

Executive Summary

Emergency Protection Orders

Court orders for child protection crises

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Emergency protection orders

Emergency protection orders were introduced in the Children Act 1989, ss. 44-45 to replace Place of Safety Orders following concerns expressed amongst others in the Review of Child Care Law and the Cleveland Inquiry. The Place of Safety Order could be granted by a single magistrate and last up to 28 days; it had become a common way of starting care proceedings – obtaining an order to remove the child without informing the parents. Emergency protection orders (EPOs) are intended to provide for ‘the immediate protection of children in a genuine emergency’.²

Any person³ can apply to the Family Proceedings Court for an Emergency Protection Order, which allows a child to be removed or detained for their protection. The usual period of notice for an application is 1 day but the order can be granted *without notice* to the parents (the old term for this is *ex parte*) or after short (*abridged*) notice. The court must be satisfied that ‘there is reasonable cause to believe’ that a child is ‘likely to suffer significant harm’ unless removed or detained. There is provision for the court to make an exclusion order alongside the EPO so that the child can remain at home and the abuser be excluded. The order lasts for up to 8 days and can be renewed for a further 7 days. There is no appeal, but a parent who was not notified of the proceedings can apply to have the order discharged after 72 hours. EPO proceedings are ‘specified proceedings’ – the court should appoint a children’s guardian to represent the child unless it is satisfied that this is unnecessary for the child’s welfare.

The European Court of Human Rights has examined the use of emergency protection powers in 5 recent cases, including one involving the Children Act 1989.⁴ Emergency intervention, like other child protection intervention, may breach article 8; the *draconian step* of removing a baby from the mother soon after birth must be supported by relevant and sufficient reasons.⁵ However, the Court has accepted that there are cases where emergency intervention is required, even without prior notification to the parents, but has held that it was not appropriate to use such powers where concerns about the family’s care were longstanding and not in crisis.⁶ It has also emphasised the need to consider alternatives, and to involve the parents before removal powers are exercised.

There are two alternative courses of action for a local authority faced with a child protection crisis where a child needs to be removed from home, or the parents have to be stopped from removing the child from hospital, foster care etc. The police have a power under Children Act 1989, s.46 to take the child into police protection for up to 72 hours where a police officer has ‘reasonable cause to believe’ that the child would

¹ The full report of this research is available at:
<http://www2.warwick.ac.uk/fac/soc/law/about/staff/masson/>

² Review of Child Care Law (1985) para 13.1

³ It was clear from the National Survey of Magistrates Courts that applications other than by local authorities are almost unknown.

⁴ *P., C. and S. v. U.K.* [2002] 2 FLR 631.

⁵ at paras 132-3.

⁶ *Haase v. Germany* [2004] 2 FLR 39 a case concerning emotional abuse and neglect.

otherwise suffer significant harm. This power is widely used both at the request of social services and where the police come across a child at risk independently. The use of police protection was the subject of an earlier study by Masson, Winn-Oakley and McGovern, *Working in the Dark* (2001).⁷ Alternatively, the social worker may seek to persuade the parents to agree to their child being cared for away from home for a temporary period. A study for the Department of Health of the use of local authority accommodation estimated that in half the cases this was in response to a crisis rather than planned.⁸

Research methods

The research involved 3 main elements:

- 1) A national survey of magistrates' courts conducted by telephone interview to a magistrates' legal advisor with special responsibility for public law family work.
- 2) A study of all applications for EPOs in 3 Magistrates' Courts Committee Areas over a 12 month period.⁹ The 3 Areas covered 6 local authorities, 3 shire counties and 3 unitary authorities. Overall there were 86 applications in relation to 127 children. EPO applications were followed to the final hearing of subsequent care proceedings in respect of the same child.
- 3) A study of local authority decision-making through interviews with social workers (27) and local authority legal department staff (14) and file reading (56) in the 6 local authorities.

In addition, in the 3 Areas interviews were conducted with solicitors in private practice who represented parents or children in EPO or care cases (24); with magistrates' legal advisors (6) and magistrates (7) who handled these cases in the courts; and there were group discussions with children's guardians on the 3 panels which served the Areas.

