FAMILY LAW COURTS ANDJUDGES Oral application for recusal application dismissed. APPLICANT: Ms Eldred RESPONDENT: Mr Eldred INTERVENER: INDEPENDENT CHILDRENS LAWYER: FILENUMBER: MLC 10616 of 2012 DATE DELIVERED: 23 May 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Bennett J HEARING DATE: 23 May 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr St John QC SOLICITOR FOR THE APPLICANT: Tolhurst Druce & Emmerson COUNSEL FOR THE RESPONDENT: Mr A Robinson SOLICITOR FOR THE RESPONDENT: Clancy & Triado ORDERS Idismiss the husbands application that I recuse myself from furtherhearing these proceedings. IT IS NOTED that publication of this judgment by thisCourt under the pseudonym Eldred & Eldred has been approved by theChief Justice pursuant to s 121(9)(g) of the Family Law Act 1975(Cth). FAMILY COURT OF AUSTRALIA AT FILE NUMBER: Ms Eldred Applicant And Mr Eldred Respondent REASONS FOR JUDGMENT EX TEMPORE INTRODUCTION Atthe commencement of the third day of the final hearing of proceedings betweenthe respondent husband and the applicant wife forparenting orders, finalalteration of property interests, spousal maintenance and child support, thehusband makes an oral applicationthat I recuse myself from further hearingthese proceedings by virtue of a reasonable apprehension ofbias. Thecontention by counsel for the husband is that on the second day of thehearing[1], during hiscross-examination of the single expert witness valuer, Mr GG, there was adiscussion between us in which I raised variousmatters (detailed below) which,he contends, injected into the wifes case arguments or matters hithertonot relied upon byher or expressed or identified as issues on her behalf andotherwise not available to the wife on the evidence upon which she relies. Itis further contended that my conduct could, in the context of this case, bereasonably apprehended to be assisting the wifescase to the extent thata fair minded lay observer might reasonably apprehend that I would not bring animpartial and unprejudicedmind to the determination of the case. Itook some time to retrieve the relevant audio recording of the proceedings andthen decided to adjourn the proceedings to today.These reasons are necessarilycomposed without access to official transcript. BACKGROUND Iwill set out some history about the parties and the proceedings to provide somecontext to the matters which counsel for the husbandcontends give rise

to areasonable apprehension of bias. Eachparty relies upon and has filed a case outline document(s) in relation to allissues before the court, namely, parenting arrangements,final alteration ofproperty interests, spousal maintenance and child support. The details referredto below are from the partiescase outlines and/or their affidavitevidence. The below statements are not findings of fact by me nor theconclusions to which Iwill come after having had the benefit of evidence whichis tested and submissions. I have drawn the facts largely from thepartiesoutlines of case and for the stated purpose of giving somecontext to the application. Thehusband is 46 years old and employed in a sales role by a large city business, NPty Ltd. The wife is 39 years old and works inthe finance industry operatingher own businesses P Pty Ltd as a sole proprietor and another business, Q PtyLtd, with two otherpersons. Thewife asserts that she is in good general health but has suffered serious anddebilitating back and leg pain since approximately2010. There is medicalevidence by the wifes treating specialist to the effect that hercondition has slowly improved withrehabilitation but that she remainssignificantly disabled, her prognosis is guarded and she is unlikely ever to bepain free. Thespecialist concludes that the wife has decreased tolerance forstanding, driving and sitting and the most likely extent of her futureabilityto work is eight to twelve hours per week of administrative duties. The husbandhas not adduced any competing medical evidenceand does not seek tocross-examine the wifes specialist. Theparties married in 2001. There is a dispute about direct financial contributionat the commencement of cohabitation. It is notdisputed that the wife operatedthe finance businesses when the parties commenced cohabitation. The income ofthe businesses wasand continues to be by way of upfront commission paid on thegaining of new business and by other commissions paid during the currencyof thegained business. Bothparties were successful in their respective careers. In 2007 the husband becamea senior executive at N Pty Ltd deriving anincome in excess of $250,000 perannum by a combination of salary and commission on sales. The wifesbusinesses were successfuland she generated income and benefits reasonablycomparable with the husbands income. The parties purchased and soldvariousreal properties in which they lived. Theparties first child, B, was born in March 2006. In contemplation of thebirth, the wife hired Mr X to work in her businessesas a full time managergaining business and

