

**Emergency Social Services Association**

**Child Protection Emergencies**

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**George Eddon**  
Principal Lawyer (Children)  
North Yorkshire County Council

## The legal framework<sup>1</sup>

There are two primary legal options available to safeguard children in an emergency:

1. an Emergency Protection Order (EPO) under [section 44](#) Children Act 1989 (CA 1989);
2. Police Protection under [section 46](#) CA 1989.

Other procedures that may sometimes be relevant, but are not normally encountered out-of-hours, include:

1. Child Assessment Order under [section 43](#) CA 1989;
2. Wardship / Inherent Jurisdiction of the High Court.

The limitation of a Child Assessment Order is that the parents must normally be given seven days' notice, although this can be shortened in some circumstances.

Orders under wardship/inherent jurisdiction can be obtained very quickly, including out-of-hours, but are reserved for those rare situations where none of the other legal remedies is suitable. One example would be disputes about emergency medical treatment. The procedure for this is outside the scope of this paper - legal advice would always be needed.

### EPO or Police Protection?

Factors to consider include:

- Police protection can be obtained more quickly than an EPO, especially if the police are already involved in the case;
- An EPO lasts for up to eight days, whereas police protection lasts only 72 hours and cannot be extended;
- Human Rights considerations (Articles 6 and 8) suggest that an EPO should be applied for where possible;
- An EPO gives parental responsibility to the applicant and can include directions about contact, assessment etc.

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<sup>1</sup> The law is summarised as it was at 1<sup>st</sup> October 2009.

## Emergency Protection Order

The power to make EPOs is contained in [Section 44](#) CA 1989:

(1) Where any person (“the applicant”) applies to the court for an order to be made under this section with respect to a child, the court may make the order if, but only if, it is satisfied that –

- (a) there is reasonable cause to believe that the child is likely to suffer significant harm if –
  - (i) he is not removed to accommodation provided by or on behalf of the applicant; or
  - (ii) he does not remain in the place in which he is then being accommodated;
- (b) in the case of an application made by the local authority –
  - (i) enquiries are being made with respect to the child under section 47(1)(b); and
  - (ii) those enquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access and that the applicant has reasonable cause to believe that access to the child is required as a matter of urgency; or

There is a third ground, but that is currently only available to the NSPCC and has not been used by them for many years, so it is not reproduced here.

In practice, most applications are made under ground (a).

Any person can apply under ground (a), but applications by individuals are extremely rare. An individual who obtains an EPO can, with the consent of the local authority, transfer responsibility for it to the local authority under the [Emergency Protection Orders \(Transfer of Responsibilities\) Regulations 1991](#).

The test is a simple one. Is there reasonable cause to believe that the child is likely to suffer significant harm if he is not (as applicable) removed from the carer or left where he is (eg in hospital or in foster care)?

The effect of an EPO is that:

1. Any person who is in a position to do so must comply with any request to produce the child to the applicant;
2. The applicant may remove the child at any time to accommodation provided by or on behalf of the applicant and keep them there, if it is necessary to do so to safeguard his welfare (s44(4)(b)(i) and (5)(a)<sup>2</sup>;
3. The applicant may prevent the child’s removal from any hospital, or other place, in which he was being accommodated, if it is necessary to do so to safeguard his welfare (s44(4)(b)(ii) and 5(a);
4. The applicant has parental responsibility for the child while the order remains in force, but can only take such action in discharging that parental responsibility “as is reasonably required to safeguard or promote the welfare of the child (having regard in particular to the duration of the order)” (section 44(5)). In other words, a

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<sup>2</sup> It is an offence to obstruct such removal (s44(15)).

short-term order should not generally be used as a basis for long-term decision-making.

5. The applicant must, unless the court directs otherwise, allow reasonable contact with:
    - (a) his parents;
    - (b) any person who is not a parent of his but who has parental responsibility for him;
    - (c) any person with whom he was living immediately before the making of the order;
    - (d) any person in whose favour a contact order is in force with respect to him;
    - (e) any person who is allowed to have contact with the child by virtue of an order under section 34; and
    - (f) any person acting on behalf of any of those persons.
- (s44 (13))<sup>3</sup>

### Exercise of Powers under an EPO

An EPO confers wide powers, but it is important to remember that they must only be exercised if it is necessary to do so in order to safeguard the child. In particular, if the child has been removed from home, or kept in foster care, but the situation has changed so that it is now safe, the local authority must return the child without delay, even if the order is still in force. Case law suggests that the need for continued separation must be reviewed every day while the order remains in force. This obligation applies out-of-hours (ie “every day” does not mean “every working day”, although in practice the scope of the review will be limited by the amount of information available.