In order to find out more about practices in local authorities where there was little use of EPOs the researchers carried out further interviews with social work managers in 3 other local authorities. In order to explore the proportion of care proceedings preceded by EPOs they examined CAFCASS data for 3 further local authorities for the period 2000-2002.

Policy and practice implications of the research were discussed at two focus groups held in January 2004. One focus group was held for social workers, social work managers and child protection policy makers and one for lawyers and magistrates' legal advisors.

⁷ The executive summary of *Working in the Dark* is available at: <http://www2.warwick.ac.uk/fac/soc/law/about/staff/masson/>

⁸ J. Packman and C. Hall, *From care to accommodation* (1998). These cases were not necessarily ones where the local authority would have sought an EPO, the pressure to accommodate the child frequently came from the parent, not from the social worker.

⁹ Between September 2000 and April 2002. The same period was not used in each Area so that interviews could be conducted within a reasonable time of the application.

National picture

The statistics published on EPOs in the *Judicial Statistics* and the *Children Act Reports* provide a misleading picture of the use of EPOs. The *Judicial Statistics* substantially under-record the use of EPOs; there were 3333 applications in 2002, not 1960 as shown in the *Judicial Statistics*. They also suggest a decline in the use of EPOs when (unpublished) Court Service data (collected from all magistrates' courts committee areas) do not (see table 1.2 and figure 1).

CAFCASS data for 3 local authorities indicated considerable variation in the proportion of care proceedings preceded by EPO, between the authorities and during the years 2000-2002, from over 40% to 5% with an average of just under 20%. This compares with 40% of care proceedings started by EPO in Hunt and Macleod's study¹⁰ of care proceedings shortly after the implementation of the Children Act, 35% in Julia Brophy and colleagues' study¹¹ of care proceedings involving families from minority ethnic communities, and 12% in one court sample in Booth and Booth's recent study.¹²

The survey of magistrates' courts committee areas indicated considerable variation in practice in dealing with EPOs. Over a third of the magistrates' legal advisors interviewed indicated that they rarely allowed EPOs to be heard without notice to the parents. Another 20% responded that they preferred to deal with such applications by abridging notice – in such cases parents would be informed but the hearing would go ahead on the same day. The remaining 44% indicated that they did hear cases without notice to parents, of these 5 (12%) said they never heard EPO application on notice. There were also variations in practice in terms of the duration of EPOs. Although many clerks mentioned making orders for the '*shortest possible time*', it was also common to fix the duration so that the following care proceedings would come to court on a day set aside for such proceedings. More than a quarter of clerks indicated that EPOs always lasted 7 or 8 days.

Although all but 3 magistrates courts committee areas had some form of arrangements for hearing EPOs out of normal court hours it appeared that these were rarely used. Police protection provided a solution both to restrictive court approaches to *without notice* applications and limited provision for obtaining orders out of hours. In some areas it was noted that '*the culture is that police protection is the best way*'.

Although practices in the courts, in local authorities and in the police impacted on the other agencies, in most areas there appeared to have been little discussion between these 3 agencies as to how child protection emergencies should be dealt with.

Children and their families

EPO applications generally related to young children – over 40% were under the age of 2 years, 22% were between the ages of 2 and 5 years, 29% between 5 and 10 years

¹⁰ J. Hunt and A. Macleod, *The last resort* TSO (1999)

¹¹ J. Brophy *et al.*, *Significant harm: child protection in a multi-cultural setting* LCD research series 1/03 (2003)

¹² Tim Booth, personal communication see also T. Booth and W. Booth, *Parents with learning difficulties and the courts*. Report to Nuffield Foundation (2004).

and almost 8% over the age of 10 years (see table 4.1). 1 in 8 of children (1 in 5 cases) were new born babies. If these figures were replicated across the country, approximately 400 babies in England would be removed each year under EPOs. (The use of EPOs in relation to new born babies is discussed in Chapter 6 of the Report). Almost three quarters of cases concerned only one child and in a third of families the child made subject of the EPO was an only child. Where children had siblings these children were likely to already be subject to a care order, joined into the care proceedings subsequently or living with their other parent elsewhere (see table 4.3). At the time the emergency intervention was sought only 70% of the families had the child living with them; the extensive use of agreements and police protection meant that this declined to 21% by the time the EPO was sought. Children not living with their parents were in hospital, accommodated by social services, living with relatives or had been left at home (or elsewhere) alone (see table 4.5 and figure 5.1).

