest of the Child, the Court was not minded to hear why the Petitioner was stating that the Ex-Parte Order should be discharged and was instead focused on the fact that the parties had joint custody. With that custody order in place and the father being out of town, the mother should have care and control in his absence which was a clear indication of bias and resulted in the filing of the application for leave to appeal.

31. A mother is usually granted care and control of a minor child. The fact that the Petitioner had been granted care and control should have placed the Court on notice to make inquiries as to why there was a deviation in the instant case. The setting aside of the Ex-Parte Order was only as a result of the Respondent's failure to make full and frank disclosure and did not illustrate the tribunal's independence and impartiality. The Court did not do so on the merits of any of the other submissions before it.

Respondent's Submissions

32. The Respondent contends that the Petitioner's reliance on the likelihood that there is a conclusion of a real possibility he would not have a fair hearing, is wrong in law. The correct test is whether the fair-minded and informed observer perceives the existence of apparent bias, as set out in **Porter v Magill** (supra).

33. It is the judge who considers from the standard of a fair-minded and informed observer following the proceedings, whether his/her independence and partiality appears to have been compromised.

> **"A judge should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so and the burden of proving the bias falls upon the party raising the objection." Stubbs and others v Regina [2015] 1 BHS J. No. 95.**

34. In **Mengiste and another v Endowment Fund for the Rehabilitation of Tigray and other [2013] EWCA Civ 1003**, the Court stated:-

> **"Judicial recusal occurs when a judge decides that it is not appropriate for him to hear a case listed to be heard by him.....when a party applies for him to do so...a judge must step down in circumstances where there appears to be bias, or as it puts, "apparent bias". Judicial recusal is not then a matter of discretion."**

35. Merely inviting a judge is not enough. A party seeking recusal bears the burden of proving apparent bias. Only then, would a judge be required to step down. In this instance, the Court was not biased because the 2018 Order never denied her her parental rights but granted her and the Petitioner joint custody, with care and control to the Petitioner. An independent and impartial tribunal does not determine matters based on generalized views but on legal principles and the individual circumstances of the case. She did not accept that the Court had to requisition the 2018 report because the father was given care and control.

36. The notion that the Petitioner's mother had temporary care and control of the Child was not a recognized principle of law as a grandparent had no parental rights. The Petitioner did not provide any evidence of bias by the Court towards the decision to discharge, set aside and vary the ex-parte Order. The Petitioner did not provide any assertion in support of its position that the Court lacked jurisdiction to appoint a single joint expert or to disclose the name of the expert.

37. Section 9 (1) of **The Child Protection Act** states:-

> **"A court considering any question with respect to a child under this Act may ask the Department to arrange for a social services officer or such other person as the court considers appropriate, to report to the court on such matters relating to the welfare of that child..."**

The section confers the court the jurisdiction to appoint such other person as it deems appropriate. Therefore, the decision was neither improper nor biased where the paramount concern is the welfare of the child.

38. The Petitioner's claim that no child psychologist was needed was contradictory and inconsistent, when in fact his Counsel recommended a report be done in 2022. She did not accept that the court determined care and control anew but considered it as an application for variation. There was no bias in the letter to social services and the judge made it clear that she nor any of the parties or their Counsel would accompany the professional while the Child was being interviewed.

39. There was no breach or possibility of a breach of Article 20 (8) of the Constitution and a fair-minded observer would not conclude that there was a real possibility of bias.

DECISION

40. The Petitioner seeks this Court's recusal from continuing to hear his matter. The law as it relates to recusal is well established. A leading authority on recusal is **Porter v Magill [2001] UKHL 67** where an objective test was developed. The question that must be answered 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.

41. In **Oktritie International Investment Management v Mr. George Urumov [2014] EWCA Civ. 1315,** the Court of Appeal more recently considered this test and stated:-

> **"It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concepts of bias... extends... to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case."**
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> **There is already a certain amount of authority on the question whether a judge hearing an application (or trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one of other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the Petitioner; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact sensitive...**

42. The Court in **Locabail (UK) Ltd. v. Bayfield Properties and others (2000) 1 All ER 65 stated that:-**

> **"in considering whether there is a real danger of bias on the part of a judge, everything depends on the facts, which may include the nature of the issue to be decided" [emphasis added].**

43. The Court further stated that a recusal application cannot ordinarily be soundly grounded upon the following:-

> **"That where apparent bias was asserted it was for the reviewing court, personifying the reasonable man with knowledge of the relevant circumstances and adopting a broad approach, to assess whether there was a real danger of bias; that in making that assessment the court might properly inquire whether the judge knew of the matter relied on as undermining his impartiality, since ignorance would preclude its having influenced his mind and dispel any such danger; that; although the judge could not be cross-examined or required to give disclosure, the reviewing court might properly receive, but not necessarily accept, a statement from him as to his state of knowledge, but not as to its effect on him since that issue was for the court, not the judge, to assess (post, pp. 475D-E, 476H-477C, E-478A).**

44. The issue in this case is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there exists a real possibility that I was biased against the Petitioner? The test for apparent bias requires consideration of a "possibility", applying the information known to and attributes of the hypothetical observer.