the wife commenced to work minimal hours on a part timebasis from home. The wife hasalso employed other persons although it appears tome that these may have been administrators or assistants. Mr X worked for thewife from approximately 2006 to 2011. The parties youngest child, C, wasborn in October 2008. In2009 the husband retired from his position at N Pty Ltd. There is a disputeabout the extent to which the husband made any contributionto the wifesbusinesses before or after his retirement and his contributions generally. Thewife underwent back surgery in October 2010 and September 2011. InJune 2011 Mr X gave the wife three months notice of his resignation andhe left her employ in September 2011 at which timethe wifes case is thatshe [discovered] the full time [business] manager of [P Pty Ltd], [Mr X]has tainted clientsand is setting up a ... business in competition. InSeptember 2011, the wife initiated proceedings against Mr X et al in theSupremeCourt of Victoria. Those proceedings were settled on 8 February 2012 with Mr Xand associated entities agreeing to a 12month restraint of trade in relation toapproaching the wifes clients and payment of costs. InFebruary 2012 B started Preparatory Grade and C commenced kindergarten. Thehusband attended upon a psychiatrist and was prescribedRitalin, the wife saysfor treatment of symptoms consistent with ADHD. On 19 February 2012 the husbandwent back to work at N PtyLtd in a sales role earning, according to the wife,$20,000 per month as a retainer and commission on sales. Later in February 2012the parties separated with the husband absenting himself from the formermatrimonial home and they then reconciled in late March2012. During the briefreconciliation the wife entered into a three year lease of business premisesclose to the family home at arental of approximately $42,000 per annum. Theparties put the former matrimonial home on the market for sale and sold it for$3,025,000on 12 May 2012. The husband and wife separated finally on 28 May2012. Settlement of the sale of the former matrimonial home waseffected inSeptember 2012 and the net proceeds of sale, some $900,000, is invested onbehalf of the parties. Inabout October 2012 the husband changes employment to N Pty Ltd Marketing for afixed annual salary $175,000 (no commission). Thewife alleges, and the husbanddenies, that he has equity or a proprietorial entitlement in N Pty LtdMarketing. It is an issue forthe trial. Whereasthe husband deposes to an income of approximately $175,000 per annum plussuperannuation derived solely as

a salary (no commissionon sales), the wifecontends that the husband is a highly experienced [salesperson], withexperience in [sales] development.He is also a licenced [tradesman]. He has thecapacity to earn at a substantially greater level than his presently disclosedincome.In the context of s 75(2) the husband contends in his caseoutline document that [the husband] has a higher earning capacity thanthe Wife, althoughboth parties have a high earning capacity and the Husbandmaintains that the Wife can support herself. Postseparation the parties established themselves in rental accommodation. The wifehas primary care of the children, the husbandseeks equal shared care and has 4or 5 out of 14 nights with the boys. In November 2012 the wife made applicationfor child supportand also initiated these proceedings in the Federal CircuitCourt in Melbourne (FCC). On8 February 2013, the matter was not reached on its first return date in the FCCand the restraint of trade period for Mr X andothers expired. Interim orderswere made in the FCC in late February 2013. The parties prepared for the finalhearing in the FCCwhich was set down for 21 August 2013 but the matter was notreached and was transferred to this court because of a revised estimateofhearing time. The wife sought and obtained a priority hearing here. Theproceedings came before me on 28 October 2013 and orders were made for a singleexpert witness to value the wifes businesses,and for a family report.Each party had previously obtained a valuation of the wifes business. Bythis stage the parties hadeach received a payment of $20,000 and $150,000 fromthe invested proceedings of sale of the home and the remaining fundsapproximated$500,000. The other property of significance was the wifesbusiness to which the husbands valuer ascribed a value of$725,000 andthe wifes valuer ascribed a value of $167,000. The husband had traded inhis Porsche Model 1 motor vehicle toacquire a Porsche Model 2 thereby assuminga liability for car lease repayments. The wife had sold her Porsche Model 3motor vehicle,borrowed a car for three or so months and then acquired a BMWvehicle for which the loan repayments are $1,300 per month as opposedto the$3,200 per month due on the car driven by the wife during the marriage. Thewife and children moved rental houses a number of times. The wife filed andserved lengthy affidavits and all but one is repletewith complaints that shehas no funds, that she has not been able to generate sufficient business incometo support herself, thatshe has