Situations that may trigger the duty to return the child include:

- The abuser has now left the family home;
- The mother has left her abusive partner and moved into safe accommodation;
- Members of the extended family have come forward as carers (but note that the court’s permission is required to place the child with anyone who is not a parent and does not have parental responsibility)(s44(11)(iii));
- The EPO was made to enable a medical examination to take place and the examination is inconclusive (this would depend on what other evidence was available).

### Additional Orders

The court has the power to make a number of additional orders and directions, which may assist the applicant in implementing the EPO. The relevant ones are:

- Contact between the child and others, including the family (s44(6));
- Medical or psychiatric examination of the child. The court should be asked to authorise:
  - examination for the purpose of evidence-gathering;
  - examination or treatment that is opposed by the family.

Otherwise, if the child is ill or injured and requires *urgent* treatment, then the local authority can authorise this using its parental responsibility under the EPO.

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<sup>3</sup> The provisions of s34, which allow for a seven-day refusal of contact without a court order, do not apply to EPOs.

Decisions about non-urgent treatment should not be made under an EPO. Note that a child of sufficient understanding can refuse an examination, even if the court has authorised it.

- A requirement under [section 44A](#) requiring an abuser to leave, or stay away from, the family home. This can include a power of arrest;
- An order requiring anyone who knows where the child is to disclose that information to the local authority ([s48\(1\)](#));
- Authorisation to enter premises specified in the order ([s48\(3\)](#)). It is an offence to obstruct entry that has been authorised by the court. Note that the premises to be entered must be specified in the order. There is no reason why two or more premises could not be specified;
- A warrant authorising the police to enter premises, using force if necessary, to remove the child.

## Guidance and Case Law

### Recommendation 36

*No emergency action on a case concerning an allegation of deliberate harm to a child should be taken without first obtaining legal advice. Local authorities must ensure that such legal advice is available 24 hours a day.*

Lord Laming, [Climbié Report](#) 2003

There have been several reported court cases relating to EPOs. In at least two of those cases, the local authority has been severely criticised by the court for its conduct in relation to without-notice applications. In one case, the local authority was ordered to pay £200,000 in legal costs. Not all of the legal and practical points identified in those cases are relevant to out-of-hours work, and some may be impossible to deliver, but it is important to keep them in mind and follow them as far as:

- (i) An EPO, summarily removing a child from his parents, is a 'draconian' and 'extremely harsh' measure, requiring 'exceptional justification' and 'extraordinarily compelling reasons'. Such an order should not be made unless the court is satisfied that it is both necessary and proportionate and that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the child's safety: 'imminent danger' must be 'actually established'.
- (ii) There must be scrupulous regard for the European Convention rights of both the child and the parents.
- (iii) Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.
- (iv) If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to an application for a Child Assessment Order.
- (v) No EPO should be made for any longer than is absolutely necessary to protect the child, especially where it is made without notice.
- (vi) The evidence in support of the application must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified.

- Expressions of opinion must be supported by detailed evidence and properly articulated reasoning.
- (vii) Where the application for an EPO is made without notice the local authority must make out a compelling case for applying without first giving the parents notice. This will normally be appropriate only if the case is genuinely one of emergency or other great urgency or if there are compelling reasons to believe that the child's welfare will be compromised if the parents are alerted in advance to what is going on.
  - (viii) The evidential burden on the local authority is even heavier if the application is made without notice. It is under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them.
  - (ix) The court must 'keep a note of the substance of the oral evidence' and must also record in writing not merely its reasons for its decision but also any findings of fact.
  - (x) The local authority must immediately following the hearing, inform the parents of exactly what has gone on in their absence. Parents against whom an EPO is made without notice are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told:
    - i. exactly what documents, bundles or other evidential materials were lodged with the court either before or during the course of the hearing; and
    - ii. what legal authorities were cited to the court.
 The local authority should respond forthwith to any reasonable request from the parents or their legal representatives either for copies of the materials read by the court or for information about what took place at the hearing.
  - (xi) Even if an EPO is granted, the local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough. The FPC decides whether to make an EPO. But the local authority decides whether to remove and must still consider less drastic alternatives to emergency removal. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision-making actually takes place and that it is appropriately documented.
  - (xii) The local authority is under a continuing duty to keep the case under review day by day so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety. In this, as in other respects, the local authority is under a duty to exercise exceptional diligence.
  - (xiii) The local authority, subject only to any direction given by the FPC under s. 44(6), must allow a child who is subject to an EPO 'reasonable contact' with his parents. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources.<sup>4</sup>