45. The Privy Council, **in Stubbs (Appellant) et al v The Queen (Respondent) [2018] UKPC 30**, considered an appeal from the Court of Appeal's decision not to allow the recusal of one of its judges after the application was made based on the fact that the appellate judge had heard and determined the matter in a Court below. Throughout the Council's discussion of the issue of bias Lord Lloyd Jones considered a judge's prior involvement in cases and recusal applications made during family law proceedings,

> **"15. The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. The appearance of bias includes a clear indication of a**

prematurely closed mind (Amjad v Steadman-Byrne [2007] EWCA Civ 625; [2007] 1 WLR 2484 per Sedley LJ at para 16). The matter was expressed by Longmore LJ in Otkritie International Investment Management Ltd v Urumov [2014] EWCA Civ 1315 (at para 1) in the following terms: "The concept of bias ... extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case."

16. A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made.

17. It is not acceptable for a judge to form, or to give the impression of having formed, a concluded view on an issue prior to hearing full argument by all parties on the point. In re Q (Children) [2014] EWCA Civ 918 provides a strong example. In care proceedings the judge expressed himself at a case management hearing in terms which made clear that he accepted the account given by the father and rejected the allegations made by the mother, in circumstances where the mother had not yet given evidence. The Court of Appeal allowed an appeal against an order made by the judge in a subsequent fact-finding evaluation. McFarlane LJ observed (at paras 53, 54 and 57) that there is a thin line between case management and premature adjudication. Here however, the judge had strayed beyond the case management role by engaging in an analysis, which, by definition, could only have been one-sided, of the veracity of the evidence and the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process. Further examples are provided by Amjad v Steadman-Byrne (Practice Note) [2007] EWCA Civ 625; [2007] 1 WLR 2484 and In re K (a child) [2014] EWCA Civ 905; [2015] 1 FLR 927." [Emphasis added]

46. In **Re T (A Child) (Suspension of Contact: Section 91(14) CA 1989) - [2016] 1 FLR 916**, the judge in the court below had made substantive orders against the father outside of his presence and after she stated that she would recuse herself from the action. The Court of Appeal held that she had erred in doing so and that she instead should have made an interim order which could have been suspended after a hearing in father's presence.

47. McFarlane LJ in **Re Q (Children) (Fact finding hearing: Apparent judicial bias) [2014] EWCA Civ** discussed a judge's role in family proceedings when considering an application for recusal stemming from the same:-

> "[44] More generally, a judge hearing a family case has a duty to further the overriding objective of dealing with cases justly (having regard to any welfare issues) by actively managing the case [FPR 2010, rr 1.1(1) and 1.4(1)]. Active case management involves a range of matters set out at FPR 2010, r 1.4(2) which include identifying the issues at an early stage [r 1.4(2)(b)(i)] and deciding promptly which issues need full investigation and hearing and which do not [r 1.4(2)(c)(i)].
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> [45] Family judges are encouraged to take control of the management of cases rather than letting the parties litigate the issues of their choosing. In undertaking such a role, a judge must necessarily form, at least a preliminary, view of the strength and/or merits

> **of particular aspects of the case. The process may well lead to parties reviewing their position in the light of questioning from the judge and, by agreement, issues being removed from the list of matters that may fall to be determined.**
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> **[46] Despite having to adopt a "pro-active" role in this manner, judges must, however, remain very conscious of the primary judicial role which is to determine, by a fair process, those issues which remain live and relevant issues in the proceedings. The FPR 2010 makes provision for an "Issues Resolution Hearing" ["IRH"] at a later stage of care proceedings. As the IRH label implies, it is intended that some, if not all, of the issues will be resolved at the IRH stage. The rules are however plain [FPR 2010, PD12A] that the "court resolves or narrows issues by hearing evidence' and 'identifies the evidence to be heard on the issues which remain to be resolved at the final hearing".**
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> **[47] 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 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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> **[48] 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.**
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> **[49] As the words used in some parts of the formal judgment given on 20 March make plain, HHJ Tyzack, as an extremely experienced family judge, was aware of the need to express himself with care for the reasons that I have described. Two examples come from para 12 of the judgment:**
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> **". . . it seems to me that the local authority could be, I am using that word advisedly, could be in some difficulty in getting over the threshold in this case.**
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> **. . . at the moment, on the basis of what I have read in those police papers, I very much doubt, and I put it no higher than this, but I very much doubt that threshold would be made out. I can put it no higher than that at the moment, because obviously I need to give the parties an opportunity to investigate that, and the local authority, perhaps, to file further threshold documents."**
> **[50] Such expressions of judicial opinion, given the need for the judge to manage the case and be directive, are commonplace and would not be supportive of an appeal to this court based upon apparent judicial bias."**