incurred expenses that she cannot meet and thatthe husband pays insufficient child support. On5 March 2014 the single expert witness, Mr GG, reported on the value of thewifes business at $277,000. A final hearingwas fixed before me on 24March 2014 but did not proceed because I was unavailable to sit for that month.The wifes practitionerspressed for the earliest possible hearing datebased on her alleged adverse financial situation and lack of funds. Finally,thishearing was allocated to commence before me on 20 May 2014. Onthe day prior to the hearing, the husband made urgent application for the singleexpert witness valuer to confer with his shadowaccountant/valuer. Theapplication was initially opposed by the wife but granted by me on the basisthat her shadow accountant/valuercould also participate. At the commencement ofthe hearing, the parties had not agreed on any values other than the quantum offundsthat each had received from the sale proceeds of the home and, even then,the characterisation of those funds remained in dispute. Bythe end of the first day, by discussion between counsel and the Court, theparties had clarified the dispute about the value ofthe cars retained by themat separation, defined the amounts in respect of which adjustment could be madefor certain monies receivedsince separation and agreed on the amount of postseparation credit card and loan debt carried by the husband in the sum $28,143and by the wife at $95,415. By the morning of the second day the parties hadagreed on nearly all relevant figures although thereremained a dispute abouthousehold furniture. The parties had agreed on some childrens orders,although no major issues. Theparties had mutually agreed to abandon formalobjections to affidavits. The parties had considered a memorandum prepared by meofissues in relation to property. I now direct that that document should bemarked Exhibit C2 and remain on the Courtfile. Counsel for thehusband informed me on the second day that he considered that thecharacterisation of the $50,000 receivedby the husband was an issue whichshould be included. That was the only amendment. Iwas informed that the conference between the single expert witness, Mr GG, andeach partys accountant had resolved the valueof the wifesbusiness in the sum of $240,000. The reduction in value, below the earlier valuecalculated by Mr GG, was saidto be in consequence of Mr GG being given accessto a combination of external accountants figures and internal figures forthe wifes businesses for the 12 months up to March 2014. I was

informedthat the methodology of the valuation, which had hithertobeen in dispute, wasalso agreed. Hitherto the husbands accountant had opined that the correctapproach was future maintainableearnings and application of a multiplier offive. There was no affidavit from Mr GG. His report dated 5 March 2014 had beentenderedby consent but it was superseded by the agreement reached with theparties accountants. It was agreed that Mr GG would commencehisevidence, by cross-examination, when we resumed after the lunch adjournment at1.45 p.m. He did so. Iindicated to counsel that I would be assisted by some evidence of thewifes actual income or benefits from the business havingregard to herapplication to change all child support assessments issued since separation. Iasked Mr GG some questions as did counselfor each party. He gave some generalobservations and discussed general principles in relation to assessing whatbenefits proprietorscan get from a business other than by declared salary orincome. Consistentlywith his report, Mr GGs evidence was that the wifes businesses hadbeen consistently profitable until the2012/13 financial year but there was avery significant reduction in up front commissions consequent on very little newbusinessbeing gained and a reduction in other commissions too. There was noissue about the restraint of trade against Mr X having expiredin February 2012.The wifes affidavit evidence was that her subsequent arrangement with oneof the co-proprietors of Q PtyLtd (Mr A) to give him 65 per cent of thecommission on any new business generated but that this arrangement had notresulted insignificant business or income for her. Whilstbeing cross-examined by counsel for the husband, Mr Robinson, Mr GG readilyagreed that the drop in income in the financialyear ended 30 June 2013 wassimply a product of not [gaining] any new business or words tothat effect. He also agreedthat the short answer for the fall inother commissions for the 2012/13 financial year was because no newbusinesswas [gained] or words to that effect. IMPUGNED CONDUCT Itappears that the discussion which counsel for the husband (Mr Robinson)identifies as giving rise to a reasonable apprehensionof bias on my part and infavour of the wife commenced at approximately 3.20 p.m. and was asfollows:- MR ROBINSON: (addressing the single expert witness Mr[GG]) ...If you were to hypothesise that there had been the ongoing[gaining] of upfront [business]...Ill try again ...ongoing [gaining]of[business] that generated up-front commission at the

