

CITATION: *CEO Territory Families v C and T [2021] NTLC 020*

PARTIES: CEO TERRITORY FAMILIES

v

C (MOTHER)

RE: T (CHILD)

TITLE OF COURT: LOCAL COURT

JURISDICTION: FAMILY MATTERS JURISDICTION

FILE NO: 2020-03258-LC

DELIVERED ON: 4 August 2021

DELIVERED AT: DARWIN

HEARING DATES: 21 July 2021

DECISION OF: A/JUDGE SUE OLIVER

CATCHWORDS:

CHILD PROTECTION - Interlocutory Application - Orders on Adjournment of protection application - Whether Court is empowered to make on “access” order –power does not exist.

Care & Protection of Children Act 2007 ss 138, 139, 123 & 128
Interpretation Act 1978 s 12

JD v The Attorney General of the Northern Territory [2007] NTCA 11

REPRESENTATION:

Counsel:

Applicant: Ms Brown
Mother: Mr Fernandez

Solicitors:

Applicant: Solicitor for the Northern Territory
Mother: NT Legal Aid Commission

Judgment category classification:	A
Judgment ID number:	020
Number of paragraphs:	46

IN THE LOCAL COURT (FAMILY MATTERS JURISDICTION)
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2020-03258-LC

BETWEEN

Chief Executive Officer, Territory Families

v

C
Mother

Re: T
Child

REASONS FOR DECISION

(Delivered 4th August 2021)

1. The mother of the child T, who was born on 22 September 2016, has brought an interlocutory application seeking orders that the Court make a “Direction” on adjournment as follows:

“Territory Families are to ensure access between the mother and child as follows:

- a. Monday 10am until 5pm
- b. Tuesday, 9am until 12pm or the time that playgroup finishes
- c. Wednesday 10am until 5pm
- d. Friday 10am until 5pm”

Background

2. Provisional protection was enacted for T on 20 September 2020 at 4.51 am to safeguard T’s wellbeing. At 1:40 am that day a member of the public had found T outside an hotel on Smith Street in Darwin without adult supervision. NT Police attended and took T to the Darwin Police Station. T, who was then almost 4 years old, was unable to provide police with any information that could identify him. It was noted that the child was not distressed.
3. The mother had woken up at 4:15 am and noticed that T was missing. She had contacted the police who informed her that T was in the care of Territory Families, and she contacted them.

4. On 22 September 2020, a Temporary Protection Order was made for T. The mother and T had arrived from Queensland about three weeks before and had been staying at a motel in the Darwin CBD. The subsequent care and protection application which is the subject of this application was made on 30 September 2020. T has continued under an order for daily care and control to the CEO of Territory Families (“the CEO”) since the granting of the Temporary Protection Order. The application for a short term order of two years giving parental responsibility to the CEO remains contested and is listed for a final hearing on 17 August 2021.
5. The father of T has not been involved in the proceedings as the mother has declined to identify him.

The Interlocutory Application

6. This application for “access” is brought pursuant to sections 138 and 139 of the *Care and Protection of Children Act 2007*. Although this expression is used in a number of provisions in the Act it is not used in the sense that is perhaps often thought of in relation to proceedings for children. The only part of the Act where the term is used in the sense of contact between a child and another is in Chapter 2 Part 2.4 Division 2 Subdivision 1 which deals with the transfer of protection orders to a participating state where, in addition to giving notice of the proposed transfer to the parents of the child, the CEO is required to give notice to “each person who has access to the child under the order”.
7. The CEO says that ss138 and 139 do not empower the Court to make the order sought nor does any other provision in the Act.
8. The mother’s application is for unsupervised access. Current contact between the mother and the child remains at twice per week for 1.5hours per visit, supervised by Territory Families¹. The order sought by the mother would effectively place the child with her unsupervised three and a half days a week during the day.
9. There are two issues to be determined. They are expressed in the mother’s submissions as follows:
 - (a) Whether the Court has the power to make directions on TF on adjournment about contact between a child and family (**contact direction**)² under s138 and 139 of the Care and Protection of Children Act 2007 (NT) (**the Act**).
 - (b) Whether it is in the child’s best interests per s90 of the Act for the Court to make a contact direction as set out at paragraph 6³ above.

