

Director of Child Protection Litigation Practice Note

Guidance on engaging section 99 of the *Child Protection Act 1999* when making a child protection application, including on a designated court holiday

1. This Practice Note provides guidance to DCPL Lawyers on the engaging of the provisions of s99 of the *Child Protection Act 1999* (CP Act) when making either a child protection application or an application in a child protection proceeding (proceeding), including on a designated court holiday.

Summary

2. Where a child is in the chief executive's custody or guardianship, or in the custody of a member of the child's family under an order, and before the order ends, "**an application is made**" (either a child protection application or an application in a proceeding) for the extension of the order or for another "**order**", the existing order granting custody or guardianship of the child continues under s99 of the CP Act until the application that has been made is decided unless the court orders an earlier end to the order.

Operation of section 99 of the CP Act

3. Section 99 of the CP Act operates to continue an order that is in force that grants either custody or guardianship of a child to the chief executive, or custody of a child to a member of their family, when an application is made for the extension of the order or for another order. The order that grants either the custody or guardianship of the child continues until the new application is decided unless the Childrens Court (court) orders and earlier end to the order.
4. In practical terms, if a child is in the custody or guardianship of the chief executive, or the custody of a member of their family under an order (including an assessment order, temporary custody order or child protection order) at the time the DCPL makes either:
 - a. an originating child protection application for a child protection order for the child under s10(1)(a) of the *Director of Child Protection Litigation Act 2016* (DCPL Act), or
 - b. an application in a proceeding seeking an interim child protection order/s for the child under s67 of the CP Act, which could be for any 1 or more of the following interim orders:
 - i. an interim order granting temporary custody of the child to the chief executive or a suitable person who is a member of the child's family
 - ii. an interim order directing a parent of the child not to have contact (direct or indirect) with the child; or with the child other than when a stated person or a person of a stated category is present, and or

- iii. an interim order authorising an authorised officer or police officer to have contact with the child.

Then, the existing order granting either the custody or guardianship of the child will continue until the court determines the new application or orders an earlier end to the continuing of the order under s99 of the CP Act.

Effect of section 99 of the CP Act

5. It is important to note the type of order that has been continued by operation of s99 of the CP Act, as this will be a relevant consideration for DCPL Lawyers when determining if and when the DCPL should make an application in a proceeding to end the order that has been continued and seek an interim order under s67 of the CP Act.

Engaging of section 99 of the CP Act on a designated court holiday

6. It is noted that the Practice Direction No. 2 of 2021, has no direct application to child protection proceedings in the court, as the Uniform Civil Procedure Rules 1999 (UCPR) and practice directions issued under the UCPR, have no direct application. This was confirmed by Judge Boskill in *Jennifer Glover, Separate Representative v Director, Child Protection Litigation & Ors* [2016] QChC 16.
7. However, the court and those utilising the court, have to take the Magistrates Court Registry as they find it. Rule 11 of the *Childrens Court Rules 2016* (the Rules) indicates, an originating application may be filed in the registry of the Magistrates Court, with those seeking to file documents for use in the court, need to do so in compliance with whatever the Magistrates Court registry operating hours are designated by amongst others, the Chief Magistrate, whether it be under a practice direction or otherwise. For instance, by the Magistrates Court Practice Direction No. 2 of 2021, issued by the Chief Magistrate, Judge Gardiner that has designated that each of the days from Monday, 20 December 2021 to Friday, 31 December 2021 inclusive, as a court holiday.
8. On a designated court holiday, if the DCPL applies for a child protection order under s10(1)(a) of the DCPL Act, or makes an application in a proceeding under r 73 of the Rules for an interim child protection order made under s67 of the CP Act, and the child is the subject of an order (including an assessment order, temporary custody order or child protection order) that grants either custody or guardianship, on the lodging of the application for a child protection order before that order ends, s99 of the CP Act is engaged, and the order granting custody or guardianship continues.
9. The DCPL will evidence that s99 of the CP Act has been engaged by providing Child Safety with a copy of the originating application that has been lodged and a copy of the automatic reply email that DCPL receives acknowledging that the application has been uploaded.

10. Under r17(2) of the Rules, any originating applications or applications in a proceeding seeking a child protection order that are lodged on a designated court holiday will be taken to have been accepted by the registrar and filed on the day the registry opens for business at the specific location the application has been lodged, and the registrar or a member of the registry staff will stamp the application and record that date on it, and will fix the time and place for hearing under s55 of the CP Act.
11. The engaging of s99 in these circumstances is based on the following:
 - a. the elements in s99(1) are firstly, that the child is in the chief executive's custody or guardianship, or in the custody of a member of the child's family under an order, and secondly, that before the order ends, "**an application is made**" for the extension of the order or for another order (emphasis added)
 - b. then under s99(2), the existing order granting custody or guardianship of the child continues until the application is decided unless the court orders an earlier end to the order
 - c. the words "an application is made" is in inverted commas, as the proper meaning of this phrase is central to determining whether s99 is engaged
 - d. the first point to note is that when "an application is made" for a child protection order, it may not necessarily be the time when the application is filed. In other words, the making of the application is not synonymous with the filing of the application
 - e. "an application is made" by the DCPL for a child protection order when the DCPL has firstly lodged a compliant originating application or an application in a proceeding (complying with the CP Act and the Rules) and secondly, done all that the DPCL can do to put in place a process that will bring the matter before the court
 - f. the CP Act uses both the concept of filing and "an application is made", with many sections in the CP Act referring to when an application is "filed". The most pertinent example is s56(1) which provides "As soon as practical after the application is filed, the chief executive must...". Similarly, as noted above, in s55 – "When the application is filed, the registrar of the Childrens Court must immediately fix the time and place for hearing..."
 - g. there is some authority in migration cases that an application is made when it is lodged: *Singh v Minister for Immigration and Citizenship and Another* (2011) 25 FLR 56 and *Ashurov v Minister for Immigration and Border Protection and Another* (2015) 297 FLR 267. However, these have limited value in assisting in interpreting the meaning of the words in s99 because they appear in an administrative environment