same level as previousyears it had not dropped from the 78, theearnings of the business wouldhave been much higher, wouldnt they? MR [GG]: Hypothetically, Your Honour, yes.. HER HONOUR For what purpose would you hypothesise? MR ROBINSON: Is Your Honour asking me what... HER HONOUR: Yes, I am asking because Mr St John hasnt objected but Idont understand why I am sitting here listeningto hypothetical evidence.Either the wife gets somebody else that she hopes doesnt rip her off orshe goes back into the business[inaudible...]and trains someone new to...atwhich [inaudible]....enter into a new business relationship at that time MR ROBINSON: Well, certainly that is what I would be urging Your Honour tofind that she could have entered into a new arrangment.... HER HONOUR: Or would you be saying, well she could get someone to do itnow? MR ROBINSON: Yeh... HER HONOUR: Okay. Where would they work from? Where are her businesspremises? MR ROBINSON: At her home? HER HONOUR: Right. What is her home like Mr Robinson? MR ROBINSON: I dont know Your Honour. HER HONOUR: Okay, well if you dont know how can you say that they canwork from there? MR ROBINSON: Well, simply because she says she runs her office from her homeand she has done so for a number of years. HER HONOUR: Yes, but you are talking about having somebody else in your housedoing it. MR ROBINSON: I dont know if someone else is in the house the wholetime or travelling around doing it. I am not sure becausewe have not got tothose questions yet. HER HONOUR: If they are travelling around, what are they travelling aroundin? The car that doesnt exist at the moment becauseshe has got the carthat is supported by the company? MR ROBINSON: Until I am able to ask [the wife] the questions about how sheoperates her business, how it operated with Mr [X] andother employees I canonly speculate about those things, Your Honour, but she did not have an officeprior to renting [Y Property]and they maintained a very profitablebusiness. HER HONOUR: They had a house before, they had a very big house ...beforeseparation and her material is that sometimes in order toescape all of thepeople that were going in and out of her house participating in her business,her and her husband, and sometimesthe children, used to go and stay in a hotel... right, it wasnt always happy families the way that I read thematerial.....itdidnt coexist all that happily. That is, by the way,affidavit evidence that your client hasnt responded to so I takeit thatif he took issue to the facts in it I would have seen

something to thateffect. MR ROBINSON: My recollection is that the attendance at the hotels takes overabout an 18 24 month period... HER HONOUR: Mmm ...Prior to separation ... MR ROBINSON: and coincides with her back operations ... HER HONOUR: No, she says that part of it was nothing to do with backoperations but that it was trying to get some sanctuary froma house that waseither full of a ... production company or full of employees in relation to abusiness. MR ROBINSON: My recollection is a period..... HER HONOUR: Just bear in mind please that I will deal with practicalities andrealities and not hypothetical situations. MR ROBINSON: I take it that Your Honour is giving a clear indication that youdont think its at all reasonable for thewife to have employedanyone? HER HONOUR: I dont know....but I dont see how.... MR ROBINSON: I dont at this point either Your Honour which is why I amasking the questions of this witness in relation toif she had what you couldreasonably expect the earnings of the business to have been. That is the onlyreason why. HER HONOUR: Well, is there some other law inventive or creative way you canapproach adducing evidence. Is it for this witness tocurrently leave thewitness box and to put the wife....see if Mr St John would allow the wife to beput into the witness box to givethat evidence so that he can hear it, we canhear it, and then you can ask him? MR ROBINSON: I didnt think that it was necessary at this point becauseI didnt think I need to put this witness thecertainty or otherwise ofher capacity to employ someone else. I was really putting to him the effect ofhaving to continue ...having[gained business], that is effectively all and Idont think the wife can add to that. But Your Honour has simply raisedwithme the question of why I would ask hypotheticals and that is how we haveengaged in this discussion. HER HONOUR: Well, OK, so you [gain business], you get [other] commissions,you get upfront commission. Yes, anything else? MR ROBINSON: In paragraph 71 you estimate future maintainable earnings at$136,000. Can I ask why that wasnt simply the totalof the three yearsdivided by three? MR [GG]: Yes, Your Honour, there is a clear downwardtrend in those three years from 160 down to 92,000. Id formed the viewfrom the evidence and from speaking to the wife that it was highly unlikelygiven the state that she was in and the use of Mr [A],who was an associate ofthe wife in the business, it was highly unlikely that the level of [business]that were going to be [gained]to correspond back to those early years wasprobably, was not probable and the existence of

