***Sawyer & Sawyer* [2015] FamCA 982 (10 November 2015) – Family Court of Australia**

'Application to discharge the icl' – 'Independent children's lawyer' – 'Legal practitioners' – 'Negligence or bias'

Proceedings: Numerous applications including an application to discharge the ICL.

Facts: The mother and the father separated in 2009.There were three children of their relationship. In 2012, a final parenting order was made with the consent of the parties and the Independent Children's Lawyer (ICL). There was continued conflict between the parents. Numerous applications were considered by the court in this case in particular, an application brought by the father to discharge the ICL.

Issues: Whether the ICL had been negligent and demonstrated bias towards the mother?

Reasoning/Decision: The application was dismissed. Forest J referred to his previous discussion (in *Dean & Susskind* [2012] FamCA 897 at [19]-[28]) of the principles applicable to such an application:

'…

The role is to be discharged independently and professionally, but it is not inconsistent with that duty for an ICL to make submissions to the Court that particular findings of fact, supported by the evidence, be made or that particular evidence be preferred over other evidence, or that a particular course of action be taken by the Court. It is also beyond doubt that an ICL's duty to advance what he or she independently considers is in the best interests of the children in the case, does not require the ICL to slavishly follow what the children might want or what either one or both of the parents consider is in the best interests of the children .[20]

I consider it to be accepted principle that a court should be slow to remove or discharge an ICL simply where one party complains, in an unsubstantiated way, about the ICL because they do not like or accept the position being taken by the ICL overall or in respect of any particular aspect of the conduct of the case by the ICL. [21]

…

It will, in my opinion, be a matter of considering the evidence presented on each application for the removal of an ICL to determine if it demonstrates sufficient lack of objectivity and professionalism on the part of the ICL such as to justify his or her discharge. The mere appearance of partiality to a particular party's position will not necessarily suffice to warrant the ICL's removal. [26]

Parents, particularly in high conflict parenting litigation, must understand that as part of his or her role, the ICL may legitimately and responsibly say things that are challenging and confronting to the parent in respect of his or her views about parenting and the best interests of his or her children in the particular circumstances of the case, but that does not necessarily mean that the ICL is not acting in accordance with his or her duty in the case'. [27]

The father submitted a number of facts as evidence of bias. First, the ICL sought the appointment of a new, female report writer (Ms C). The father argued that the ICL failed to give him an opportunity to argue against Ms C's appointment and, by retaining Ms C, evidenced 'significant gender bias' by removing 'the only male person within our entire court process'. The fact that the ICL disagreed with the father on the issue of appointing a new family report writer, as she was entitled to do, did not prove that the ICL failed to adequately consider the father's argument. Further, the selection of a report writer alone, who happened to be female, did not demonstrate or prove gender bias (see [58]-[63]).

Second, the father argued that the ICL demonstrated negligence or bias against him because she would not give him a copy of her instructions to the report writer. Forrest J noted that there is nothing in the Federal Circuit Court Rules or the Family Court Rules that obliges an ICL to provide copies of her instructions to an expert retained by her to each of the parents. Further, the father did not actually request the ICL to provide him with a copy of her instructions; he instead asked whether he would receive a copy of the instructions to which the ICL replied 'you don't see the letter of instruction'. In these circumstances, the ICL had not demonstrated negligence or bias that warranted her disqualification (see [65]-[70]).

Third, on the day of the interviews for the report, the father argued that the ICL demonstrated bias in directing the waiting arrangements in her office for the parents and children. Forrest J held that, at the interim stage, where the evidence invited a number of possible findings that could not be made without cross-examination of deponents, he was not in a position to say that the ICL had acted in a way that warranted her immediate discharge (see [71]-[78]).

Finally, the father asserted that the ICL was incompetent as well as negligent and biased against him. Forrest J was not persuaded by the father's evidence and held that (see [79]-[81]):

'It is most certainly not the case that where a parent might be able to point to a mistake made by an ICL that the Court will necessarily accede to an application by that parent to discharge that ICL. The authorities I have discussed clearly disclose that significantly more than that is required'.