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<sup>4</sup> Points (i) to (xii) are taken from the judgment of Munby J in [X Council v B \(Emergency Protection Orders\)](#) [2004] EWHC 2015 (Fam). The other points are taken from the judgment of McFarlane J in

- (xiv) It is the duty of the applicant for an EPO to ensure that the above guidance is brought to the court's attention;
- (xv) Mere lack of information or a need for assessment can never *of themselves* establish the existence of a genuine emergency sufficient to justify an EPO.
- (xvi) Evidence given to the court should come from the best available source. In most cases this will be from the social worker with direct knowledge of the case;
- (xvii) Where there has been a case conference with respect to the child, the most recent case conference minutes should be produced to the court;
- (xviii) Where the application is made without notice, if possible the applicant should be represented by a lawyer, whose duties will include ensuring that the court understands the legal criteria required both for an EPO and for an application without notice;
- (xix) The applicant must ensure that as full a note as possible of the hearing is prepared and given to the child's parents at the earliest possible opportunity;
- (xx) Cases of emotional abuse will rarely, if ever, warrant an EPO, let alone an application without notice;
- (xxi) Cases of sexual abuse where the allegations are inchoate and non-specific, and where there is no evidence of immediate risk of harm to the child, will rarely warrant an EPO;
- (xxii) Cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO.

## Police Protection

### [Section 46, CA 1989](#)

(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may –

- (a) remove the child to suitable accommodation and keep him there; or
- (b) take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented.

(2) For the purposes of this Act, a child with respect to whom a constable has exercised his powers under this section is referred to as having been taken into police protection.

Any police officer can take a child into police protection in the first instance – there is no need to obtain prior approval from a senior officer. There is however a requirement (s46(3)(e)) for the case to be reviewed afterwards by a designated senior officer, usually an inspector, who must discharge the child from police protection unless this is likely to result in significant harm (s46(5)).

The power may be exercised either on the officer's own initiative or at the request of Social Care. However, the decision to exercise the power is made by the officer, not the social worker and it is the officer who is accountable for the action taken.

Police Protection does not give parental responsibility to either the police officer or the local authority.

The police officer has a number of legal duties once the child has been taken into police protection. Note that these matters are the responsibility of the police, although in some cases certain of them (eg wishes and feelings) may be better done by a social worker on their behalf:

1. Notify the local authority where the child is found and the local authority where the child normally lives;
2. Tell the child what is happening and try to ascertain their wishes and feelings;
3. Inform the parents, others with parental responsibility and the child's carers;
4. Arrange for the child to be placed in local authority accommodation or (rarely applicable) in a refuge;
5. Do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare (having regard in particular to the length of the period during which the child will be so protected).

The police also have a duty to allow such contact as is "both reasonable and in the child's best interests". If the child is placed by the police in local authority accommodation, then the local authority is under the same duty. Contact must be considered in relation to:

- (a) the child's parents;
- (b) any person who is not a parent of the child but who has parental responsibility for him;
- (c) any person with whom the child was living immediately before he was taken into police protection;
- (d) any person in whose favour a contact order is in force with respect to the child;

- (e) any person who is allowed to have contact with the child by virtue of an order under section 34; and
- (f) any person acting on behalf of any of those persons,

The local authority has the following duties in relation to a child who is in police protection:

1. to initiate section 47 enquiries in relation to the child (s47(1)(a)(ii));
2. to allow contact in accordance with the above table;
3. if requested by the police, to receive the child and provide/arrange accommodation (s21(2)). Once so received, the child becomes a looked after child.

### **Duration of Police Protection**

The maximum duration is 72 hours, but the child must be discharged before then if it is safe to do so.

If the child is placed with the local authority (see above), it is important to be clear with the police as to whether the police protection is to remain in force. Sometimes, the police will assume that the child is now the responsibility of Social Care and the police protective power is no longer required. In fact, if the police protection is discharged, the child will revert to section 20 status and can be removed by the parents on demand. Therefore, unless the parents have now agreed to accommodation, the police should be asked to continue the police protection until other arrangements are in place, subject to the 72 hour maximum.

The police officer can apply for an EPO and, if one is granted, it will be made in favour of the local authority, whether they know about it or not! (s46(7)) In practice, the application is invariably made by the local authority and the procedures set out above will apply.