the decline in the [othercommissions]income was evident from the information that I had so I used aweighted average that weighted the 2013 higher than the previous yearsYourHonour. MR ROBINSON: And if the EBIT was at the same level this was the hypotheticalwe just...[inaudible]...it was thought that [business]would continue to be[gained] I presume there wouldnt have been a weighted average applied itwould have been a simple average? MR [GG]: That would depend on the outcome of the hypothetical year less anyhypothetical expenses incurred to increase the income. MR ROBINSON: But if it had been at the same level it wouldnt have been aweighted average is all I am saying. MR [GG]: In valuation terms I would probably use an average, yes. MR ROBINSON: So a straight average? MR [GG]: A straight average. RELEVANT LEGAL PRINCIPLES Counselfor the husband referred me to the recent decision of Hillier &Wootton [2013] FamCAFC 11 in which the Full Court, comprising Finn,May and Strickland JJ considered an appeal from the decision of a FederalMagistrate (ashe was then known) to dismiss an application by a party toproceedings that his Honour recuse himself for reasonable apprehensionof bias. Inthe reasons of May J, with whom Finn and Strickland JJ agreed in the result, herHonour referred to the following well knownexcerpts asdemonstrating the development of the legal principles applicable to areasonable apprehension of bias:- 56. In Johnson v Johnson [2000] HCA 48; (2000)201 CLR 488, their Honours Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJsummarised the test to be applied in cases in Australian courts whereapprehension of bias is claimed (at page 492): 11 ... It has been established by a series of decisions of this Court thatthe test to be applied in Australia in determining whethera judge isdisqualified by reason of the appearance of bias (which, in the present case,was said to take the form of prejudgment)is whether a fair-minded lay observermight reasonably apprehend that the judge might not bring an impartial andunprejudiced mindto the resolution of the question the judge is required todecide [eg, Re Lusink; Ex parte Shaw (1980) 55 ALJR 12; 32 ALR 47; Livesey v NSWBar Association (1983) 151 CLR 288; Vakauta v Kelly [1989] HCA 44; (1989) 167 CLR 568; Webb vThe Queen [1994] HCA 30; (1994) 181 CLR 41]. 57. The specific two-step inquiry to be applied upon such claim being madewas explained by Gleeson CJ, McHugh, Gummow and Hayne JJin the subsequent caseof Ebner v Official Trustee in Bankruptcy;

Cleane Pty Ltd v ANZ Banking GroupLtd [2000] HCA 63; (2000) 205 CLR 337 (at page 345): 8 ... First, it requires the identification of what it is said might lead ajudge (or juror) to decide a case other than on its legaland factual merits.The second step is no less important. There must be an articulation of thelogical connection between the matterand the feared deviation from the courseof deciding the case on its merits. ... 58. The rationale for the description of the fair-minded lay observer andexplanation for the test was explained by their Honoursin Johnson (at pages492-493): 12. ...It is based upon the need for public confidence in the administrationof justice. If fair-minded people reasonably apprehendor suspect thatthe tribunal has prejudged the case, they cannot have confidence in thedecision. The hypothetical reasonableobserver of the judgesconduct is postulated in order to emphasise that the test is objective, isfounded in the need forpublic confidence in the judiciary, and is not basedpurely upon the assessment by some judges of the capacity or performance oftheir colleagues. At the same time, two things need to be remembered: theobserver is taken to be reasonable; and the person beingobserved is aprofessional judge whose training, tradition and oath or affirmation require[the judge] to discard the irrelevant,the immaterial and the prejudicial. 13. Whilst the fictional observer, by reference to whom the test isformulated, is not to be assumed to have a detailed knowledgeof the law, or ofthe character or ability of a particular judge, the reasonableness of anysuggested apprehension of bias is tobe considered in the context of ordinaryjudicial practice. The rules and conventions governing such practice are notfrozen in time.They develop to take account of the exigencies of modernlitigation. At the trial level, modern judges, responding to a need formoreactive case management, intervene in the conduct of cases to an extent that maysurprise a person who came to court expectinga judge to remain, until themoment of pronouncement of judgment, as inscrutable as the Sphinx. In Vakauta vKelly Brennan, Deaneand Gaudron JJ, referring both to trial and appellateproceedings, spoke of the dialogue between Bench and Bar which is sohelpful in the identification of real issues and real problems in a particularcase. Judges, at trial or appellate level,who, in exchanges withcounsel, express tentative views which reflect a certain tendency of mind, arenot on that account alone tobe taken to indicate prejudgment. Judges are notexpected to wait until the end of a case before they start thinking about theissues,or

