

CHILDRENS COURT OF QUEENSLAND

CITATION: *GEK v Director-General, Department of Child Safety, Youth and Women* [2020] QChC 6

PARTIES: **GEK**
(applicant)

v

DIRECTOR-GENERAL, DEPARTMENT OF CHILD SAFETY, YOUTH AND WOMEN
(respondent)

FILE NO/S: CCQ 4/20

DIVISION: Childrens Court of Queensland

PROCEEDING: Application for extension of time within which to appeal under section 118(3) *Child Protection Act 1999*

ORIGINATING COURT: Childrens Court at Bundaberg

DELIVERED ON: 8 April 2020

DELIVERED AT: Brisbane

HEARING DATE: 20 March 2020

JUDGE: Loury QC DCJ

ORDER: **The application for an extension of time within which to appeal is refused.**

CATCHWORDS: CHILDRENS COURT – CHILD PROTECTION ACT – EXTENSION OF COURT ASSESSMENT ORDER – EXTENSION OF TIME WITHIN WHICH TO APPEAL – where court assessment orders were made pursuant to section 44 of the *Child Protection Act 1999* – where the court assessment orders were extended for four weeks – where the time for filing a notice of appeal against the orders had expired

SERVICE OF ASSESSMENT ORDER – NON-COMPLIANCE WITH RULES OF SERVICE – WAIVER – CHILDRENS COURT RULES – where the respondent failed to effect service of applications for the extension of court assessment orders within at least 3 business days of the hearing date – whether applicant was denied procedural fairness

Child Protection Act 1999 ss 5A, 5B, 44, 49, 99, 118(3)
Childrens Court Rules 2016 rr 8, 25, 26, 26(2), 30, 31
Acts Interpretation Act 1901 s 38(1)(a)

APPEARANCES: Self-represented for the applicant
B. Wilkie for the respondent

SOLICITORS: Self-represented for the applicant
Office of the Child and Family Official Solicitor, Department
of Child Safety, Youth and Women for the respondent

- [1] On 14 November 2019 court assessment orders were made by a Childrens Court Magistrate pursuant to section 44 of the *Child Protection Act 1999*. Those orders allowed for an investigation to be conducted into whether the applicant's six children were in need of protection. Evidence before the court demonstrated that the applicant and his wife had failed to meet the childrens' immediate needs and that the youngest child had suffered harm as a result of the conduct of the applicant and his wife during her pregnancy. The orders granted the temporary custody of each of the six children to the chief executive. Those orders expired at 11.59 pm on 3 December 2019.
- [2] On 28 November 2019 the Office of the Child and Family Official Solicitor, Department of Child Safety, Youth and Women ("the department") filed an application for an extension of those court assessment orders pursuant to section 49 of the *Child Protection Act 1999*. That application was heard and determined on 3 December 2019 by the same Childrens Court Magistrate. The court assessment orders were extended until 31 December 2019. It is those orders, extending the court assessment orders, against which the applicant wishes to appeal. The applicant's notice of appeal was filed on 30 January 2020. Section 118(3) of the *Child Protection Act 1999* required the notice of appeal to be filed within 28 days after the decision was made.
- [3] The applicant has explained the delay by indicating that he attempted to file his appeal on 20 December 2019 but for reasons unknown his notice was not accepted by the registry. After the Christmas vacation period he then required an extension of time within which to file his appeal. He ran into difficulties in determining, in what form such an application was required to be filed. The applicant is self-represented. The delay is not a significant one however it means that the orders against which he now seeks to appeal have expired.
- [4] The grant of an extension of time is not automatic. The real issue which arises is whether it is necessary in the interests of justice to extend the time within which to appeal. The applicant's proposed ground of appeal is that service was not effected upon him in accordance with the *Childrens Court Rules 2016*.
- [5] Rule 25 of the *Childrens Court Rules 2016* provides that a party filing a document in the court for a proceeding must serve a copy of the document on each other party to the proceeding. Rule 26 applies, if the document filed in the court relates to a court event and the rules require the document to be served on a person. The applications for the extension of the court assessment orders were such documents. Rule 26(2) required the applications to be served on the applicant as soon as practicable after the document had been filed but, in any event, at least three days before the day set for the court event.

- [6] The applicant was served personally with the application on 29 November 2019 at 4.20 pm.¹ The application of section 38(1)(a) of the *Acts Interpretation Act 1901* means that in calculating when service was required to be effected, it is necessary to exclude the day of service and the day of the hearing. Bearing in mind that 3 December 2019 was a Tuesday, the applicant was required to be served on 27 November 2019.
- [7] The applications for the extension were not filed until 28 November 2019. The department was never in a position to serve the applicant in accordance with the rules. The applicant argues that he was denied procedural fairness as a consequence.
- [8] The applicant attended the hearing on 3 December 2019. He objected to the extension of the order on the basis that he had not been served at least three business days before the day set for the court event. The learned Magistrate referred to the reason why an extension of time was required to the court assessment order. The person commissioned to prepare an independent assessment of the applicant and his wife was required to travel to Bundaberg and interview a number of the children as well as the applicant and his wife. That report was integral to an assessment of whether it was then necessary for an application to be made for child protection orders. The learned Magistrate referred to it being in the best interests of the children for the application for an extension of the court assessment orders to be allowed.
- [9] The legal officer from the Office of the Child and Family Official Solicitor advised the court that the cut-off date for filing the application was missed by her office however that the applicant and his wife were notified that the documents were coming. She submitted that the applicant's wife was served on 28 November 2019 and that the applicant was invited to attend the department's offices so that service could be effected by them. The legal officer did not make an application to the court for the rules relating to service to be waived. If such an application had been made the learned Magistrate would have been directed to rule 8 of the *Childrens Court Rules*.
- [10] As referred to above the applications were required to be filed and served by 27 November 2019 at the latest. The department's explanation for the failure to file in accordance with the rules was not compelling. No explanation has been provided by the department as to why the applicant was not served until 29 November 2019 which was well short of the requirement for three business days notice.
- [11] The learned Magistrate made an order under rule 30 of the *Childrens Court Rules 2016* that service had been effected. Rule 30 applies to a situation where a document is not served in a way provided for in the rules but the document came into the possession of the person who was to be served and the court is satisfied that the document came into the person's possession on or before a particular day. The court may make an order that the person is taken to have been served in accordance with the rules, on the day that the document came into the person's possession. This rule is not directed towards abridging the time for service. It rather applies to persons who are not served for example personally, but nonetheless come into possession of the document by other means. This rule would at best have permitted