48. The facts which must be considered stem from the events which occurred after the making of the Ex-Parte Order. By the Respondent's urgent ex-parte application, she had submitted to the Court that the Child should have been in her care and control because the Petitioner was out of the jurisdiction and her concern was that he was moving abroad to live in the United States, and that the Child was left with his grandmother. The parties had previously appeared before Gray-Evans J (now retired) who had vested the parties with joint custody and the Petitioner with care and control. There was no part of the order which stated that the grandmother of the Child was granted guardianship over the Child in the event that the Petitioner was outside of the jurisdiction. As a result, I ordered at the ex parte hearing that the Child should be placed in the care and control of the Respondent until there was an inter-partes hearing on the issue of custody, care and control as a result of the application made by the Respondent to vary the 2018 order.

49. Two days later, the Petitioner sought to have the order stayed and I agreed, at a directions hearing to hear Counsel. It was decided during that hearing that his application to set aside the Ex-Parte Order would be heard at a later date as the Court was in the midst of a trial and to give the parties an opportunity to prepare their cases in support.

50. The Ex-Parte Order was not discharged at the directions hearing and the Court directed that the Child was to remain with the Respondent until the inter partes hearing to discharge the ex-parte Order. Further the Petitioner, who had returned to the jurisdiction, agreed to stay until he was interviewed by Social Services, in preparation for the application to vary. He was also ordered to give the Respondent twenty four hours' notice before he visited the Child on the island of Eleuthera where she resided with the Child.

51. I find it prudent to set out a rough draft of the transcript from the directions hearing on the 16th March in its entirety as many of the discrepancies stem from the same:-

> "“Eldon Ferguson v Nakera Ferguson - FAM/DIV/0090/2022
> ROUGH - 16 March 2022
> THE COURT: Can I have the appearances, please.
> MS. BOSTWICK-DEAN: My Lady, I appear on behalf of the petitioner in this matter. I Janet Bostwick-Dean appear along with Mrs. Smith-Mackey on behalf of the petitioner in Eldon Alexander Ferguson III. For the record this is FAM/DIV/0090/2022 Eldon Alexander Ferguson III, Nakera Latisha Ferguson nee Ford. Mrs. Lilith Smith-Mackey appears for the respondent.
> MS. SMITH-MACKEY: My Lady, just for the record I also appear along with Ms. Nicolette Burrows.
> MS. BOSTWICK-DEAN: Mr. Ferguson, I don't know if you can hear me, but you have to have your camera on.
> THE COURT: Mr. Ferguson, you are not driving are you?
> MR. FERGUSON: I'm parked.
> THE COURT: Mrs. Mackey, where is your client?
> MS. BOSTWICK-DEAN: My Lady, she's present.
> THE COURT: Thank you. She is here, Mrs. Bostwick-Dean.
> MS. BOSTWICK-DEAN: My Lady, we appear on our application. And our application is an application to stay or discharge your order of March 14th in this matter. It is our anticipation that the original application, if necessary, should be heard at another date because many of the papers on the original application -- well, not many. All of the supporting papers in the original application were not delivered to us until last evening. And so, delivered to use electronically last evening, hard copy about an hour ago. So while we have prepared a response to it, in what I consider to be a complete disregard of the rule and practice which would normally require that all papers relied upon in an ex parte matter be served with the order,that did not happen in this matter. We got only the order.
> THE COURT: Mrs. Mackey, why was that not done?
> MS. BOSTWICK-DEAN: My Lady, they were served within the hour. I sent the documents along with the order with my messenger. They did not get to their chambers until apparently today. It was my intent to send the order along with all of the accompanying documents to Mr. Smith. However based on my instructions from my client she was at the school and I would prefer them to have sight of the order without -- I would have rather them have sight of the order so that there would have been no confusion or "unnecessary disturbance and/or drama" at the school in the presence of the minor child. They received all of the documents. The documents were first e-mailed to Mr. Smith. And then secondly after I received notification from Ms. Bostwick that she had not yet received the documents I forwarded them to here and she acknowledged receipt of the same. All of this transpired in under perhaps maybe two to three hours, my Lady.
> THE COURT: Yesterday?
> MS. SMITH-MACKEY: Yes, ma'am.
> THE COURT: So Ms. Bostwick --
> MS. BOSWICK-DEAN: My Lady, the point that I -- making
> THE COURT: No, let me ask the question. Did you get the documents yesterday?
> MS. BOSWICK-DEAN: Last evening. We got the order at around 2:00, and the accompanying papers were not delivered to us at that time. We got the accompanying papers were not delivered nor were they mentioned until I requested them after my Lady set this hearing for 1:00 p.m.
> MS. SMITH-MACKEY: My Lady, that is not correct. When sent the e-mail to Mr Smith, I explained to him that the documents will be sent to him in a very short period of time. The documents were scanned and e-mailed to Mr Smith. Mrs. Bostwick sent me an e-mail indicating that she had yet to receive the documents and they were transferred to her immediately. We have the e-mail notification of then the documents were sent. This all happened within a few hours. The order was only collected from your chambers yesterday morning. The order was sent to Mr. Smith before Mrs. Ferguson went to school to collect the minor child. If need be, my Lady, it's very simple. We can pull up an e-mail.
> MS. BOSTWICK-DEAN: Absolutely. My lady, I'm not going to waste time on that because the reality is you are probably dealing with this during your adjournment. But we most certainly will

