FAMILY LAW PRACTICE AND PROCEDURE Disqualification Where it was appropriate for Johnston J to recusehimselffrom the proceedings. Family Law Act 1975 (Cth) Johnson v Johnson (No.3) [2000] HCA 48; (2000) FLC93-041 APPLICANT: Ms B Xavier RESPONDENT: Mr Munoz FILENUMBER: SYC 5198 of 2010 DATE DELIVERED: 15 July 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Johnston J HEARING DATE: 15 July 2014 REPRESENTATION FOR THE APPLICANT: Ms Xavier in person FOR THE RESPONDENT: Mr Munoz in person ORDERS Thatleave is given to the wife to file an Application in a Case in Courttoday. Thatthe Court notes that Johnston J recuses himself from theseproceedings. Thatthese proceedings are adjourned to the docket registrar at 9:00 am on4 August 2014 for a telephone directions hearing and forthispurpose: Dial ... fromany telephone When requested,enter the Meeting number, *...* (please dont forget to press the *(star)key before and after the number); You will hearmusic until the Registrar joins the conference. Conferences are generallylimited to about 15 minutes. Please makesure you are available to participatein the conference at the commencement time. Be aware that there may be morethan one matterbeing heard by way of InterCall link-up. Each matter will beannounced by the Registrar when they are ready toproceed. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Xavier & Munoz has been approved by the Chief Justicepursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER:SYC 5198 of 2010 Ms B Xavier Applicant And Mr Munoz Respondent REASONS FOR JUDGMENT Thisis an application by Ms B Xavier (the wife) for me to recusemyself in substantive property proceedings betweenherself and Mr Munoz(the husband). On19 May 2014 I was hearing a considerable number of applications in a very busyduty list. My recollection is that there was anapplication in a case byMr Munoz on that occasion which had been referred to me by the registrar. AfterI had some preliminary discussion with each of the parties, I recall looking atthe file and endeavouring to ascertain fromthe yellow and pink sheets whichrepresent the court record in the proceedings some brief understanding of theprocedural historyof the substantive proceedings between the parties. What Idiscovered caused me great concern. That was because the substantiveproceedings had commenced something like four years

previously and I do notthink had progressed even to the stage where there hadbeen a satisfactorilycompleted financial conciliation conference. Fromwhat I could see of the court record, a great deal of court time had beeninvested by various registrars and then by Rees J overa long period,endeavouring to assist each of the parties to bring the matter to a state ofreadiness so that there could be a properconciliation conference. There aretwo other parties to the proceedings. The wifes mother, Ms M Xavier, andI think themarried parties daughter. Rees J had been involved in thematter over quite some period and apparently her Honour had haddifficulty inmaking various orders trying to deal with a considerable number of issuesbetween the parties about various aspectsof these very complex proceedings. Her Honour after such a long contribution in these proceedings had ultimatelyhad to recuse herselffrom the proceedings in circumstances where there hadsomehow been disclosed an offer that one of the parties had made to the other.I think that is what had happened. Inthose unfortunate circumstances, and particularly bearing in mind the longperiod of time that it had taken for the substantiveproceedings to not get veryfar down the procedural pathway, I formed the view that the best thing I coulddo in terms of tryingto assist all of the parties to prosecute theseproceedings and bring these proceedings to finality would be to bring the matterinto my own docket of cases and endeavour to case manage the matter with a viewto trying to get it on for an early hearing. Inthat process, I raised some criticisms of each of the parties. At one point Ihad indicated that neither of the parties had compliedwith directions that thecourt had made. The wife took great exception at the time and she has given methe impression again thatshe took great exception in her address to me todayabout the matter. As it turns out, I was of the mistaken view that Rees J hadordered the parties to file affidavits and they had not complied with thatdirection, but, in fact, it turns out that, from whatI have been able to see ofthe yellow sheets today, her Honour did not order such affidavits and I wasmistaken in my impressionabout that. But there have been other occasions whereorders reaching right back into the history of the matter have been made andneither of the parties has a perfect record in terms of complying with thosedirections. Thewife now says that such was my conduct of the matter on the last occasion thatshe has an apprehension that I would not be ableto bring an impartial mind andimpartial approach to hearing

