

PARK COURT CHAMBERS

Family Law Seminar: An Update

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**Emergency Protection Orders and Judicial Review
Contact, Local Authorities and Human Rights
Appeals – from the FPC to the High Court and from the County Court and High
Court to the Court of Appeal – procedure. Finding of fact hearings
The risk of the wasted costs’ order in care proceedings
Post- adoption contact and how birth parents can enforce letter box contact if
there has been a written agreement.**

Introduction

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1. **The Emergency Protection Order – the removal of the newborn baby/child from his parents**

- a) Section 45 (1), 45 (5) 45(6) Children Act 1989 – An EPO can be made initially for 8 days and extended for 7 days.

“A terrible and drastic remedy” - per Munby J in *X Council v B* (2005) 1 FLR 341, at para 34.

- b) European Law

Strasbourg has recognised in a number of cases that the EPO or its equivalent is in principle entirely compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention)

There may be cases where an ex parte (without notice) application is justified: *K and T v Finland* (2000) 2 FLR 2, *P, C and S v UK* (2002) 2 FLR 631, *Venema v Netherlands* (2003) 1 FLR 552, *Covezzi and Morselli v Italy* (2003) 38 EHRR 28 and *Haase v Germany* (2004) 2 FLR 39

But however compelling the case for intervention may be, the local authority seeking the EPO, and the magistrates in the FPC who grant the EPO “assume a heavy burden of responsibility” (*X Council B* (2005) 1 FLR, 341 at p 355)

- c) *X Council v B* (2005) 1 FLR 341 (see also Fam Law, Dec 2004, at p 931; and article at p 882)

Facts - The children were taken into foster care under ex parte emergency protection orders, with the stated aim of arranging medical examinations without any risk of parental interference. It was eventually accepted that it was in the children’s best interest to return to parents.

The court re-emphasised that a local authority, even if they had a care order, was not entitled to make significant changes in the care plan, or to change the arrangements under which the children were living, let alone to remove the children from home if they were living with their parents, without properly

involving the parents in the decision making-process and without giving the parents a proper opportunity to make their case before a decision is made.

d) Law re EPO's:

- An application for an Emergency Protection Order may, with the leave of the justices' clerk, be made ex parte: r 4 (4) (b), Family Proceedings Courts (Children Act) 1989 Rules 1991
- The application for an EPO and EPO itself are only required to be served on the parents within 48 hours after the EPO has been: Rule 21 (8) (b) of the Family Proceedings Courts (Children Act) 1989 Rules 1991
- There is no appeal against either the making or the extension of an EPO: Section 45 (10) (a) and 45 (10) (b) Children Act 1989.
- No application for the discharge of an EPO can be heard until 72 hours after the EPO was made: s 45 (9)
- There is no appeal against the refusal to discharge an EPO: s 45 (10) (c)
- A parent who was present (even though unrepresented) at the original hearing cannot apply to have the EPO discharged: S 45 (1) (a)
- Where a child subject to an EPO has been returned by the local authority to his parent in accordance with s 44 (10), the local authority, whilst the EPO remains in force, **may again remove the child** – “and without any form of judicial intervention” – **if it appears to the local authority that ‘a change in the circumstances of the case make it necessary...to do so’**: s 44 (12)

e) X Council v B (2005) 1 FLR 341, per Munby J at page 356

“There is now quite a long line of cases showing that judicial review is not normally an appropriate remedy in cases where emergency protection or care proceedings are either threatened or on foot...Re V (Care Proceedings: Human Rights Claims) (2004) 1 FLR 944. But each of those case proceeded on the assumption that the FPC (or the Family Division on an appeal from the FPC) would be able to do full justice to the parties within the EPO or care proceedings. Here, by contrast, the Family Division is powerless to act. It is by no means obvious to me that judicial review would not lie, in an appropriate case, to correct error or injustice. The cases to which I have referred should not, as it seems to me, be read as necessarily precluding such an application in an appropriate case. There are, after all other family law contexts in which the absence of any effective right of appeal has prompted the court to acknowledge that judicial review is or may be an appropriate remedy: see Cazalet J's observations in T v Child Support Agency and Another ...(1997) 2 FLR 875 and my own judgments in R (Marsh) v Lincoln

District Magistrates' Court (2003) All ER and Re L (Family Proceedings Court) (Appeal: Jurisdiction) ... (2005) 1 FLR 210.”

“As I said in R (Marsh) v Lincoln District Magistrates' Court at para 50 speaking of the Administrative Court: ‘It is the historic and vital function of this court when exercising its supervisory jurisdiction over justices to ensure, if not that justice is done, at the very least that demonstrated injustice is not allowed to continue uncorrected.’... These lacunae in the statutory scheme make it all the more important that both the local authority and the justices in the FPC approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the European Convention rights of both the child and the parents.”

f) Is this the ‘green light’ for a judicial review of ex parte EPO by a local authority?