## EPO Checklist

1. If possible, seek legal advice
2. Consider, if either alone or in conjunction with the legal adviser:
  - what evidence is available?
  - Are the threshold criteria (set out below) met? If so, on which ground?
  - Have alternatives been considered (eg police protection, voluntary accommodation)?
  - whether the application should be on notice (normally one day but can be reduced by the court) or without notice. If without notice, why? (eg urgency; risk to the child if notice is given to parents)<sup>5</sup>
  - whether additional directions are needed eg
    - contact (supervised, permission to refuse)
    - medical examination of the child
    - power to enter premises
    - disclosure of child's whereabouts
    - exclusion requirement
    - a warrant authorising the police to gain access by force if necessary (this is applied for separately)
3. Obtain approval from the relevant manager under local authority procedures.

Name/ contact details of manager:

4. Contact the magistrates' clerk to arrange a hearing. If you do not have a telephone number for them, the local police should be able to help.
5. When you speak to the clerk they should consider whether to grant you leave to apply without notice., although some clerks effectively skip this stage. If leave is granted, the clerk will contact one or more magistrates and call you with a time and venue for a hearing.

Insert local contact details:

6. Complete forms [C1](#) and [C11](#). The clerk may ask you to email or fax these to them, or they may ask you to bring them to court with you. If you are applying for a warrant to enter premises, you will also need to complete form [C12](#).
7. Depending on local arrangements, you may need to attend court without a lawyer. Take the current file and any supporting evidence such as medical reports. The case will normally be heard by a single magistrate. See overleaf for tips on presenting the case.

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<sup>5</sup> The remainder of this checklist assumes that the application is made without notice, as this is the more likely scenario out-of-hours.

8. There is a fee of £150 payable by the local authority for an application for an EPO. The court should accept an application without a fee, but may require you to sign a written undertaking on behalf of the local authority to pay the fee afterwards.
9. The clerk will draw up the order and give you a copy. You must supply a copy of the order and of the application to the parents within 24 hours.
10. Keep a copy of any documents that were shown to the magistrates and provide copies to the parents.
11. Tell Legal Services, as well as the relevant day team, that the order has been made and when it expires. Tell Legal Services if you have undertaken to pay a fee, so that they can arrange payment.

#### **Effect of an EPO**

- Gives parental responsibility to the applicant.
- Allows the applicant to remove the child (or prevent removal if the child is already in a place of safety).
- Allows the applicant to consent to medical treatment that is clinically necessary, but not to assessment for evidence-gathering purposes.
- Lasts as long as the court directs, up to a maximum of eight days.
- If the need to keep the child away from home ceases before the EPO expires, then the child must be returned immediately.

#### **Threshold Criteria for an EPO**

##### **Children Act s44(1):-**

(a) there is reasonable cause to believe that the child is likely to suffer significant harm if-

- (i) he is not removed to accommodation provided by or on behalf of the applicant; or
- (ii) he does not remain in the place in which he is then being accommodated.

(b) in the case of an application made by a local authority -

- (i) enquiries are being made with respect to the child under section 47(1)(b); and
- (ii) those enquiries are being frustrated by access to the child being unreasonably refused to a person authorised to seek access and that the applicant has reasonable cause to believe that access to the child is required as a matter of urgency.

## Hints on Presenting EPO applications

- Take your current file with you, together with any available medical reports.
- Try to arrive in good time, to allow time to compose yourself.
- You will not have had time to change clothes. If you are not dressed appropriately for court, briefly explain why not - this will always be accepted in an emergency.
- You will probably be given a New Testament to take the oath. If you want to affirm, or swear by a different holy book<sup>6</sup>, tell the clerk.
- Address the magistrate as Sir/Ma'am, but do not worry too much about this if it is putting you off!
- Remember this is a short-term order. Concentrate your evidence on recent events and the immediate future.
- Points to cover in evidence:-
  - family composition
  - brief summary of previous/ongoing concerns
  - current concerns/precipitating incident
  - nature/extent of risk to the child
  - why the situation cannot be managed without an order
  - arrangements for the child if the order is made
  - arrangements to be made for contact
  - whether directions are needed
- If the child is not already looked after, explain how they will be removed.
- Be clear about which evidence is fact and which is opinion. Explain the factual basis for your opinion. Also be clear about which evidence is first-hand and which is hearsay.
- If the parents are not present, remember that you are under a duty to be open and fair in your evidence. This means drawing the court's attention to any positive or protective factors.

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<sup>6</sup> If the relevant holy book is not available, you will be asked to affirm instead.