¹ Mother’s outline of submissions at [24].

² “Contact direction” is not a phrase used in the Act

³ These are the directions sought and referred to in this decision at [1].

Does the Court have power to make an order on adjournment directing contact between a child and family?

10. The CEO submits that the Court does not have power to make the order that is sought. The specific provisions relied upon by the mother are ss138(4)(b) and 139(5)(c).
11. These provisions are contained within Part 2.3 Division 5 of the Act being the orders that the Court may make on adjournment of the proceedings. They are:

138 Court may adjourn proceeding

- (1) The Court may adjourn proceedings for an application for an assessment order, a protection order or a permanent care order (including an application under section 136 or 137).
- (2) The Court must:
 - (a) to the greatest extent possible, avoid granting adjournments; and
 - (b) may grant adjournments only if the Court considers:
 - (i) doing so is in the best interests of the child to whom the proceedings relate; or
 - (ii) there are other strong reasons for doing so.
- (3) In deciding the period of adjournment, the Court must have regard to the principle that it is in the best interests of the child for the application to be decided as soon as possible.
- (4) The Court:
 - (a) must state its reasons for the adjournment; and
 - (b) may give directions to the parties to the proceedings about what they must do or refrain from doing during the adjournment.

139 Order on adjournment

- (1) On granting the adjournment, the Court may make one or more of the following orders:
 - (a) an order giving daily care and control of the child:
 - (i) to the CEO if the proceedings relate to an assessment order; or
 - (ii) to the CEO or a family member of the child if the proceedings relate to a protection order;
 - (b) an order that a report be prepared and filed in the Court about the following persons:
 - (i) the child;
 - (ii) the child's family;

- (iii) if the proceedings relate to an application for a permanent care order – the person proposed to be given parental responsibility for the child under the order;
 - (c) an order authorising a medical examination of the child and the filing of a report of the examination in the Court;
 - (d) an order restricting the contact between the child and specified persons;
 - (e) an order that a mediation conference be convened for the child.
 - (2) Each of the orders has effect during the adjournment.
 - (3) The Court may, without limiting what may be addressed by a report prepared for subsection (1), specify matters that must be addressed by the report.
 - (4) The child may refuse to submit to any of the examination mentioned in subsection (1)(c) if the child is of sufficient maturity and understanding to make the decision.
 - (5) Without limiting subsection (1)(d), an order mentioned in that subsection may:
 - (a) direct a person not to have any direct or indirect contact with the child; or
 - (b) direct a person not to have any direct or indirect contact with the child except when a specified person or a person belonging to a specified group is present; or
 - (c) require the CEO to supervise any contact between the child and a specified person.
 - (6) The Court must not require the CEO to supervise any contact between the child and a specified person unless the Court has heard submissions from the parties in relation to the requirement.
 - (7) Section 127 (which is about mediation conference) applies for subsection (1)(e) in relation to proceedings for an assessment order with any necessary changes.
12. The mother submits that section 138(4)(b) does empower the Court to give a direction providing for contact between a parent and a child on the adjournment of the proceedings. In the written submissions on behalf of the mother, reliance is placed upon an amendment to section 139(6) of the Act which removed the requirement that the Court must not require the CEO to supervise any contact between the child and a specified person unless the CEO agrees to do so and replaced it with a requirement that the Court must not make such an order for supervision unless the Court has heard submissions from the parties in relation to the requirement.

13. The mother points to the explanatory memorandum as assisting the interpretation of s138(4)(b) and section 139(5)(c)⁴. Reference is made to Clause 29 of the explanatory memorandum to the amending Bill⁵ which provides

“Clause 29. Section 139 amended (Order on adjournment).

This clause amends the current section 139 which outlines the orders a Court may make on granting an adjournment. Sub-section (6) currently specifies that the Court must not require the CEO to supervise any contact between the child and a specified person, without the CEO’s agreement.

