

Re X (Emergency Protection Orders)

[2006] 2 FLR 701

16/03/2006

Barristers

Private: Jonathan Cohen QC

Court

Family Division

Facts

Two child protection case conferences had been held regarding the 9-year-old girl and low-level intervention had been recommended in the form of a referral to the local Child Guidance Unit and further assessment work. The child's name had been entered onto the local child protection register in the category of 'emotional harm'. At a further case conference no reference was made to the social worker's view that the child's various physical symptoms were being fabricated by the mother, although concern was expressed about the child's emotional well-being. The conference notes failed to refer to the evidence of the father's community psychiatric nurse that the father might commit suicide if the child were taken into care, or even to refer to 'confidential information'. The local authority was in the process of considering whether to issue care proceedings and a psychiatric assessment of the mother was to proceed, with a further psychological assessment of the child. There was no suggestion at the meeting that the child should be removed from the care of the parents, either immediately or at all. At the end of the conference the social worker was informed by a local nurse that the mother was at the hospital and requesting that the child be seen by a doctor for stomach pain, although the triage nurse did not consider this necessary. The social worker and her team manager determined that the child should be removed immediately from the parents' care, notwithstanding legal advice that there was insufficient evidence to warrant this. On the same day, the local authority applied for and obtained an emergency protection order (EPO), without any notice to the parents. The justices heard oral evidence from the team leader, who made a number of misleading, incomplete, or wrong statements in the course of her evidence. Social workers attended at the hospital with four uniformed police officers and removed the child from the mother's care, placing her in an emergency foster placement. The authority began care proceedings, on the basis that the child was being emotionally abused, expressing concern about possible sexual abuse, unhealthy beliefs within the family, fabricated or induced illness, the mother's irrational anxiety about the child and the father's history of mental ill-health. No doctor had ever raised the possibility of induced or fabricated illness, and the authority had not sought medical advice at this stage. One year after the child had been taken into care, after receipt of all the expert assessments, the authority abandoned its reliance on any allegation of sexual abuse or induced or fabricated illness, basing the proceedings on emotional abuse. The judge investigated the making of the EPO in such circumstances and, having found significant flaws in the process, considered that there was a public interest in wide publicity being given to the case.

Held

Held – making the child a ward of court, finding that the threshold criteria had not been established and the child should be returned to the care of the parents – (1) In regard to keeping an accurate record of all that was said in a case conference, the following were basic requirements: (a) if parents were absent for any reason a full minute should nevertheless be taken of everything said during the conference; (b) if it was considered necessary to treat part of what was minuted as confidential from the parents, that part of the minutes should be disclosed for approval to the professionals who attended the conference, but maintained separately from the body of the minutes to be sent to the parents; (c) the non-confidential section of the minutes should expressly record at the appropriate stage that confidential information had been disclosed or discussed; (d) the need for continued confidentiality with respect to confidential sections of the minutes should be kept under review by the conference chair, with confidentiality being maintained only if it continued to be necessary (see para [29]). (2) Emergency protection orders should only be made in a genuine emergency, and contain only what was necessary to provide immediate short-term protection. The list of 14 factors relating to the making of EPOs in *X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam) was required reading for every magistrate and justices' clerk involved in any EPO application. The list should be copied and placed before the court during every EPO hearing, so that the bench might consider its applicability to the case before them. Applicants for an EPO and their legal advisers should consider themselves under a duty to the court to ensure that the list was expressly and in terms drawn to the attention of the bench (see paras [63], [65], [93], [101](a)(b)). (3) Lack of information or a need for assessment could never, of themselves, establish the existence of a genuine emergency sufficient to justify an EPO; positive evidence establishing the threshold under s. 44 of the Children Act 1989 was necessary. Using an EPO, particularly one obtained without notice to the parents, solely for the purpose of achieving some sort of assessment or investigation would very rarely, if ever, be justified. In the face of parental opposition to assessment or investigation, the remedy available was to apply for a child assessment order or to issue an application for a care order and apply to the court for directions and/or an interim care order (see paras [74], [76], [77], [101](c)). (4) Evidence given to the justices should come from the best available source; usually, as in the instant case, that would be the social worker with direct knowledge of the case (see paras [81], [101](d)). (5) In all EPO applications the court should be furnished at the very least with copies of the minutes of the most recent case conference (if there had been one), unless there were very pressing reasons to the contrary (see paras [51], [101](e)). (6) If possible, an application for a without notice EPO should involve legal representation, and the lawyer concerned must consider him or herself under a duty not only to present the case for the authority, but also to ensure that it was presented fairly, and that the bench was fully aware of the legal context within which the application was made. The local authority legal department should ensure that a clear note of proceedings was prepared and made available to parents, together with copies of any material submitted to the court, at the earliest opportunity unless there were countervailing considerations requiring confidentiality (see paras [87]–[89], [101](f)(g)). (7) Unless it was impossible to do so, a without notice EPO hearing ought to be taped; if necessary by means of a small portable tape recorder, or even a dictation recorder; otherwise, a dedicated note taker, in addition to the clerk, should attend the hearing with the task of compiling a verbatim note (see paras [66](a), [101](h)). (8) Unless there was very good reason to the contrary, parents should always be given a full account of the material submitted to the court, the evidence given at the hearing, the submissions made to support the application and the justices' reasons whether they asked for the information or not. When the matter was before the court at the first 'on notice' hearing, the court should ensure this had happened, and that the parents had a copy of the clerk's notes of the EPO hearing (see paras [66](b), [101](i)). (9) An EPO would rarely (if ever) be warranted by: allegations of emotional harm; inchoate and non-specific allegations of sexual abuse where there was no evidence of immediate risk of harm to the child; or allegations of induced or fabricated illness, where there was no medical evidence of an immediate risk of direct physical harm to the child (see paras [98], [101](j)(k)(l)). (10) Justices faced

with an EPO application in a case of emotional abuse, non-specific allegations of sexual abuse and/or fabricated or induced illness, should actively consider refusing the application on the basis that the local authority should instead issue an application for an interim care order. Any such ICO application was likely to be transferred by the justices immediately to a higher court (see paras [98], [100], [101](m)). (11) The emergency nature of the application did not absolve the court of its duty to give a reasoned explanation for its decision; in urgent cases, the decision could be announced and the order made with detailed reasons prepared thereafter (see paras [54], [101](n)). (12) Part of the legal advice given to justices in an EPO application made without notice must be that two separate matters were to be considered: (i) should the application proceed without notice to the parents; (ii) were the grounds for the EPO made out. The court might direct that the application be made on notice; only if the court was fully satisfied that there was a pressing need for a without notice hearing should the court proceed on that basis (see paras [95], [101](o)). (13) The local authority's actions in applying for and obtaining an EPO, based on the social worker's uninformed opinion that this was a case of fabricated illness, were outrageous and inexcusable. The court was entitled to expect that when a social work team leader asserted in evidence that this was a case of factitious illness syndrome, the social work team had acted in accordance with the national guidance on the subject and that the assertion being made had been backed up by paediatric opinion (see paras [19], [82]). (14) An EPO application should not be fitted round a busy court list but given enough time for the justices to receive detailed evidence, to receive advice upon the legal context, and to give adequate reasons. If the consequence was that another case could not be heard, that was unfortunate, but priority should be given to the EPO hearing (see para [92]). Per curiam : while it was ultimately a matter for local authorities, the practice of permitting social workers to override the legal adviser's advice upon whether or not the grounds for an EPO had been established was deprecated. In the event of a difference of view between social workers or the legal advice, the decision whether or not to proceed should have been taken by a named individual above team manager status (see para [80]).

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