Proportionality is the key.

Court should adopt a ‘non-interventionist’ or ‘least interventionist’ approach

g) Key points

- An EPO is a ‘draconian’ and ‘extremely harsh’ measure requiring ‘exceptional justification’ and ‘extraordinarily compelling reasons’.
- separation (of the child and parent) only to be contemplated if immediate separation is essential to secure the child’s safety – ‘imminent danger’ must be ‘actually established’
- If the real purpose of the local authority’s application is to enable it to have the child assessed, then query whether Child Assessment Order under section 43 of CA is appropriate.
- No EPO should be made for any longer than is absolutely necessary to protect the child
- The evidence in support of the application for an EPO must be full, detailed, precise and compelling. Unparticularised generalities will not suffice.
- the evidential burden on the local authority is even heavier if the application is made ex parte

2. **Contact, Local Authorities and Human Rights (see X Council v B).**

a) Amount of contact offered in X Council v B?

- 3 x 1 ½ hour sessions a week - because ‘this was the maximum level of supervised contact that local authority resources could provide until the grandparents were approved as carers’.
- Per Munby J: “That, I am afraid, is simply not good enough. I repeat: arrangements for contact must be driven by the needs of the family, not stunted by lack of resources. If the state in the guise of a local authority is to interfere as drastically with family life as it does when it separates a child from his parents before it has even established the grounds for seeking a final care order then it must provide and facilitate appropriate contact.
- Too often one hears of cases where the contact offered is something of the order of two or three times a week for 1 ½ or 2 hours a time. Indeed, I hear it so often that it seems almost to be a rule of thumb....I fear what is being offered is provided not because it is genuinely believed to be appropriate but because that is the most that a hard-pressed and under-resourced local authority can cope with. That is unacceptable.”

b) Disclosure and transparency of local authority decision-making processes

- i) *Re L (Care Assessment Fair Trial) (2002) 2 FLR 730 per Munby J*
- ii) Need for a ‘transparent and transparently fair’ procedure at all stages of the process

Para 151: ‘The state, in the form of the local authority, assumes a heavy burden when it seeks to take a child into care. Part of that burden is the need, in the interests not merely of the parent but also of the child, for a transparent and transparently fair procedure at all stages of the process – by which I mean the process both in and out of court. If the watchword of the Family Division is indeed openness – and it is and must be – then documents must be made openly available and crucial meetings at which a family’s future is being decided must be conducted openly and with the parents, if they wish, with present or represented. Otherwise there is unacceptable scope for unfairness and injustice, not just to the parents but also to the children.’

3. **Appeals**

a) Appeal from Family Proceedings Court to High Court

- Who may appeal? Any party to the hearing against an order or refusal to make an order: Children Act 1989 s 94

- Rule 4.22 (2) (a) to (d) of the Family Proceedings Rules have to be complied with.
- you require: a notice of appeal setting out grounds
- order of the FPC & reasons
- time limit? 14 days
- issue out of district registry which is in same place or is nearest to the care centre for the FPC
- fee payable £90 – FPR r 4.22 (2a)
- provide court with time estimate of the hearing

Any Human Rights’ argument should be identified and brought to the attention of the Court at *earliest* possible opportunity: Re L (Care Proceedings: Human Rights’ Claims) 2003 2 FLR 160

Generous arrangements for contact should be made, especially if the child is being removed from parents immediately after birth:

See case of Re M (Care Proceedings: Judicial Review) 2003 1 FLR 171 per Munby J:

‘It is a dreadful thing to take a baby away from his mother: dreadful for the mother, dreadful for the father and dreadful for the baby’

b) Appeal from a Judge of the County Court or the High Court to the Court of Appeal

Procedure for all appeals to the Court of Appeal is prescribed by CPR 1998, pt 52 as supplemented by Practice Direction – Appeals (PD 52)

- i) County Courts Act 1984 S 77 (1) Appeals from the decision of the County Court Judge lie to the Court of Appeal in accordance with CPR 1998 Pt 52
- ii) Permission to appeal to the Court of Appeal is required in all cases save for few limited exceptions as prescribed by CPR 1998 r 52.3
- iii) Appeal from Family Proceedings Court – see Family Proceedings Rules 1991 r4.22. Appeal from FPC to the High Court under section 94 of the Children Act 1989.
- iv) On an appeal under s94 CA 89, the High Court may make such orders as may be necessary to give effect to its determination of the appeal

- v) Appeal from a Judge of the County Court or the High Court to the Court of Appeal – see PD 52, para 5.6. See CPR 1998, Pt 52 as supplemented by Practice Direction – Appeals (PD 52)
- vi) For the documents see PD52 at 5.6 at page 2781 of the Family Court Practice 2004
- vii) Skeleton arguments
- viii) Note of judgement/transcript if the judgment to be appealed has been officially recorded by the court

Who may appeal? With permission, any party aggrieved by the decision: SCA 1981, s 16; CCA 1984, s 77

Time limit – 14 days

Respondents – all parties to the proceedings who are affected by the appeal and anyone allowed to become a party.