This amendment amends sub-section (6) to provide that the Court may only issue supervision directions binding upon the CEO after hearing from the parties in relation to the requirement. The purpose of this amendment is to give effect to the Court’s increased powers to make protection orders with supervision directions binding the CEO under section 123 (see clause 21).” (Emphasis added).

14. There are two matters that arise from the explanatory memorandum. Neither are of any assistance. Indeed, one wonders whether the drafter of the explanatory memorandum properly understood the structure of the legislation. First, there is the reference to the amendment **giving effect** to the Court’s increased powers to make orders with supervision directions binding the CEO under s123. Section 123 deals with Protection Orders i.e., final orders not orders on adjournment. When the Court makes a Protection Order it is empowered by s123(1)(a) to include in that order various supervision directions. The amendment that was made to s123 inserted a provision that allowed the court to make a supervision direction on a final order that the CEO must do, or refrain from doing, a specified thing related to the care of the child. The amendment made by clause 29 regarding orders on adjournment cannot possibly give effect to the power of the court in making final orders.
15. Second, the amendment does not give effect “to provide that the Court may only issue supervision directions binding the CEO after hearing from the parties in relation to the requirement” because s139 does not deal with “supervision directions”⁶.
16. Further, the explanation in Clause 21 of the explanatory memorandum that it gives effect to the amendment to section 123 (Directions in a Protection Order) also suffers from error. It provides

“The amendments to section 128 under clause 26 require that, if the Court proposes to issue directions that were not included in the application, they must hear submissions from the parties in relation to these directions.”

⁴ Section 62B of the *Interpretation Act 1978* provides that extrinsic material may be considered in particular circumstances to interpret a provision of an Act, this includes, *inter alia*, any explanatory memorandum or speech.

⁵ Care and Protection of Children Amendment Bill 2019 (Serial No. 82).

⁶ See footnote 7.

17. Clause 26 has nothing to do with amending section 128. Clause 26 amended section 137 of the Act which provides for the variation or revocation of orders. It is clause 23 of the Bill that proposed the amendment to section 128 by inserting the requirement that if the Court proposed to specify other directions in a final protection order under subsection 1(a)(ii), it must hear the parties in relation to those directions. That amendment was directed at ensuring procedural fairness when the Court itself was proposing directions that had not been submitted by any of the parties.
18. None of these amendments are relevant to the issue at hand as they all deal with supervision directions⁷ on final orders not with orders on adjournment.
19. Statutory interpretation requires the court to consider the text of the legislation⁸. It is only when there is some ambiguity in the text that extrinsic material may be considered to illuminate the meaning.
20. In my view section 138 and section 139 have different but related purposes and the meaning of each must be determined by consideration of both, as they each dictate the powers that the court may exercise on adjournments.

Section 138 Court may adjourn proceeding

21. Section 138 is, in its terms, primarily concerned with the number of adjournments and the orders on adjournment necessary to progress the application in a timely way. However, section 138(4) contains a procedural provision; in other words, it references the orders that the Court is to make in order to progress the application for a contested protection order to a final determination in the timely fashion that section 138 requires.
22. The mother says that section 138(4) cannot be intended to refer to procedural timetabling orders because section 96(2) of the Act allows the Court to set a timetable for each matter to which the proceedings relate and give directions the court considers appropriate to ensure the timetable is kept.

“Section 96 Expedition

- (1) The proceedings must be conducted as expeditiously as possible to minimise their effect on the child.
 - (2) For subsection (1), the Court: (a) may set a timetable for each matter to which the proceedings relate, having regard to the age and developmental needs of the child; and (b) may give such directions the Court considers appropriate to ensure the timetable is kept.”
23. As can be seen, s96(2) is referenced back to s96(1) which requires that proceedings be conducted as expeditiously as possible to minimise the effect on the child. In my view ss96 and 138(4) are simply complementary of each other. Section 96 is concerned with expediting the proceedings whilst s138 which is headed “Court may adjourn

⁷ “Supervision Direction” is a defined term under the Act and is confined by the interpretation provision of the Act, section 11, to the meaning set out in section 123(1)(a) in relation to what orders may be included in a protection order made by the Court.

