CEO Department of Children & Families & Anor v TC & Ors
[2015] NTSC 49

PARTIES:	CHIEF EXECUTIVE OFFICER DEPARTMENT OF CHILDREN AND FAMILIES and TCH v TC and FH and MB
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 6 of 2014 (21201194)
DELIVERED:	20 AUGUST 2015
HEARING DATES:	22 SEPTEMBER 2014
JUDGMENT OF:	KELLY J
APPEAL FROM:	E ARMITAGE SM

CATCHWORDS:

APPEALS – Error of jurisdiction – Application for protection order withdrawn by the Chief Executive Officer of the Department of Children and Families – No 'proceeding' under s 138 of the *Care and Protection of Children Act* – No jurisdiction to make orders in relation to a proceeding under s 139 of the Act.

Care and Protection of Children Act ss 121, 138, 139.

Department of Children and Families v MGM & Ors [2012] NTSC 69, followed.

R v Fulham, Hammersmith and Kensington Rent Tribunal ex parte Zerek [1951] 2 KB 1, referred to.

REPRESENTATION:

Counsel:

Appellant:	M Fisher
Child:	P Maley
Third Respondent:	M Strong

Solicitors:

Appellant:	Solicitor for the Northern Territory
Child:	Maley & Burrows
Third Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Judgment ID Number:	KEL15011
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

CEO Department of Children & Families & Anor v TC & Ors
[2015] NTSC 49
No. LA 6 of 2014 (21201194)

BETWEEN:

CHIEF EXECUTIVE OFFICER DEPARTMENT OF CHILDREN AND FAMILIES
Appellant

AND:

TCH
The Child

AND:

TC
First Respondent

AND:

FH
Second Respondent

AND:

MB
Third Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 20 August 2015)

[1] This is an appeal against orders of the Local Court, purportedly made under the *Care and Protection of Children Act* ("the Act"), adjourning protection proceedings under the Act and giving daily care and control over the child the subject of those proceedings to the child's grandmother.

[2] At the date of hearing of the appeal, the child was two years and nine months old. The Department of Children and Families has been involved with the child since December 2011. On 21 May 2012 the Department removed the child from his mother's care, and on 4 September 2012, placed him into the care of his grandmother as a department approved carer.

[3] The child's mother was opposed to the child being under the care of his grandmother and the parties to the proceeding entered into discussion about how to proceed. They discussed the idea of commencing Family Court proceedings to determine custody issues and the Local Court adjourned the proceeding for three months so that could occur.

[4] On Tuesday 9 September 2014 the Department of Children and Families placed the child with his mother, and on Thursday 11 September 2014 the CEO of the Department of Children and Families withdrew her application for a protection order. No evidence was before this Court as to why the CEO no longer believed that the child was in need of care and protection.

[5] The matter came before the Local Court on 11 and 12 September 2014. The grandmother was represented, as were the parents, the child and the CEO. Argument proceeded before the trial magistrate on a range of issues

including whether it was in the best interest of the child for him to be in the care of his mother or his grandmother pending the outcome of any Family Court proceeding, and as to whether the CEO was empowered to withdraw the application for a protection order without the leave of the Local Court. At the conclusion of these arguments, on 12 September 2014, the learned magistrate made the two orders the subject of the appeal:

(a) she adjourned 'the proceeding' to 15 September 2014; and

(b) she made an interim order, purportedly pursuant to s 139 of the Act, giving daily care and control of the child to the child's grandmother until the adjourned hearing date.

Grounds of Appeal

[6] The appellant contends that the learned magistrate had no power to make the orders in question. She contends that the CEO did not require leave to withdraw the protection application.[1] Accordingly, once the application had been withdrawn, there was no proceeding on foot; there was nothing that could be properly adjourned; and the learned magistrate did not have jurisdiction to make interim orders in relation to the daily care and control of the child - or any other matters relating to the child. I agree as, ultimately, did all of the parties, and on 22 September 2014 I made orders by consent allowing the appeal and setting aside the orders which had been made by the learned magistrate. These are the reasons for that decision.