the substantive proceedings out of a perceptionthat she has arisingout of my very limited case management of this matter. Forexample, the wife says at paragraph 11 of her affidavit in support oftheapplication on 19 May: Johnston J left me feeling intimidated, denied me procedural fairness and hisconduct made me look like a charlatan who has wastedtaxpayers money inthis Family Court proceedings. And there were references made in the affidavit about how the wife felt aboutthings on that occasion. My recollection of matterson that occasion was that Itook a very robust approach, time being very limited. It is true that I spokeover each of the partiesand that was in circumstances where, certainly onoccasions, I had asked the parties direct questions and I was not getting aresponsiveanswer to those direct questions. Those matters which I was raisingwith each of the parties were with a view to endeavouring, inas quick a time aspossible, to improve my understanding of the issues and the history of thematter. I was asking questions whichwere directed to trying to identify whatthe real issues were in the case between the parties so that I could endeavourto make somedirections which would have enabled the issues to be spelt out interms of the relevant evidence. That was the reason for the mannerin which Idealt with the matter on that occasion. Irecall at one point interrupting the parties when I think it was MrMunoz started to speak to me with a very loud voiceand I have noticed againtoday he does have a very loud voice. Perhaps my perception was not entirelycorrect. I thought it wasat the time. My perception was, such was the volumeof his address towards me, that I regarded him as shouting at me and alsoshoutingat Ms B Xavier. When Ms B Xavier joined in and started what Ithought was shouting over Mr Munoz, I felt the court had a duty totry and bringback some dignity to the place. I pointed out to the parties that I thoughtthey were behaving in a manner which wasoffensive, and certainly offensive tothis Court. I regarded that behaviour as certainly being grossly discourteousnot only toeach other, but also to this Court that just reinforced, in my mind,the need for the Court to take a fairly robust approach to thematter,especially bearing in mind its very long history, and the fact that a system hassimply failed to produce a result in theseproceedings. That was theexplanation for the robustness of my approach on that occasion. Thetest which is applied in disqualification applications has been set out in manyhigh authorities in this country and others overthe years. It has beenreferred to in a judgment

of the High Court of Australia in Johnson v Johnson(No.3) [2000] HCA 48; (2000) FLC 93-041. The High Court said at page 87,631 as followsunder the general heading of The governing principles: It has been established by a series of decisions of this Court that the test tobe applied in Australia in determining whether ajudge is disqualified by reasonof the appearance of bias (which, in the present case, was said to take the formof prejudgment)is whether a fair-minded lay observer might reasonably apprehendthat the judge might not bring an impartial and unprejudiced mindto theresolution of the question that the judge is required to decide. Soultimately, the question that is to be asked is would a fair-minded lay observerin the court reasonably apprehend that the judgemight not bring an impartialand unprejudiced mind to the resolution of the question the judge is required todecide. I must say,given the volume of the parties on the last occasion, andgiven the robustness of my approach, I cannot say that it would be impossiblethat a person sitting in the back of the courtroom might not have thought that. I think it probably also illustrates some of thedifficulty for judges casemanaging applications with considerable robustness and then going on todetermine the substantive proceedings. Inote that the husband opposes the wifes application. Inall the circumstances, in my view, the appropriate thing is to recuse myselffrom these proceedings. My view about this mighthave been slightly differentif matters had progressed before me a considerable distance from where theyhave, but there is reallyvery little loss to these parties in starting beforesomebody else. I certify that the preceding twelve (12) paragraphs are atrue copy of the Reasons for Judgment of the Honourable Justice Johnstondelivered on 15 July 2014. Associate: Date: 15 July2014 AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/899.html