to sit mute while evidence is advanced and arguments are presented.On the contrary, they will often form tentative opinions onmatters in issue,and counsel are usually assisted by hearing those opinions, and being given anopportunity to deal with them. (footnotes omitted) Asis summarised by May J in Hilliers case at [22], theimpugned conduct consisted of comments and inquiry, initiated by theFederal Magistrate on the second day of trial. As will be explained, thedialogue between the Federal Magistrate and counsel for the parties took placein a semi-closed court,and included an inquiry by his Honour whetherbattered woman syndrome formed a part of the wifes case. Inessenceit is argued that by his conduct the Federal Magistrate could, in thecontext of this case, be reasonably apprehended to have soughtto assist thewifes case, such that a fair-minded lay observer might reasonablyapprehend that his Honour might not bringan impartial and unprejudiced mind tothe resolution of the case. MrRobinson submitted that the circumstances of Hillier & Wootton aresimilar to the circumstances of this case. Hillierscase at first instance was an application by a wife for a declaration thatthere was no binding financial agreement between the partiesbecause she had notreceived independent legal advice as required under s 90G of the Act or,alternatively, it should be set aside on the ground that it was void and/orvoidable as a result of duress. Particularsof the duress were provided in awritten outline of the wifes contentions which included that the husbandhad engaged in ahistory of violent, threatening and intimidatory conductdirected to the wife from 2001 to 2007 (when the agreement was signed) andthatthe husband had assaulted and threatened the wife on numerous occasions in themonths preceding her execution of the agreementwhich conduct had the effect ofcompelling or persuading the wife to enter into the agreement and that thehusband intended or wasaware that such behaviour would have that effect on thewife. InHilliers case, there had been lengthy discussion before theFederal Magistrate on the first day of the hearing as to how the wifescasewas put and what evidence was to be relied upon. After it was confirmedthat the full extent of the wifes case was beforethe court, at hisHonours initiative, his Honour had a quick word just to thelawyers by themselves and, inthe absence of anyone else, queried ofcounsel appearing whether battered wifes syndrome was partof the landscapeof the case. Nomention had been made of battered wifes syndrome in thewifes

contentions and no reference was madeto the syndrome in the expertevidence upon which the wife relied. May J described the thrust of thehusbands argument inHilliers case as being that hisHonours comments and inquiries could reasonably be interpreted asassisting the wifes caseto the point of injecting a new issue into it,thus calling into doubt the Federal Magistrates impartiality in hearinganddealing with the trial. It is the argument that the trialjudges comments appeared to be injecting a new issueintothe proceedings to the advantage of a party who had not constructed her case toinclude the issue, that Mr Robinson aligns hissubmission in this case. MayJ makes the following observations:- 75. It was submitted for thehusband that the cases referred to by the Federal Magistrate in his reasons forjudgment speak in termsof clarification or narrowing of issues. Senior counselsought to distinguish his Honours exchange from such clarificationornarrowing of issues, which are open on the facts or evidence before a Court. HisHonours exchange, it is submitted, wasakin to suggesting to a party (thewife) that they ought expand the case, by adding a new issue or claim. 76. The submission that battered wife syndrome was not open on the evidenceput before the Court by the wife is of some significance.To raise battered wifesyndrome in this case would necessarily have involved compelling and furtherevidence from the wife and suitablyqualified experts. Yet the evidence wasclosed subject to the wife and her witnesses being cross-examined. 77. The impression created by his Honour, it is said, is that he thoughtbattered wife syndrome was something which fitted with theevidence, or that hewould likely allow the wife, upon application, to change her case and callevidence in that regard. Consequently,it is submitted, his Honoursability to thereafter impartially deal with any application by the wife toadduce further evidence,or even in the absence of such evidence, to makesubmissions on the topic, was so compromised that the appearance of a fair trialhad been lost. I accept the submission of senior counsel that subsequentassurances from the Bench, that the Federal Magistrate hadnot made up his mindabout anything yet, are irrelevant in a matter where the allegation is anapprehension of bias. HerHonour discussed at [83] the elements of the syndrome as it is raised in defenceof a criminal charge and observes at [87] that, Importantly, in thiscase the evidence about the wifes psychological state and the effect shesaid the husbandsconduct had upon her bore no resemblance