An appellant's notice known as the 'N 161' must be filed and served in all cases.

Also the appellant must file all necessary documents with his appellant's notice:

PD 52 Para 5.6 eg

- 1 copy of A's notice for the appeal court,
- 1 copy of A's notice for each of the respondents,
- 1 copy of any skeleton argument,
- sealed copy of the order being appealed,
- any order giving or refusing permission to appeal, together with a copy of the reasons for that decision,
- any witness statements or affidavits in support of any application
- included in the A's notice,
- a bundle of documents in support of the appeal where it is not possible to file all the above documents the appellant must indicate which documents have not yet been filed and the reasons why they are not currently available

4) **Finding of fact hearings**

- Burden of proof? – On the local authority
- Standard of proof? Balance of probabilities – Re H (confirmed eg by Re U 2004 2 FLR 263)
- Means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not
- Re U; Re B (Serious Injury: Standard of Proof) 2004 2 FLR CA 263 Para 13 per Butler-Sloss P ‘The standard of proof to be applied in Children Act cases is the balance of probabilities and the approach to these difficult cases was laid down by Lord Nicholls of Birkenhead in his speech in Re H.’
- **Re H (Minors) (Sexual Abuse: Standard of Proof) (1996)AC 563, Lord Nicholls of Birkenhead at 586 : ‘ The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability’**
- Re U at p 270: ‘The principles set out by Lord Nicholls of Birkenhead should continue to be followed by the judiciary trying family cases and by magistrates sitting in the family proceedings courts’.
- Re B (Threshold Criteria: Fabricated Illness) 2004 2 FLR 200 The test to be applied with respect to the standard of proof was that in Re H (Minors) (Sexual Abuse: Standard of Proof). That test was the balance of probabilities commensurate with the extremely serious allegations. Although medical evidence was of very great importance, explanations given by carers and the credibility of those involved with the child were also of great significance. The cogency of circumstantial evidence depended on its quality.

Burden of Proof

Bracewell J Re B at p204 ‘The burden of proof in respect of disputed issues is upon the local authority, and the standard of proof is the civil burden on the balance of probabilities...The more serious the allegation, the more convincing evidence is needed to tip the balance in respect of it. If the evidence at the end of the day is equivocal then the court cannot make a finding because the local authority would not have discharged either the burden or the standard of proof. The test, therefore, is the balance of

probabilities, but commensurate with the extremely serious allegations in this case. The court has to consider evidence and avoid conjecture and speculation.’

5) **Costs**

a) Risk of a wasted costs’ order?

- i) When acting for the parent, try and ensure that deadlines on court orders e.g. for the filing of the parties’ statements are complied with.
- ii) If there is a problem in keeping to the timetable, please inform the court and the other parties as soon as possible to avoid adverse comment or criticism or a wasted costs order.
- iii) The guardian’s report is usually the last to be filed. The Guardian needs the statements of the parties before he/she can make the final recommendation. If there are real problems in taking instructions or in being able to prepare the statement, these should be addressed as soon as possible.

b) Re G, S and M (Wasted Costs) Family Division (2000) 1 FLR 52

Held: Wall J (as he then was) made a wasted costs order against counsel for the local authority in the amount incurred by the local authority in securing the paediatrician’s attendance on the second occasion –

- i) In failing to keep expert witnesses up to date and to ensure that they had seen all relevant material before giving oral evidence, counsel had committed two elementary breaches of established good practice in the Family Division
- ii) In a further breach of good practice, all the lawyers involved had failed to raise the question of the additional material at the pre-hearing review, a burden which fell on all because the material was relevant to the case preparation of all. The purpose of pre-hearing reviews was to enable the advocates to ensure that everything had been done which needed to be done to ensure that the case was ready for hearing and that had not happened in this case. Counsel and solicitors should go to such reviews with a complete mental or documentary checklist, and the witness template referred to in Re EC (Disclosure of Material) should be standard practice for a case of any complexity.
- iii) In care proceedings the court had to be the watchdog over the proper expenditure of public funds in a way which it did not in adversarial proceedings. If practitioners failed to conduct cases economically, whether in adversarial or in non-adversarial proceedings, the court had jurisdiction to initiate a wasted costs inquiry, provided the procedure adopted was fair. In non-adversarial litigation all the legal teams had to take responsibility for the failure to prepare the case properly.

c) Need for full preparation for the pre-hearing review esp identifying which witnesses are necessary, when they are to be called, which witnesses can be dispensed with or put on 'stand by' rather than waiting in the court. witness templates

6) Post-adoption contact – can birth parents enforce agreements made for letter box contact years after the adoption has taken place?