provide you with the chain of e-mails which will indicate when we got the order, when we were communicating with you, when I requested the accompanying documents and when Mr Smith received them.
THE COURT: All right. So counsel, let me just stop, as you correctly indicated Mr. Bostwick I am in the middle of a trial. And this is my lunch hour and so I don't plan to spend the entire lunch hour dealing with it. The issue here is who should have care and control of this child. It is not an issue of custody because the Court already in a previous iterations had granted joint custody to both parties. And I made the order because I was told that Mr. Ferguson is not on the island and that Mr. Ferguson is in the US somewhere. Mr. Ferguson, where are you?
MR. FERGUSON: I'm in Atlanta, Georgia.
THE COURT: That was what I was told. And the child was staying with your mother.
MR. FERGUSON: Yes.
THE COURT: And therefore I made the order that the child would stay with his mother until we can have this inter parties hearing. That is my order. Now, there is no question of unfitness to have custody because the Court made an order of joint custody that has not been appealed as far as I understand it.
MS. BOSTWICK-DEAN: No, my Lady. But may I please speak to this. First of all in terms of living arrangements it has always been the case that the child has lived with his father and his father's mother. That has been the status spoken to through social services report. So the fact that Mr. Ferguson is travelling child is in the custody of his mother is not a unusual circumstance. The second part, my Lady, is that if I look at the social services report, the social services report which was relied upon in 2018. It indicated that yes, the child should be in their joint custody. However that Mr. Ferguson be granted care and control of Eldon and the reason for that is very very important and significant and set out in full on page twelve of the report. In summary what it speak to is that Mrs. Ferguson has a history or of severe depression. Furthermore, contrary to medical advice and taking prescriptions for her conditions she has refused and severe she self medicated with marijuana. This makes her lethargic and unable to care for the child. This they set out in full, the full conditions. This is on her own admissions. The social services said no change should be made. Furthermore this child has been in his father's sole custody from he was about three years old. This child has been predominantly raised by his father and his father's family. So that is set out in the social services report. My Lady, I can take you to it.
THE COURT: I'm not hear to address it today. That is the point. I hear what you are saying. I will hear the application. If I find that the order was improperly made it will be set aside. The problem, Ms. Bostwick, is that I have -- what I had before me and what includes my decision was there was an order of joint custody. The father was away. The mother had access rights which I understand she was not being allowed to see the child. And also that there was an issue a very serious issue with regard to the psychological disposition of the child. Hence my requesting social services to intervene. And I'm going to get a report. I'm also going to interview this child myself.
MS. BOSTWICK-DEAN: My Lady, what I will say. The father will be back in town tomorrow. But in addition to that, my Lady, what is disruptive is that this mother lives in Eleuthera. We don't even know where. THE COURT: I raised that issue and I asked about the schooling. And Mrs. Smith-Mackey, you can speak to it, please.
MS. SMITH-MACKEY: My Lady, it has been confirm that Elie will continue to go to school. The issue why has has not been allowed to go to school or sign onto his school platform is because he does not have any of his tool a laptop they were not given to Mrs. Ferguson yesterday. However, once they return to Eleuthera he will be able to join school virtually and that will continue until the Court says otherwise, my Lady.
THE COURT: When was the last time Mrs. Ferguson had access, Mrs. Bostwick?
MS. BOSTWICK-DEAN: My Lady, the arrangement is always when the child is in school he is in New Providence.
THE COURT: No, I asked you a question.
MS. BOSTWICK-DEAN: Two weeks ago when she took him and we had to go to the police to show the order to say that she did not have the right to retain the child she took the child so that the child was not able to write his mid-term examinations. We had to make or arrangements.
MS. BOSTWICK-DEAN: My Lady, counsel is making assertions that are completely incorrect. Mr. Ferguson travelled and she found out from the child that he had travelled and nobody spoke to Mrs. Ferguson with respect to where the child would remain at that time. Mrs. Ferguson went to the last known address of Mr. Ferguson and found that he had packed up the entire apartment with no knowledge to the respondent. That is not the way parents who have to share custody operate. Notwithstanding that, my Lady, there were numerous occasions -- to answer counsel's question as to when was the last time sh had access which was mutually agreed between the parties, would have been at the end of Summer when he was wisped away to Atlanta and returned sometime in August at the end of Summer. Two weeks ago was the first time since Summer she had access to her son.
MS. BOSTWICK-DEAN: Two weeks ago was mutually agreed. She got access to her child because they agreed the child would be with her and then she did not return the child back to