Court records provided little information about the children's parents; 23 parents were known to be living together when the EPO was sought (see table 4.4). The applications indicated that many parents were experiencing problems which undermined their capacity to care; drug or alcohol misuse were identified in over 40% of families, domestic violence in a quarter and almost 20% had mental health difficulties (see table 4.6). Unsurprisingly almost all families were known to social services; at least 70% had been known for over a year. Just under half the children subject to EPO were on the child protection register when the EPO was sought and 42% of the families with other children had previously been involved in care proceedings (see tables 4.7 and 4.8).

Local authority decision-making

The decision to apply for an EPO was generally made in response to an incident or an event. However, this event was not necessary more serious than previous incidents concerning the child. There was agreement amongst lawyers that EPO applications were generally made appropriately but local authority lawyers noted greater willingness to seek orders from some area offices. Low use authorities identified the *local culture* as the reason for seeking few EPOs rather than any formal controls on their use. In the 6 authorities in the study, the decision to seek an EPO was made in the context of substantial pressures on individual social workers and managers because of unfilled posts. Three of the authorities had also been involved in recent serious case reviews. Failure to give sufficient attention to a case was identified by social workers in 2 of the 3 Areas as a reason for crises that necessitated the use of EPOs.

In all 6 local authorities the process of deciding to seek an EPO involved consideration by a social services manager (generally at the level above team manager) and by a local authority lawyer. Lawyers and social work managers stressed the need to consider alternatives – police protection or an agreement with the parents. There was general acceptance within the local authorities that agreements were preferable to proceedings, but concerns were expressed by lawyers that parents were pressured to agree when they had no real alternatives, and that the effects of such agreements was not always clear to them. In 29 cases the EPO application was preceded by police protection taken at the request of social services and in 10 cases by police protection taken by the police independently (see figure 5.2)

Neglect was a major feature in nearly half the families and child abuse was the precipitating factor in nearly a third. The 5 cases where EPOs were used for children from unknown families all related to incidents of non accidental injury. Lack of co-operation with social services was also a major feature. EPOs were sought where parents refused to make an agreement, or broke the terms of one they had made (e.g. not to allow a particular adult to be alone with the child), or sought to reclaim their child who had been accommodated by social services following an earlier crisis (see table 5.1). In the words of a local authority lawyer, '[the case] *becomes an emergency because the parents are demanding the child.*'

Where children were removed at birth, this had generally been planned during the pregnancy but plans had often not been shared with parents for fear of their concealing the birth. Of the 16 children subject to EPOs shortly after birth only 3 were the mother's first child. There were 7 families where children had previously been removed through care proceedings and a further 3 with current care proceedings relating to older siblings. One baby had a sibling cared for by a relative under a residence order, another's sibling had died as a result of NAI and in the final case concerns had been expressed about the care of the older sibling but proceedings were only started following the birth of the new baby.

Court process

It was standard practice in all three Areas for a local authority lawyer to contact the court to forewarn of an impending application for an EPO and to discuss whether or not the application could be made without notice. The decision to allow an application to proceed without notice or on short notice is made by the Clerk to the Justices or his/her delegate.

There was considerable variation between the 3 Areas in the use of police protection at the request of social services and in the court's approach to hearing EPOs without notice (see tables 7.3 and 7.7). These are related. Where the courts were reluctant to hear EPOs without notice, the local authority was likely to seek assistance from the police; magistrates' court legal advisors sometimes suggested this. In cases of immediate crises, the demands of the court and the procedure for EPOs meant that orders could not be obtained sufficiently quickly. In such cases police protection was relied on.