⁸ Including headings if the Act was enacted after 1 July 2006 as is the case with the *Care and Protection of Children Act 2007*.

proceedings” is primarily concerned with limiting the number of adjournments in the proceedings and s138(4) may be seen as assisting the requirement for expedition by the court making appropriate procedural orders.

24. Consequently, in my view, the reference to “directions” to the parties about what they must do or refrain from doing during the adjournment is a reference to procedural directions to the parties to progress a matter to either some resolution or contested hearing. Common examples of procedural directions in child protection matters are service of the application on the parents, setting dates for the filing of response/s to the application, filing of affidavits or updated affidavit evidence, the filing of medical or psychiatric or psychological reports about the child or a parent or obtaining criminal histories, all of which may finally lead to the preparation and filing of a trial book. Less common examples of directions about what parties must not do include redaction of allegations of sexual abuse in affidavits that are to be served where that might be the subject of a current police investigation or redacting information as to addresses which might pose some risk to the safety of another.
25. Significantly, directions that are given under s138(4) have effect only during that adjournment.
 - (4) The Court:
 - (a) must state its reasons for the adjournment; and
 - (b) may give directions to the parties to the proceedings about what they must do or refrain from doing **during the adjournment** (emphasis added).
26. If section 138(4)(b) empowered the Court to make an “access” order such as the one sought in this application, it would need to re-visit that order on each subsequent mention of the matter to determine whether the access ordered continued to be in the child’s best interests and repeat the same or another order. There is an impracticality of that from both a resource issue for the parties but also that it would be contrary to the requirement to progress matters to finalisation in an expeditious manner as is required by the legislation.
27. A power of that nature would also have significant resource implications for the CEO. It is well recognised that a court cannot force the Executive arm of government to take particular actions where there are insufficient resources to allow for that.⁹
28. It would result in an unusual construction of the Act if section 138 contained a single power to “direct” access (something the parties “must do”), including unsupervised access as is sought in this matter, without any limitation on the Court’s power to do so when section 139 provides the power to make substantive orders directly in relation to the child the subject of the proceedings and particularly contains the amendment to sub-section 6 that now provides that the Court must not require the CEO to supervise any contact between the child and a specified person unless the Court has heard submissions from the parties in relation to the requirement. In my view, that

⁹ JD v The Attorney General of the Northern Territory [2020] NTCA 11 at [98]

construction would lead to an absurdity in legislation the primary aim of which is the protection of children.

29. In conclusion, it is my view that section 138 as a whole is procedural in nature and does not confer on the Court the power to order “access” or any other orders of that nature.

Section 139 Order on adjournment

30. The terminology used in s139 is different from s 138. Whilst s138 provides for **directions** that the court **can give to the parties**, s139 provides for the **orders** that the Court may make **on the granting of the adjournment**.
31. Section 139 covers the field of the orders that the Court may make on adjournment. The Court is not empowered to make any orders other than those contained in section 139.
32. The relevant provisions and powers conferred on the Court in relation to contact with the child by others as provided by section 139 are first, that the Court may make an order restricting the contact between the child and specified persons (s139(1)(d)).
33. Second, section 139(5) then provides that, without limiting subsection (1)(d), an order mentioned in that subsection may:
- (a) direct a person not to have any direct or indirect contact with the child; or
 - (b) direct a person not to have any direct or indirect contact with the child except when a specified person or a person belonging to a specified group is present; or
 - (c) require the CEO to supervise any contact between the child and a specified person.
34. Section 139(5) read with s139(1)(d), provides examples of the orders that a court may make **restricting** contact with a child. It is a power that may be used whether or not an order has been made placing the child under the daily care and control of the CEO during the adjournment. For example, the Court may order that the mother have daily care and control of the child but direct that the father not have any direct or indirect contact (s139(5)(a)). Where the CEO has daily care and control of the child the Court may, pursuant to section 139(5)(c), be required to supervise that contact. Importantly, s139(5), in accordance with s139(1)(d) is cast in negative terms, providing only for orders that are aimed at being protective in nature by restricting any contact the child can have with others.
35. Although the examples of orders that may be made pursuant to s139(5) are not confined to those set out in subsections (a), (b) and (c) any additional orders would be required to likewise be restrictive in nature in accordance with s139(1)(d).
36. Third, section 139(6) provides that the Court must not require the CEO to supervise any contact between the child and a specified person unless the Court has heard submissions from the parties in relation to the requirement. It is not a provision that

confers a requirement to provide contact, rather it ensures procedural fairness to each party as to whether supervision of contact of the child with another person should be ordered.