school. And all of this, my Lady, we have also set out. She had him also for the full seven months of lockdown the child was with her in the island during the lock down.
MS. SMITH-MACKEY: Incorrect.
MS. BOSTWICK-DEAN: My Lady, I am not going to argue with Mrs. Smith who insists on speaking over the top of me.
MS. BOSTWICK-DEAN: Because you are not speaking facts.
THE COURT: Both of you that's it. Counsel, we are dealing with a child. The Court order has been made giving both parents joint custody. One parent care and control. And I made an order on an emergency application and it may be improper it may not be. What I'm saying right now is there is nothing which precludes this mother from having this child at the moment. I'm going to hear the interparty hearing, and if there is something that was not done properly or should not happen I will deal with it. But at the moment -- and I'm going to interview the child. I'm definitely going to interview the child and have the child psychologist deal with this child because there appears to be some issues here.
MS. SMITH-DEAN: My Lady, I received two reports; one from Dr. Huyler and the other from Nadia Cash. These are all reports that have been done to the exclusion of Mrs. Ferguson. The whole premise of having joint custody is that if they thought it fit for this child to be interviewed by any doctors this is something she ought to have been privy to. I do note on the first paragraph of the report from Ms. Nadia Cash --
THE COURT: Where is this?
MS. BOSTWICK-DEAN: This is a document that was just sent by Mrs. Bostwick. She said she had inadvertently left it out however I note that it was signed on the 15th of March, 2022 by a clinical psychologist.
THE COURT: It's in the affidavit?
MS. SMITH-MACKEY: Correct, my Lady. These are medical terminology which require joint custody. No party has the right to do any such evaluation on this child without the permission of both parents. And, my Lady, I will refer you to the first paragraph and this is the reason why we indicate that Mr. Ferguson is in breach of the order as it relates to joint custody. Even referred by his lawyer Mr. Tavari Smith. Does that make him a lawyer now or a witness? My Lady, I find it very strange that a lawyer can step in as a guardian and a minor who has both parents alive in the absence of any guardianship application to say that he was referred by his lawyer. This is a minor. The only person who can refer this child to be assessed analyzed by any psychiatrist ought to be the parent or the Court. We have only recently received a court order for a social service evaluation. So the only report that the Court should be privy to is the report of 2018 which is outdated which is why we requested a new social services report. I'm going to object to these reports, my Lady, because they have no bearings on this application as they are made in the absence of the respondent.
THE COURT: I can hear that on the inter parties hearing. Anything else, Ms. Bostwick, so I can set a date?
MS. BOSTWICK-DEAN: Yes, thank you, my Lady. What I would like to say is when you speak to the fact that he will be able to return to school virtually. My Lady, because of the urgency I really ask the court -- it is my understanding the children are now in person. In the past the children were virtual.
THE COURT: I will do what is necessary in the best interest of the child, not the parents. The reality is, the fact is Mr. And Mrs. Ferguson are the parents of this child. They both have equal rights to the child. But the primary concern of this court is the child.
MS. BOSTWICK-DEAN: My Lady, believe it or not so is mine. I'm very distressed that his home environment has been interrupted in this matter.
THE COURT: Well, that is one of the reasons Mrs. Bostwick there is concern by the mother the child is going through some psychological issues. The court has to get to the bottom of it.
MS. BOSTWICK-DEAN: But I would say the fact is that in my humble submission to take the child and move him to another island --
THE COURT: Mrs. Bostwick he is going to his mother. It's not as if he is with a stranger.
MS. BOSTWICK-DEAN: My Lady, I understand. But even so his normal environment is being interrupted. And I'm very concerned about that because of the circumstances which -- I will only say, my Lady, that I don't know how long this take. In my experience Social Services reports are going to a minimum of three weeks. I am looking at this. This child is going to be out of sorts. I would have thought all of that would have happened. If examiners had said yes, pull him immediately that should have happened. But ex parte without hearing from the other side I am deeply concerned about this entire process. But that is all I had --
THE COURT: The interim order, Ms. Bostwick --
MS. BOSTWICK-DEAN: How much time are we talking about?
THE COURT: The nature, unfortunately, of these types of proceedings are always adversarial. And the order that is made was made consciously. The child is placed with his mother. His father is not here. Now also bearing in mind the other factors. The evidence was that she was deprived of her access. And therefore I made the order that I did. Under the law that order stands until it's set aside. I'm going to fix a date and I will hear your application to set aside. I have also written a