¹ Affidavit of Annette Connor sworn 2 December 2019.

an order to be made that the applicant had been served on 28 November 2019 when his wife came into possession of the applications and by inference, himself. This rule does not permit an abridgement of the time to be served to 27 November 2019.

- [12] Counsel for the Office of Child and Family Official Solicitor, who did not appear for the department on 3 December 2019 relied in her submissions on rule 31 which allows for the dispensing of, limiting or altering of the service requirements. However a reading of that rule clearly reveals that it does not apply to documents that are not required to be served personally. Rule 31 therefore has no application because the application filed on 28 November 2019 was required to be served personally. There is otherwise no specific rule that relates to the abridging of time for service. However the *Childrens Court Rules 2016* do contain a provision that deals with the effect of non-compliance with the rules. Rule 8 provides that non-compliance does not invalidate a proceeding unless the court directs otherwise. It also provides that the court may waive compliance with a rule or set aside all or part of a proceeding or make any other order that it considers appropriate. The legal officer representing the department at the proceedings ought to have made an application to the court dispensing with strict compliance with the rules relating to the service of the application pursuant to rule 8.
- [13] The main object of the *Childrens Court Rules 2016* is to provide for flexible procedures that allow a court to decide a proceeding for a court assessment order: firstly, consistently with the child protection principles; secondly, fairly, as soon as possible, and with the minimum of cost and legal technicality; and thirdly in accordance with the nature, importance and complexity of the issues to be resolved in the proceeding.
- [14] The paramount principle is that the safety, well-being and best interests of the child are paramount.² Some of the other principles relevant are that:³ a child has the right to be protected from harm or risk of harm; in protecting a child the State should only take action that is warranted; and a delay in making a decision in relation to a child ought to be avoided.
- [15] Whilst the learned Magistrate considered the substance of the applicant's complaint about service he considered that bearing in mind the child protection principles that the appropriate course was, in effect, to waive the noncompliance with the service requirement of three business days notice. Such an order could properly have been made under rule 8 if the legal officer who appeared for the department had drawn it to the learned Magistrate's attention and made an application pursuant to that rule. The remedy available to the applicant to avoid any prejudice occasioned by the failure to serve him in sufficient time was for the matter to be adjourned. However, had the matter been adjourned the court assessment order would have ended and no application for an extension could be made.⁴ That would have necessitated proceedings being commenced again which would have served only to delay the purpose of the orders which was to investigate whether the children were in need of protection. Such action would potentially have delayed the period of time in which the children were in the custody of the department.

² Section 5A *Child Protection Act 1999*.

³ Section 5B *Child Protection Act 1999*.

⁴ Section 49 *Child Protection Act 1999*.

- [16] Pursuant to section 49 of the *Child Protection Act 1999* the Magistrate was required to be satisfied only that the court assessment order had not ended and that the extension was in the childrens' best interests. The applicant was present at the proceedings on 3 December 2019 and he was given an opportunity to be heard. He made submissions about the failure of the department to have served him in accordance the rules. He was clearly distressed that his children were in the care of the department and that the order extending time to 31 December 2019 was during a time when the court was closed.
- [17] The applicant's submissions were considered by the learned Magistrate and balanced against the child protection principles which required the learned Magistrate to avoid delay. The learned Magistrate did not consider that the department were delaying matters unreasonably. He considered the matter a complex one involving a number of children. The hearing was not one that involved a final decision being made as to the custody of the applicant's children. It was merely an application to extend the time in which the investigation by the department would continue into whether the applicant's six children were in need of protection. There were no submissions made by the applicant directed to whether the extension was in the best interests of the children nor to any circumstances which meant that the order was not necessary for the investigation to continue.
- [18] The order made extended the time within which the assessment was to be made until 31 December 2019. In that period an application for a child protection order has been made by the Director of Child Protection Litigation. A final determination on the merits of whether the applicant's children are in need of protection will not be made until after a full hearing of that application.
- [19] The applicant was not denied procedural fairness in the circumstances of this matter by a failure on the part of the learned Magistrate to adjourn proceedings requiring them to commence again. The applicant is an unrepresented litigant. He is distressed by the actions that the department have taken. The department ought to comply with the Childrens Court Rules. If non-compliance occurs they ought to apply for a waiver of the rules and provide a proper foundation for such an order to be made.
- [20] The order the applicant wishes to appeal has now come to an end. On that basis it would not be in the interests of justice to extend the time within which to appeal. The non-compliance by the department with the *Childrens Court Rules 2016* relating to service does not invalidate a proceeding unless the court directs otherwise. The order granting custody of the children, which was made on 14 November 2019, continues pursuant to section 99 of the *Child Protection Act 1999* until the application is decided or the Childrens Court orders an earlier end to it.
- [21] There being no merit in the appeal, the application for an extension of time within which to appeal is refused.