Social workers were anxious about leaving children in very difficult conditions once they had decided that they needed to be removed for their protection. Only 15% of applications were heard on full notice without prior use of police protection (see table 7.1). Courts preferred to hold hearings which the parents could attend; clerks were willing to shorten the notice period as a compromise to allow hearings quickly and parental attendance. Shortening the period of notice made it difficult for parents to find and instruct a lawyer for the hearing. Constraints on time for preparation made it almost impossible to contest EPO applications; in only 7 cases out of 60 where the parents were notified did they actively contest.

The crisis in CAFCASS had a substantial impact in two of the study Areas.¹³ There was no system in place for early warning CAFCASS of EPO applications. Children were less likely to be represented by a children's guardian in Area 2 where a higher proportion of EPOs were heard without notice (see table 7.6). They were also less likely to be represented by a children's guardian or a solicitor if the application was heard without notice (12%) or on short notice (42%) (see tables 7.4 and 7.5).

Despite the intentions of the Children Act 1989 to provide a process for court determination of the decision to remove or detain a child for their protection, in over 40% of cases compulsory separation occurred before the hearing, and only in a small minority was this decision made at a hearing where the parents and the child were represented (see table 7.4).

Local authority lawyers generally preferred longer orders so that there was sufficient time to call a meeting to decide whether care proceedings should be started, and to give the required 3 days notice for an interim care hearing. It was the practice of the courts in all 3 Areas to set the length of the order so that the first application for an interim care order could be heard on a court 'family day' before the EPO expired. In over 60% of cases the EPO was granted to last 7 or 8 days. In the sample, a higher proportion of *without notice* EPOs lasted 7 or 8 days (81%). Extensions were rare and occurred either because the local authority wanted more time to decide on future action or because the court was unable to hear the interim care application before the date when the EPO would otherwise expire.

Outcome

Although some social workers were anxious whether the EPO would be granted, it was the common experience of all professionals interviewed that refusals of EPOs were almost unknown. The *Judicial Statistics* indicate that approximately 90% of EPOs is granted (see table 1.1). Where EPOs were not granted, applications were withdrawn following agreements between the parents and the local authority or interim care or supervision orders were made. Out of the 86 families subject to EPO applications orders were made in 75, there were 3 ICOs, 1 ISO and 7 agreements (see figure 8.1).

It was most common for EPO applications to be followed by care proceedings. Out of 86 families, care proceedings were brought in relation to 77. There were only 5 families where EPOs were granted and not followed by care proceedings; 3 of these involved a change of carer from mother to father, there was 1 application for a secure accommodation order in respect of a child who was accommodated by agreement. In the other case no care proceedings were started but later in the year there was a further EPO application followed by care proceedings.

Only 43% of these care proceedings remained in the family proceedings court (see table 8.1). Transfers were most commonly due to complexity but it was also clear that some lawyers, social workers and guardians had limited confidence in the family proceedings court. The high rate of transfer is likely to have been a factor in the length of the cases. Of those with a final hearing just under 40% were completed

¹³ In Area 1 most of the EPO applications occurred before CAFCASS was established.

within the 40 weeks now set by the Public Law Protocol¹⁴ (see table 8.2). Just over 60% were uncontested by the time they reached the final hearing. Disputes generally concerned the care plan; the threshold criteria were disputed in only 9 out of the 72 cases.

Although it has been suggested that the hurried nature of EPO applications and the short time between the EPO and starting care proceedings may lead to cases being pursued inappropriately this did not seem to be the case. Only a small number of care applications were withdrawn and this occurred after a substantial period with substantial improvement in the care provided for the child and co-operation between the family and social services.

The final outcome in the care proceedings for this sample is similar to that found by Hunt and Macleod¹⁵ (see table 8.4). Care orders were granted in 62% of cases, supervision orders in 18% and residence orders in 15%. Out of the 109 children whose case reached a final hearing 20 remained with the carer who had been looking after them when the EPO was sought and 89 had a change of carer (see figures 8.3 and 8.4). Care plans for just over half the children were that they should live with a parent (27.5%) or relative (23.9%); adoption was the plan for more than a third (see tables 8.3 and 8.5). Adoption was planned for 12 of the 16 babies removed at birth, and all but one had already been made the subject of a freeing order.