letter to Social Services and requesting an investigative report of both parents and the child. I will also contact a child psychologist and I will interview the child.
Ms. BOSTWICK-DEAN: My Lady, we welcome that. And by the way Mrs. Huyler is the school therapist. Dr. Huyler is not our therapist. Dr. Huyler is somebody that was associated with the school and the school recommended that the child undergo therapy after he was moved in 2018.
THE COURT: Why was that report done in 2021?
MS. BOSTWICK-DEAN: They actually requested a report be done on the child. I know the cool requested it and if you read the report it references discussions with both parents.
THE COURT: It was done at the request of the father.
MS. SMITH-MACKEY: Again, my Lady, it an obvious breach of joint custody.
THE COURT: My question is was Mrs. Ferguson interviewed for this?
MS. BOStWICK-DEAN: When I read it I –
MS. SMITH-MACKEY: No, my Lady. She is here. She can speak to it.
As a matter of fact when they called her she said can you send me an an e-mail she that I can document everything because she knows that sometimes what is said by her is misconstrued and mis-communicated in these very same reports that she has not given consent to do with their child. So again, my Lady, these reports have been done at their own admission to the exclusion of the respondent.
THE COURT: It appears as if they interviewed her, so I don't know.
MS. BOSTWICK-DEAN: When I read it it is read as if they interviewed her. You were asking about the timing. This was when the child came back after the Covid restrictions. And when they came back the principal kept saying this is not the child that I know. She contacted the parents and said this child needed some therapy. And she recommended Huyler and Dr. Ava Thompson and Huyler was associated with the school and already knew the child. And it was felt that the child knew her and would be more forthcoming.
THE COURT: I'm going to look at the matter and I will make a determination after I obtain the assistance of the expert as to what is best for that child. It does not matter who the father is or who the mother is. I'm concerned about the child. When is the Easter vacation for the school? I can hear the application 2:30 on the 26th of April.
MS. SMITH-MACKEY: My Lady, can we possibly do the 28th or the 3rd of May.
MS. BOSTWICK-DEAN: No, my Lady. Sooner rather than later.
MS. SMITH-MACKEY: I have a calendar, Ms. Bostwick.
MS. BOSTWICK-DEAN: My Lady, the 29th and the 26th are convenient.
THE COURT: Ms. Smith-Mackey, what I will do is I will have the child -- I'm going to make an arrangement for this child to be interviewed by a child psychologist to have the child available. I will also see him on that same date. So the child psychologist will come to the court and I will see the child.
MS. SMITH-MACKEY: Obliged, my Lady.
MS. BOSTWICK-DEAN: My Lady, you did not actually set the date and time
THE COURT: The 29th at 10:00 a.m.
MS. BOSTWICK-DEAN: My Lady, in the event we get the Social Services report back and you review it and there is anything of concern that merits this matter being given a short hearing I would ask that the Court please accommodate the same.
THE COURT: Ms. Bostwick, you don't have to tell the Court that. If there is something then I will deal with it soon as I can. At the moment my calendar is chalk a block and the only reason that this matter is before me is because I'm the duty judge. Hence I had to deal with any applications that come. And since I made the initial order I'm going to hear the inter parte hearing. Now on the 29th I will hear inter parte application.
Mr. Ferguson, how long are you going to be in Nassau?
MR. FERGUSON: As long as you need me to.
THE COURT: All right you are going to need to be here because I have sent to social services to arrange to interview you as well as the respondent. Your cell number is [redacted]?
MR. FERGUSON: Yes, ma'am.
Ms. BOSTWICK-DEAN: My Lady, during this period of time what about access to Mr. Ferguson?
THE COURT: Mr. Ferguson can travel to see the child if he wishes to.
MS. BOSTWICK-DEAN: Just to be very clear, you see the nature of this -- she's not to -- if she arrives --.
THE COURT: Let me just stop you right here. No parent is to remove this child from the Bahamas, none. That is an order.
MS. BOSTWICK-DEAN: My Lady, let me make it clear. That was never my client's intention in as much as that was represented to you that was false. He would not have done so.
MS. SMITH-MACKEY: My Lady --
MS. BOSTWICK-DEAN: Excuse me. You cannot speak for my client.
MS. SMITH-MACKEY: What I would say, my Lady –
MS. BOSTWICK-DEAN: Mrs. Mackey, you must be the rudest counsel I have ever met. You are speaking over counsel.