to suchsymptoms. As importantly, the expert psychologists for the wife had notidentifiedsuch a syndrome as being suffered by her.. Her Honourconcluded that:- 97. Raising such a specific possible claim, notmentioned at all in the wifes application, her outline of contentions orindeedthe experts evidence in her case, in circumstances where lengthydiscussions had been had in the lead up to and on the firstday of trial aboutthe parameters of the wifes case, then this being finalised and theevidence effectively confirmed as closedwas not, in my view, areasonable inquiry or clarification. 98. The test identified in Ebner and in Johnson and confirmed in MichaelWilson is met, having regard to the context of the wholetrial and thecircumstances of the intervention (Galea). It is the Federal Magistratesraising of a specific claim, not raisedby the wife, in the absence of theparties, at a time in the proceedings when the parameters of her case andevidence were acceptedas closed, which might be reasonably apprehended asleading his Honour to decide the case other than on its legal and factualmerits.There is a clearly articulated, logical connection between that specificclaim and the circumstances in which it was raised, andthe issues fordetermination before his Honour, such that I accept it might be reasonablyapprehended that his Honour would not bringan impartial and unprejudiced mindto the resolution of the question his Honour was required to decide. MayJ was satisfied that the lengthy discussions which had occurred between FederalMagistrate and counsel on the first day of thehearing dealt conclusively withthe parameters of the wifes case and thereby prevented the FederalMagistrates commentsas being characterised as clarification,frank dialogue or inquiry. Thereasons of the majority in Hilliers case, being Finn andStrickland JJ, agreed with May J that the appeal ought to be allowed but on adifferent basis. Their Honoursstated:- 16. In our view, thiscase is indeed borderline as to whether his Honours question was no morethan a valid query made to assisthim understand the wifes case, orwhether the reasonable and properly informed observer would understand thequestion as beingone which was designed to assist the wifes case therebyleading to a perception of partiality on his Honours part towardshercase and an apprehension that the case would not be decided impartially. ... 19. Nevertheless, and leaving to one side the scope of the law relating tobattered wife syndrome, we are concernedthat use of theexpression could itself carry an implication or impression of partiality towardsa party to

proceedings who has raisedin support of his or her case, allegationsof violence against the other party. Accordingly, and on balance, we agree withMay Jthat his Honour should be disqualified from further hearing theproceedings between the husband and the wife on the basis of apprehendedbias. DISCUSSION Inthe present case, the discussion relied upon by counsel for the husband asevidence upon which a reasonable apprehension of biascan be drawn did not occurafter a comprehensive statement of a partys case in circumstances wheremy comments introduceda new issue much less a new issue which could not beadvanced in the absence of supporting expert evidence. Our discussion aroseduring counsels cross-examination of the single expert witness whoseevidence, as to the methodology of valuing the wifesbusiness and thevalue of that business, had been accepted by both parties. The comments relatedto the steps that would need tobe covered before the responses to thehypothetical questions posed could be of probative value. Atthis point in counsels cross-examination of Mr GG, Mr GG had twice statedthat the reduction in commissions received bythe wifes business in the2012/2013 financial year was because no new business was being gained. Thesingle expert witnesshad agreed that the reduction in the earnings beforeinterest and taxation (EBIT), as calculated by him, was reasonably equatabletothe drop in up front commissions. Itis, in any event, self-evident that new business was the source of upfrontcommissions and in due course other commissions andthat, if the incidence ofnew business in 2012/2013 could have been be kept at the level at which thewifes business was performingbefore the 2011/12 financial year, theupfront commissions for 2012/13 would have been similar to the earlier years. Itwas in thiscontext that I raised the utility of hypothetical evidence. Counselfor the husband contends that my statements indicate, to the extent required tomake out a reasonable apprehension of bias,that I would be favourably disposedto accept evidence from the wife which is consistent if that evidence was to begiven by heras an excuse for not having employed a replacement full timemanager to the businesses following the resignation of Mr X. Furthermore,it issubmitted that those excuses or justifications are not relied upon by the wifeanywhere in her evidence or in her outline ofcase or available to her on herevidence. I am unable to accept that submission. Allof the matters to which I referred, in the context of the utility of obtaininghypothetical