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[1] *Care and Protection of Children Act* (NT) s 121; *CEO Department of Children and Families v MGM & Ors* [2012] NTSC 69

[7] The jurisdictional question before the Local Court was whether, in the case of an application by the CEO of the Department of Children and Families for a protection order under s 121 of the Act, that court had any jurisdiction once the CEO had withdrawn the application for a protection order.

[8] The same issue came before this Court in *CEO Department of Children and Families v MGM & Ors*.[2] In that case I held that the CEO did not require the leave of the court to withdraw an application for a protection order for the following reasons:[3]

> ….. The court does not have a general supervisory jurisdiction over the performance by the CEO of his or her functions under the Act. The court does not have a roving brief to seek out children it feels may be in need of protection. Nor does the Act allow an application for a protection order to be made by a parent, grandparent, concerned neighbour, or even the child herself. The only person authorised by the Act to seek a protection order, thus enlivening the jurisdiction of the court, is the CEO and the CEO may only do so if he or she forms the (reasonable) beliefs set out in s 121.
>
> First, the CEO must reasonably believe that the child is in need of protection or would be in need of protection but for the fact that the child is currently in the CEO's care. Secondly, the CEO must reasonably believe that the proposed order is the best means to safeguard the wellbeing of the child. The CEO has a duty to make an application to the court in relation to a particular child if she holds those two reasonable beliefs in relation to the child. Conversely, the CEO has a duty not to make application to the court for a protection order if the CEO does not hold both of those beliefs. It follows, in my view that if, in a particular case, the CEO ceases to hold one of the relevant beliefs, the CEO is empowered, and indeed obliged, to withdraw the application (or to amend it if the CEO still believes that the child is in need of protection, but believes a different type of protection order is the best means of protecting the wellbeing of the child).

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2 [2012] NTSC 69

3 at [37] to [41]

> That is to say, the scheme of the Act is that the court only becomes involved if the CEO believes both that the child is in need of protection and that the order proposed in the application is the best means to safeguard the wellbeing of the child. The CEO then brings an application thus giving an opportunity for parents and (where appropriate) the child to be heard on the matter. The court scrutinises the application and the affidavit material and determines whether the child actually is (or is not) in need of protection and, if so, what is the appropriate direction to be made.
>
> If the CEO does not hold both relevant beliefs in relation to a particular child then the matter is not one for the determination of the court. Simply put, if the CEO holds no concern for the safety or wellbeing of a child because the child has a parent or parents willing and able to care for the child, the matter should not be before the court and it is not for the court to enquire into the family's affairs to determine whether the child might be better off under some other arrangement or to enquire into the parents' plans for the child's medical treatment, education, or any other matter relating to the care and upbringing of the child.

[9] That decision is directly on point and was binding on the learned magistrate. It follows that once the CEO had withdrawn the application for a protection order there was no proceeding on foot to be adjourned and her Honour had no jurisdiction to make an order adjourning the matter. Section 138 of the Act gives the court the power to adjourn "a proceeding", and provides certain guidelines as to how that power should be exercised. However, that power cannot be exercised where there is no "proceeding" in existence.

[10] Her Honour purported to make the order granting daily care and control of the child to his grandmother pursuant to s 139 of the Act. That section provides that, <u>on granting an adjournment of an application for a protection order</u>, the Court may make a variety of orders including an order giving daily care and control of the child to a family member. Again, if there is no

proceeding on foot, and accordingly no power to adjourn "the proceeding", there can be no power under s 139 to make such orders as the court is empowered to make "on granting [an] adjournment".

[11] The Local Court has the power to determine whether or not it has jurisdiction – albeit its decision on that question is not conclusive.[4] However, what appears to have occurred in this case is that the learned magistrate heard argument about the appropriate arrangements to be made for the daily care and control of the child during a two day hearing before embarking on the question of whether she had jurisdiction – a question on which she had been referred to a binding authority of this Court directly on point. I agree with the submission of counsel for the CEO that this was to do things in the wrong order. The magistrate should have heard the argument over whether she had jurisdiction in the matter before hearing argument on the daily care and control of the child. The magistrate was not able to give herself jurisdiction under s 139 of the Act to make a daily care and control order by adjourning the hearing of the jurisdictional question.

[4] See *R v Fulham, Hammersmith and Kensington Rent Tribunal ex parte Zerek* [1951] 2 KB 1 per Devlin J at 10