Overall neither the process nor the outcome indicates that this sample of cases is very different from other cases where care proceedings are brought.

Conclusions and recommendations

Concerns about the use of EPOs

Lack of monitoring within local authorities, and the poor quality of national statistics mean that neither local nor central government knows the rates or trends in use of EPOs.

There are considerable variations in the extent local authorities rely on emergency protection orders and police protection. This raises the question whether too many or too few applications are being made for EPOs. *Too many*: Given that the majority of cases concern families known to social services and that many of the cases involve neglect it might be appropriate for care proceedings to be started on notice, rather than being precipitated by a further crisis and an EPO. *Too few*: The use of police protection and (forced) agreements effectively removes court scrutiny from the decision to remove the child from the family. There may be a considerable time between the removal and the case coming to court, by which time arrangements are entrenched and relationships attenuated. This undermines the role of representation for the child and of the court. Policies designed to restrict access to EPOs may lead to practices that are potentially worse for parents and children.

¹⁴ It should be noted that the protocol was not published when these cases were being considered by the courts. 10 of the 16 cases involving new babies were heard within this length of time.

¹⁵ J. Hunt and A. Macleod, *The best-laid plans* (1999)

There is a difficult balance between swift action and giving sufficient notice to allow proper representation of parent and child in the proceedings. In Areas where the courts took a restrictive approach to applications without notice there was greater reliance on police protection; the ‘compromise’ of abridging notice did not allow parents adequate time to find and instruct a lawyer, nor for effective representation to be secured for the child. Most EPOs were followed by ICOs but these were often made by agreement. The problems at CAFCASS meant that children’s guardians were not always available for this hearing either.

Given the current way EPOs are operating might there not be better ways of securing speedy intervention, protecting the rights of parents and children and ensuring accountability of local authorities?

Proposals 1) – improvements within the existing legal framework

Agreements for children’s accommodation in child protection cases

Local authorities encourage parents to make agreements for their children to be accommodated under Children Act 1989, s.20 in circumstances where they (the local authority) is unwilling for parents to exercise their right to remove the child. In such cases:

The agreement should contain an explicit term requiring the parents to give notice before removing their child.

Parents asked to sign such an agreement should have access to specialist advice or advocacy.

The local authority should be entitled to retain the child under such an agreement pending a hearing of an EPO application on notice.¹⁶

Where agreements do not involve the child being accommodated parents will also benefit from independent advice about the consequences:

Free advocacy and legal advice should be more widely available to parents asked to enter agreements with social services in the context of serious child protection concerns.

Newborn babies

Removal of babies from their mothers shortly after birth is the most extreme use of emergency child protection powers. These are complex cases where professionals from different disciplines need a common understanding of legal medical and social issues. These cases necessitate good communication and planning between social services and health, particularly to identify temporary care arrangements for mother and child so that decisions about separation on social grounds can be determined by the courts at interim care hearings, rather

¹⁶ This would not require an amendment to the Children Act 1989. Anyone including a local authority is empowered to do what is reasonable to safeguard a child in their care, s. 3(5). If a parent has agreed to give notice before removing their child and has had the opportunity of independent advice, it is clearly reasonable for the local authority to retain the child in accordance with the agreement.

than by the police, social workers or medical staff. Arrangements need to include CAFCASS to ensure that these babies are properly represented when the separation decision is made.

There should be a Circular issued as an addendum to Working together on the removal of babies at birth.

This Circular should require the Director of Children's Services to agree arrangements with the relevant health agencies, with CAFCASS and with the courts for these cases.

The Circular should provide the information that all agencies need about law, health and social issues so that they can understand their role and those of other agencies.

Representation for parents and children at EPO hearings

If on notice EPO hearings are to continue, changes need to be made to secure their effectiveness in determining whether orders are required. Processes should recognise that in most cases the EPO is the beginning of care proceedings and secure continuity of representation for parents and children throughout the proceedings.