THE COURT: Mrs. Bostwick and Mrs. Mackey, please ladies. I also made an order that the passport be turned into the court. Please ensure that that happens.
Ms. BOSTWICK-DEAN: Yes, my Lady. I would ask, please that when I'm addressing the court that you please guide Mrs. Smith-Mackey not to interrupt counsel. She has successfully derailed comments that I have been trying to make twice. THE COURT: What would you like to say, Mrs. Bostwick?
MS. BOSTWICK-DEAN: What I would like to say ma'am is that you were talking to the access. I was saying to you that in as much as it was represented to this court that our client had any intention of moving the child from this jurisdiction without the consent of the court, let alone consent of Mrs. Ferguson is fallacious and false.
THE COURT: Okay.
MS. BOSTWICK-DEAN: My Lady, I have to respond. If look at this report from Nadia Cash it says right there that he as asked was asked about his father. He reported that his father is currently in Atlanta. He says he asked about potentially living in Atlanta. The child responded, I have a future in Atlanta and he says he was excited about living there. So if that is not clear that it was their intention for this child to be moved to Atlanta without
Mrs. Ferguson's consent then I don't know what else it is. And this report it should not be on the record for more than one reasoning.
THE COURT: I will hear it.
MS. SMITH-MACKEY: Obliged, my Lady. I'm guided and I do apologize for my loudness today.
MS. BOSTWICK-DEAN: I'm sure that apology wasn't for me but I accept it.
THE COURT: In terms of access you people are taking up my lunch hour. If Mr. Ferguson wishes access to his child he will contact Mrs. Ferguson at least 24 hours before and he is not to remove the child from her control.
MS. BOSTWICK-DEAN: Does he have weekend visitation with the child?
THE COURT: Yes, once he makes the arrangement.
MS. BOSTWICK-DEAN: If the Court orders.
THE COURT: Matter is scheduled for April 29th at 10:00 a.m. and I will hear the parties at the time. I will make arrangements. I will let -- I have your contact number, Mr. Ferguson so that Social Services can contact you. I will make the arrangement to have this child interviewed by my psychologist. Anything else?
MS. SMITH-MACKEY: Nothing further, my Lady."

This transcript has errors in the names of the Counsel actually speaking at the time, but it is clear to follow the submissions made and determine who was making them.

52. Thereafter, another matter was vacated from the Court's schedule and the inter-partes hearing of the Petitioner's application to discharge the Ex-Parte Order was in fact heard on the 22nd March 2022 **(the "Discharge Application")**. During the hearing, the Petitioner's Counsel, Mrs. Bostwick-Dean, made the argument that the Court had, during the direction hearing, ordered that the Ex-Parte Order would remain and that the Court was functus. The Court in fact had indicated that the ex parte Order would remain until the inter-partes hearing to discharge the Order.

53. The argument was also made by the Petitioner's Counsel that there was uncertainty as to which application was being heard and it was her position that the inter-partes hearing for the Respondent's summons to vary the 2018 order was what was before the Court at that time. The Court quickly clarified which application was being heard.

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"MS. BOSTWICK-DEAN: What I was saying was that the – we made an application to discharge, set aside and vary the ex parte order.
THE COURT: Right. And that's the inter-partes application.
MS. BOSTWICK-DEAN: Right. And we say that application was disposed of; and what we are coming back on April 29th to deal with –
THE COURT: But it wasn't. That's where – that's where there is an issue. What I said was I will hear you on the 29th; that's what I said.
MS. BOSTWICK-DEAN: I took that to mean I will hear you on the Inter partes – in other words, there was an Ex Parte Order granted by the Court for which leave was to return