- The birth mother can make a free-standing application for a contact order under section 8 of the Children Act 1989.
- She is technically a 'former parent'.
- She requires the leave of the court under section 10 of the Children Act 1989.
- 'In leave applications, the adoptive parent/s will not be joined or even informed in the first instance, and this will occur only if the court considers there is a strong enough case to justify giving notice of the application to the adoptive parent/s.' ('Adoption Now', 2003 BAAF Smith Stewart and Cullen).
- 'Adoption Now' BAAF: "Contact agreements Agreements concerning contact arrangements after adoption are encouraged by the Department of Health as good practice. Such agreements should be negotiated with the assistance of the agency between adopters and birth family and formalised in writing. Such agreements are not legally binding but if they are taken into account by the court making the adoption order they may have legal consequences. If adopters subsequently renege on the agreement without good reason, the birth family may succeed in an application for leave (as above) to apply for a contact order."
- It will be necessary to clarify what exact agreement what negotiated between the adopters and the birth family and whether this was a) formalised in writing and b) taken into account by the court who made the adoption order.
- If any information is suitably anonymised, there appears to be no good reason why the promised information is not forthcoming.
- For a party to obtain leave under section 10 there must be an arguable case and the court must have regard to the merits of the proposed application: see Re A (a Minor)(Residence Order: Leave to Apply) 1993 1 FLR 425 referred to at page 514 of Family Court Practice 2004.

- ‘The fact that leave has been granted does not create a presumption in favour of a substantive order (Re A (section 8 order: Grandparent Application) (1995) 2 FLR 153, CA; FCP, p515.
- There appears to be an arguable case for the resumption of the contact that was agreed in the beginning. It is relevant to ascertain the reasons for the failure by the adopters ‘to supply the promised report’. See Re T (Adopted Children: Contact) 1995 2 FLR 792.
- If the adopters have reneged on the initial agreement without good reason then the birth mother (and/or half siblings) may succeed in an application for leave of the court to apply for a contact order (s 10, CA)

Procedure

The birth mother could make a free-standing application for a contact order under section 8 of the Children Act 1989. She is technically a ‘former parent’. She requires the leave of the court under section 10 of the Children Act 1989.

Section 10 (2) (b) provides that the court may make a section 8 order with respect to any child on the application of a person who... (b) has obtained the leave of the court to make the application.

Section 10 (9) provides; Where the person applying for leave to make an application for a section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to –

- (a) The nature of the proposed application for the section 8 order
- (b) The A’s connection with the child
- (c) Any risk there might be of that proposed application disrupting the child’s life to such an extent that he would be harmed by it.

‘A child’s natural parents are not parents within the meaning of s 10 once an adoption order has been made in respect of the child: **Re C (A Minor) (Adopted Child: Contact) (1993) 2 FLR 431** or he has been freed for adoption: **M v C and Calderdale MBC (1993) 1 FLR 505**: Family Court Practice 2004 at page 512. (As A is not one of those specifically listed in s 10 she will require leave of the court before she can apply for a section 8 order.)

The court should have regard to the likelihood of success of the proposed application. **Re M (Care: Contact: Grandmother’s application for leave) (1995) 2 FLR 86** CA ‘has been taken to provide the most authoritative guidance as to the appropriate test with regard to the prospects of success’ (Family Court Practice 2004 page 514)

‘Accordingly the court must have regard to all the circumstances of the case, for each case is different, but should always have particular regard at least to the following factors: (Page 561,Family Court Practice)

- (a) The nature of the contact sought
- (b) The A's connection to the child
- (c) The risk of the child's life being disrupted
- (d) The wishes of the parents and local authority.

In weighing up these factors, the following approach should be adopted:

- (a) If the application is *frivolous, vexatious or an abuse of process*, it will fail;
- (b) If the leave application *fails to disclose* any real prospect of eventual success (or the prospect is remote so that the application is obviously *unsustainable*) it must also be dismissed;
- (c) *The application must satisfy the court that there is a serious issue to try and must present a good arguable case* – is there a real issue which the A may reasonably ask the court to try, and has he a case which is better than merely arguable yet not necessarily one which is shown to have a better – than – even chance, a fair chance, of success? Over-analysis of these “tests” should be avoided and the matter approached “in the loosest way possible, looking at the matter in the round” because it is important that the exercise of discretion by the court is unfettered.’