37. It should be noted that “contact” is defined in the Act.¹⁰ Contact includes: (a) any form of physical contact; and (b) any form of oral communication, whether face-to-face or by other means; and (c) any form of written communication. That definition adds weight to the interpretation that the relevant sub-sections of section 139 are not about providing the Court with a power to order something akin to access. They are broader powers, protective in nature for the child, by restricting contact of the child with a parent even though parental responsibility¹¹ (other than care and control) still rests with that parent.
38. Daily care and control of a child is defined in section 21 of the Act. A person has daily care and control of a child if the person is entitled to exercise all the powers and rights, and has all the responsibilities, for the day-to-day care and control of the child.
39. In my view, one of the fundamental powers and rights in relation to day to day care and control of a child, particularly a very young child which is the case in these proceedings, is determining where that child is to reside, who is to care for the child, who may be with that child and on what terms. When the Court makes an order for the CEO to have daily care and control it confers each of those powers and rights on the CEO, subject only that pursuant to s139, the Court may place further limitations on that power, for example by requiring the CEO to supervise any contact with the child pursuant to s139(5)(c).
40. The purpose of the legislation must be considered in interpreting this Act. In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.¹²
41. Section 12 provides for the objects of the Act. They are:
 - (a) to promote the wellbeing of children, including:
 - (i) to protect children from harm and exploitation; and
 - (ii) to maximise the opportunities for children to realise their full potential; and
 - (b) to assist families to achieve the object in paragraph (a); and
 - (c) to ensure anyone having responsibilities for children has regard to the objects in paragraphs (a) and (b) in fulfilling those responsibilities.
42. The Act provides a legislative scheme to protect children who are believed to have been harmed or who are at risk of harm. It sets out a comprehensive scheme for that purpose and provisions of the Act must be construed in that context.

¹⁰ Section 13

¹¹ A parent may still exercise particular powers with respect to a child who is in the care of the CEO, for example consent to medical procedures and permission to travel interstate.

¹² Section 62A of the *Interpretation Act 1978*

Conclusion

43. Although the making of an application for a protection order will often be prompted by a specific event, and in this case it was by the child being found alone in the CBD of Darwin in the early hours of the morning, it may take some time for the CEO to further investigate the circumstances of the child particularly where, as in this case, the mother and child were recent arrivals from Queensland therefore necessitating inquiries being made in that jurisdiction, both with family and government authorities to obtain a history of the care of the child. That would be why only a Temporary Protection Order¹³ was initially sought and granted. Following those investigations, the application for a Protection Order was made prior to the expiry of the Temporary Protection Order.
44. Consequently, where a protection order application is contested, there would arise difficulty and risk associated with granting an “access” order, especially for unsupervised access as is sought in this case, while the application remains unresolved. That is not to say that a parent is or should be denied all contact with a child during that process. In most cases arrangements are made for a parent to have contact with their child while the proceedings are on foot, both supervised and unsupervised depending on the circumstances and any associated risk. The mother has had continuing supervised access with the child, *albeit* at less frequency than she wishes.
45. It is a matter for the CEO under the grant of a daily care and control order to determine and arrange the contact between a child and a parent whilst a protection order application is on foot, subject only to the power of the court to make an order for supervised access pursuant to section 139(6) after hearing submissions from the parties.
46. The Court has no power to make the order sought for unsupervised access to the child and the interlocutory application is dismissed.

Dated this 4th day of August 2021

SUE OLIVER
A/LOCAL COURT JUDGE

¹³ A Temporary Protection Order must be immediately made by the Court if it is satisfied there are reasonable grounds for believing the child is in need of protection and the order is urgently needed to safeguard the wellbeing of the child. Such order has effect for 14 days unless the child is earlier returned to the parent and the court notified of the return.