Inter partes. I took that to mean on the 29th of April, we will hearing the initial Summons Inter partes.
THE COURT: No. No. No. What I was dealing with strictly was your Application to Set Aside the Ex parte Order. That's what I was dealing with.
MS. BOSTWICK-DEAN: My Lady, that – to be honest with you, I – I hear you. So then, you would be saying that you're not res judicata? You're seized with the particular Summons?
THE COURT: Certainly. Exactly. And when I was given the opportunity, by a matter falling away, I – 'cuz im fully aware of the nature of the application, I set it down for today's date.
MS. BOSTWICK-DEAN: So you're saying – so what are you saying is happening on April 29th? Are you saying that's –
THE COURT: We don't need the April 29th application because we're dealing with it today; and depending on the outcome of this Application, there is a – if this Order is set aside, then it goes back to the status quo.
22 THE COURT: Then, it goes back to the status quo and the only outstanding issue would be the Summons to vary the Order that was made in 2000 whenever. I don't know when the date is.
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THE COURT: No. Yes. About the access position. This is on the Summons for Leave to Appeal but anyway. That's not before me, at the moment, so let's continue. But for the record, Ms. Bostwick, I want to make sure that you understand what I said. Okay? I was dealing with your application to discharge the Ex parte order, which is an inter partes hearing. That's what I was dealing with."

54. Mrs. Bostwick-Dean then presented inter alia her submissions with respect to the 2018 Social Services Report and whether there had been any previous communication between the Petitioner and the Respondent in relation to the Petitioner's plans to travel and relocate to the United States. At the beginning of the hearing both Counsel were allotted equal time to be heard on their respective positions. At the end of Mrs. Bostwick-Dean's submissions it was indicated that she had presented her full submissions.

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THE COURT.....
Okay. You can wrap up now and, then I can hear from –
MS. BOSTWICK-DEAN: My Lady, I think that's it. I was just glancing at my screen to see if I was going to get a note and no. That is it.

55. Upon Counsel for the Respondent, Mrs. Smith-Mackey completing her submissions, Mrs. Boswick-Dean was again given an opportunity to reply. When it was stated that arrangements would be made for the Court to meet with the Child and to have a psychologist interview the Child there was no objection and in fact there was assistance by the Petitioner to facilitate the same. Further, it was made adamantly clear that the expert to be chosen would not interview the Child in the presence of the Court.

56. The Ex-Parte Order was in fact set aside and the status quo was restored as the Respondent had failed to provide full and frank disclosure to the Court pertaining to the existence of the 2018 Social Services Report. This was the only reason for the discharge as the other issues being relied on and submitted by the Petitioner would be considered during the hearing of the Respondent's application to vary the original order which was then set to be heard on the 29th April 2022. On the 29th April 2022, the Petitioner filed his application for my recusal which was subsequently set for hearing and the application to vary was not heard and no further steps were taken with regard to that application.

57. Accordingly, the process before the Court involved the discharge of an order made ex-parte in family proceedings. Family proceedings, which are adversarial in nature, require more of the Court's supervision and guidance than other matters; the paramount consideration

always being the well-being of any child involved. The actions of the Court to place the Child with the Respondent outside of the Petitioner's presence is not an unusual order to make. The decision of the Court to appoint a child psychologist to interview the Child is also not new to family law proceedings. The status quo under the 2018 Order had required the Respondent to travel to see her child, so a reversal would not be any evidence of bias against the Petitioner.

58. While the Court must be seen to be independent and impartial, it is the duty of Counsel to always be full and frank with the Court, even if the evidence within his/her knowledge may be adverse to a client's case. It is that perceived relationship between Counsel and the Court which allows the Court to place reliance on evidence presented before it which becomes the basis of a court's order.

59. More importantly, in line with all parties' rights to be heard, and a right to a fair trial, orders made ex-parte may be set aside or discharged upon a full hearing, when the party whom the order was made against would be able to proffer his/her case before the Court. Following the usual process, the Ex-Parte Order was indeed set aside on the basis that there was no full and frank disclosure. The other issues argued by both Counsel are for consideration during the hearing of the Respondent's application to vary the original order. The child was returned to the care and control of the Petitioner.

60. As evidenced by the hearing on the 16th March, the Petitioner's Counsel was given the opportunity to be heard; the Court simply made the decision at that point that it would have more time to hear the Discharge Application at a later date which gave the parties' more time to fully argue their respective positions. This in fact happened and the ex parte Order was discharged. There was no breach of any constitutional right to a fair trial, or any breach of the rules of natural justice, all parties were given the right to be heard with equal time allocated and were in fact heard.

61. After considering both of the parties' evidence and submissions before me, I do not consider that there is a possibility that a fair minded and independent observer would conclude that the Court had any bias or apparent bias against the Petitioner. The Recusal Application is therefore dismissed.

62. The Respondent is to be awarded her costs of this application, to be taxed if not agreed.

Dated this 16th day of September 2022

Hon. Madam Justice G. Diane Stewart