- h. the explanatory memorandum of the Child Protection Bill 1998 states the following when discussing clause 96 (which became s99):

Clause 96 applies throughout chapter 2 “Protection of children” to circumstances when a child is already in custody or guardianship under an order which is due to expire, and application for another order for custody or guardianship or extension has been made but cannot be heard by the magistrate or court before the existing order ends. This clause allows the custody or guardianship of the child to continue until the application for a further order or extension is heard. This protects the child by ensuring there is no “gap” in the protective custody between one order and the next.

- i. the section was amended before it ever came into force by the *Child Protection Amendment Act 2000*, although not in a way that materially affected what was said in the original explanatory memorandum. The explanatory memorandum to the relevant clause, clause 23 states:

Clause 23 amends section 96 (Chief executive’s custody or guardianship of child continues pending decision on application for order) of the principal Act. The current section 96 ensures that, when an application for extension of a custody or guardianship order is made, the chief executive’s custody or guardianship of the child continues until the application is decided by the Childrens Court even though the expiry date of the original order has passed. The amendment includes orders granting custody of the child to a family member within the ambit of the provision, consistent with the intent of the provision. The amendment also omits reference to “variation” as this wording is unnecessary—an application for variation would of necessity have to be decided before an order ended.

- j. in short, the purpose of the amendment was to extend the operation of s99 (as it became) to include third-party custody orders. Otherwise, the intent remained the same – that is to ensure “there is no “gap” in the protective custody between one order and the next.”

- k. section 99 was once again amended in 2010 by the *Child Protection and Other Acts Amendment Act 2010*. The explanatory memorandum to the relevant clause of the Bill, clause 50 states:

Clause 50 amends section 99 by omitting section 99(2) and inserting a new subsection (2) to clarify that it is the order granting the custody or guardianship of the child which continues until the application is decided, unless the Childrens Court orders an earlier end to the order. Clause 50 also amends section 99 by inserting a new subsection (3) which clarifies the relationship between section 99 and interim orders under section 67 of the Act to make clear that orders under these two sections may operate concurrently.”

12. To the extent that the phrase “an application is made” is ambiguous, resort can be had to the explanatory memorandum with a view to ensuring the interpretation adopted is the one most consistent with the intent of Parliament. An interpretation of s99 that provides that the timing of when “an application is made” is referenced by when the person or office charged with protecting children – the DCPL, does all it can to ensure the continuation of that protection would, in my view be adopted. This means that the DCPL’s actions “plug the gap”.

13. In practical terms, it should be noted that there may be matters where a child is the subject of a temporary custody order obtained during a designated court holiday period, which will end during the court holiday period before the registry is open to file the application. Such examples give further weight to the rationale that s99 merely requires the making of an application, by the DCPL as applicant, doing all it can do to make that application, rather than the application being filed in the court, which, is a function undertaken by the registrar.
14. The effect of the above is that if “an application is made” on a designated court holiday, such as either on 21 to 24, or from 29 to 31 December 2021, and an existing order (including an assessment order, temporary custody order or child protection order) that has not ended grants custody or guardianship, on the lodging of the application for a child protection order, s99 of the CP Act is engaged, and the order granting custody or guardianship continues.

Abbreviations and definitions of terms used in the practice note

15. The abbreviations and definitions of terms used within the practice note are as follows:
- a. *Assessment order* as per s3 of the CP Act (dictionary in schedule 3) means a temporary assessment order or court assessment order
 - b. *Child protection application* as per r4 of the Rules (dictionary in schedule 1) means an application under the CP Act for the making, extension, amendment or revocation of a court assessment order or child protection order
 - c. *Child protection order* as per s3 of the CP Act (dictionary in schedule 3) means a child protection order under chapter 2, part 4, including:
 - i. an order extending, varying or revoking a child protection order; and
 - ii. an interim order under s67 of the CP Act in relation to a proceeding for a child protection order.
 - d. *Child protection proceeding* as per s3 of the CP Act (dictionary in schedule 3) means a proceeding under the Act for the making, extension, amendment or revocation of a child protection order
 - e. CP Act: *Child Protection Act 1999*
 - f. *Custody* as per s12 of the CP Act
 - g. DCPL Act: *Director of Child Protection Litigation Act 2016*
 - h. *Guardianship* as per s13 of the CP Act

- i. *Order* as per s3 of the CP Act (dictionary in schedule 3) means an assessment order, temporary custody order or child protection order
- j. *Proceeding* – see *child protection proceeding*
- k. Rules: *Childrens Court Rules 2016*
- l. temporary custody order as per s3 of the CP Act (dictionary in schedule 3) means an order under chapter 2, part 3AA of the CP Act
- m. UCPR: Uniform Civil Procedure Rules 1999

| Date effective | Application | Approved by |
|----------------|--|-----------------|
| 17/12/2021 | All employees of the Office of Director of Child Protection Litigation | Nigel A. Miller |

| Version | Notes | Author | Date of change |
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| 1.0 | Initial version | Nigel A. Miller | |
| 2.0 | Reissued to incorporate designation of Court holidays in 2019-20. | Nigel A. Miller | 20/12/2019 |
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