evidence from the single expert witness,are matters which appearin the wifes affidavits. The fact that the evidence is not specificallymarshalled as a responseto an allegation by the husband that the wife couldhave maintained the same volume of new business after Mr Xs departureasshe had before, either by working longer hours herself or by employing a newfull time business manager, is because that allegationdid not appear in any ofthe affidavits or contentions (outline of argument) relied upon by the husbandto which the wife had anopportunity to respond. Thesewere proceedings transferred from the FCC. By the time the proceedings wereaccorded priority in this court, the wife had sworn4 very detailed longaffidavits. By the time it came on for hearing this week, she had sworn twofurther long affidavits. Notwithstandingthat the wife had obtained permissionfrom me at an early directions hearing to rely upon previously filed affidavitsinstead ofhaving to produce one trial affidavit, on the day prior to thehearing commencing, counsel for the husband raised with me his concernthat thewifes affidavit evidence had proved to be difficult to respond to.Counsel did not object to it and seek that itbe struck out. He did not make anapplication to adduce viva voce evidence in reply. Counsel appeared to be tryingto justify whyhis clients affidavit evidence did not address all aspectsof the wifes evidence. Thewifes affidavit evidence is long, detailed and somewhat punctilious butit is not repetitive or, at first blush, irrelevantsave as to matters ofcomment and argument and both parties were equal offenders in that regard. Theparties financial dealingssince separation are relevant in this case.First, in the context of me deciding how to treat the monies which have beenspent bythe parties but which were taken from the proceeds of sale of the home,received by way of a taxation return on pre-separation incomeor received wheneach disposed of the car which they had at separation. Second, because the wifeseeks a relief in relation to eachand every child support assessment raised inthis matter. Turningto the discussion which counsel for the husband says is the conduct which givesrise to a reasonable apprehension of bias.The inference which I drew inrelation to the wife likely wanting to be cautious before employing another fulltime manager was,I consider, an inference reasonably available to me from thewifes evidence which is that she had not been aware that Mr Xhad beenapproaching her clients and negotiating business for his own benefit whilststill in her employ and that she promptly

initiatedproceedings in the SupremeCourt to protect her business. That is not necessarily the conclusion to which Iwill come after hearingthe wifes evidence tested in cross-examinationbut it was an inference reasonably available to me in trying to investigatetheutility of hypothetical evidence. Theinference that I drew in relation to the wifes capacity to have run abusiness from home if that business included a fulltime employee in addition toherself was based on the wifes evidence that even the former matrimonialhome was not large enoughto accommodate the family and the business all of thetime together with her evidence that her residences since separation have beenmore modest. Theinference which I drew in relation to her probably not having the personal orfinancial resources to hire an employee are basedon the numerous statements inher affidavit about suffering pain constantly and being compelled to borrowmoney from relatives orby way of cash on her credit card facilities or by wayof loan from the bank. Again, the inference is not necessarily how I willassessthe evidence when it is tested. Hypotheticalquestions are rarely of assistance when asked in cross-examination, particularlywhen the witness is an expert. Theyare usually permitted if there is otherevidence or inferences available from other evidence to justify asking such aquestion. Thejustification lies in the fact that if other evidence is acceptedor inferences drawn, the answer to the hypothetical question mayhave someprobative value. In this case I asked counsel for both parties if theyconsidered that there was any prejudice to the singleexpert witness valuerbeing called out of turn. I specifically mentioned the need for the valuer toconsider any evidence which theparties may give in cross- examination orotherwise. Neither raised any difficulty. Theexchange with counsel for the husband centred upon my seeking to discern fromcounsel the facts or inferences which he would submitjustified the asking ofhypothetical questions. Thissituation is entirely different from that discussed in Hillierscase and I find that the facts of this case can comfortably be distinguishedfrom the principles therein discussed. I further findthat a fair mindedobserver who understood the broad discretion which is to be exercised by thiscourt in proceedings such as thoseI am hearing would not apprehend that I havebrought anything other than an impartial mind to the task of identifying theissuesand determining how the evidence sought to be adduced advances one caseor the other. CONCLUSION Forthe above reasons, I dismiss the

husbands application that I recusemyself from further hearing these proceedings on thebasis of a reasonableapprehension of bias. I certify that the preceding fifty four(54) paragraphs are a true copy of the reasons for judgment of the HonourableJustice Bennettdelivered on 23 May 2014. Associate: Date: 23 May 2014 [1] Tuesday, 21 May 2014. AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/890.html