Notice should not be abridged for EPO hearings.

Local authorities should make arrangements for the early notification of all intended EPO applications to CAFCASS.

CAFCASS service standards should secure appointment of a children's guardian for all EPO hearings.

Wherever possible CAFCASS should seek to appoint as children's guardian a person who has previously been a guardian for children in the family.

Care proceedings generally follow EPO applications, representation should therefore continue until it is clear that there will not be further proceedings.

The Legal Services Commission should ensure that public funding for parents and children is continuous from the EPO through the care proceedings.

Parental involvement after the EPO has been granted

The Children Act 1989, s. 44(5)(a) requires that the powers under EPOs are only exercised where they are necessary. The need to consult the parents after the EPO has been obtained was stressed by the European Court of Human Rights in *P., C. and S. v. U.K.* where it held there had been a breach of art. 8 because the parents had not been consulted at this point.

When granting an EPO the court should specifically draw attention to the requirement that the powers of the EPO should only be used where protective arrangements cannot be agreed.

Proposals 2) - a new system for emergency protection.

Any system of emergency intervention should seek to achieve the best possible decisions on the limited information available and ensure accountability of those making the decisions. It must comply with the Human Rights Act, particularly allowing parents and children proper opportunities to participate and allowing a court hearing before the child is committed to care.

Currently where local authorities decide that it is necessary to protect a child in an emergency they use at least one of the three available methods, an EPO, a request to the police to exercise police protection or make an arrangement with the parents, sometimes by exerting considerable pressure on them. In relation to these first two methods external accountability is quite weak. The magistrates' legal advisor relies on the social worker's account (relayed by a local authority lawyer) to determine whether the case should be heard without notice, or on short notice. The magistrates who consider applications hear such cases rarely and do not develop expertise in them. Even where parents are represented the court remains heavily reliant on the social worker's account; parents are rarely able to bring counter evidence to the court. Similarly, the police are entirely dependent of the information provided by the social worker and lack expertise to form alternative judgments on child protection matters. There are controls within the local authority to prevent inappropriate applications to the court.

Rather than secure accountability through external agencies, local authorities could be given the responsibility for decisions about emergency protection subject to approval by the Director of Children's Services or a (named) nominee.¹⁷ This would facilitate monitoring of the use of emergency powers (within and between authorities), and the identification of training and resources needed to improve practice and prevent crises.

Police interviews for *Working in the Dark* were in favour of social services having their own power to remove or detain children, so as to avoid cases where they effectively acted as agents for social services. When this was discussed at the EPO focus groups, social workers were reluctant to acquire such a power. They preferred to be able to tell parents that they would put the matter to the court for decision. However, social workers interviewed in the study expected the court to grant the EPO, and objected to their views on urgency and the need to act were not always accepted. Also, social workers (sometimes with the encouragement of local authority lawyers) sidestepped the court by first seeking police protection.

¹⁷ Decisions about the placement of children in care with their parents are already subject to such control under the 1991 regulations.

There is a case for granting the Director of Children's Services power to remove or detain children for a limited time for their protection, and at the same time removing the option of the exercise of police protection at the request of social services. Such action would only be for a limited time (for example 72 hours) but would be extended for up to 8 days once an interim care order application had been made. The aim would be to secure a hearing at which both parents and child could be represented so that there could be a thorough examination of the care plan at the beginning of the proceedings.

It should be noted that such a scheme is not dissimilar from that operating in other jurisdictions,¹⁸ and would not breach the ECHR. Rather than having repeated court hearings limited by occurring without notice or with little time for preparation, the proposed system would allow for a thorough early hearing, which would set the direction of care proceedings. The new system would not reduce the resources required in these cases but would focus them on the issues to be considered. Such a change (unlike the others proposed) would require legislation.

¹⁸ See J. Masson, 'Human rights in child protection: emergency action and its impact' in P. Lodrup and E. Modvar, *Family life and human rights* (2004) 457-476