Neutral Citation No: [2019] NIMag 2	*Ref:* 2019NIMAG2
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 02/04/2019

IN THE FAMILY PROCEEDINGS COURT SITTING AT DUNGANNON

WESTERN TRUST Applicant

AND

P

AND

Q Respondents

(Ex Parte Emergency Protection Order)

DISTRICT JUDGE MEEHAN

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The Facts

1. On arrival at Dungannon courthouse on 2nd April for scheduled sittings of the Family Proceedings Court I was approached by the clerk and provided with a draft summons in Form C1A, a Form C1 application and a supplementary Form C8 in an intended application by the Western Trust for an Emergency Protection Order, pursuant to Article 63 of the Children (Northern Ireland) Order 1995 ("the 1995 Order"). The provision of a summons normally signals an intention to have the Application simply issued and dispatched for service, but in fact the Trust's intention was to move it before that day's Court[1].

2. In speaking to the solicitor for the Directorate of Legal Services, acting for the Trust, I was informed that the first respondent, mother of the subject children, had been told the previous day that this Emergency Protection Order application was to be brought. When I remarked upon the novel addition of a draft summons, the Trust's solicitor told me this initiative followed discussion between the Department of Justice and the Directorate of Legal Services and that it would be his intention to ask that I direct an abridgment of time for service.

3. As though to underscore that the preparation of a summons by the Directorate of Legal Services was unprecedented, it was later found that the Court Service computer programme was unable to register it[2]. It was programmed only for a summons concerning the further extension of an Emergency Protection Order.

4. Sometime before the Family Proceedings Court was free to hear the application (around 2.00pm), the social worker involved had actually

[1] While I describe the document as being Form C1A summons, it was a document which omitted the sections on Particulars of Service ("To be completed by Summons Server or person who has obtained permission to serve the within summons"), Certificate of Service and the "Notes regarding the completion of Form C1A (FPC)", of which the following are worth noting: 3. "The date of hearing should be left blank for completion by court staff", and 4. "The date fixed for hearing should take account of the minimum period for service detailed in Schedule 2 to the Rules subject to any overriding direction from the court."
Conversely, the single sheet is footed with a statement in heavy bold announcing that it has been "filed" be the Chief Legal Advisor of Business Services Organisation.

[2] Compare this to the representation made to the Court in In Re ES [2007] NIQB 58 on behalf of the Department of Health and Social Services and Public Safety that "… the application will usually be made on notice although sometimes ex parte applications will be necessary where the emergency of the circumstances demands it."

travelled to the 1st respondent's home town (more than an hour's journey away) and delivered a set of papers, including the draft summons, still unsigned and therefore not yet issued, and then got back to court.

5. It was apparent that this initiative reflected certain changes in Directorate of Legal Service practice, consequent upon the recent judgment handed down by the Court of Appeal – M (Mother) v South Eastern Health and Social Care Trust and F(Father); Department of Justice, Notice Party [2019] NICA 11 (hereinafter cited as M v South Eastern Trust and F). On that authority, other than granting a direction that time for such "service" be abridged, no leave of Court was required before making the application; it was not necessary for the Trust to establish a compelling case for applying without first giving the parents notice; such notice had been given.

The Disposal

6. The disposal of the leave application itself can be accounted for fairly briefly.

7. The elder child's school had contacted Social Services, concerned that, in the view of staff, the respondent mother had been in an inebriated state when delivering her daughter by car and there were therefore concerns about her fitness to look after the younger boy, who was still at home. Social Services visited the house. At this stage, I will pass over what the Trust say was found, save that the respondent mother was allegedly heavily intoxicated and agitated. The Police were called because the respondent would not consent to the children being voluntarily accommodated, nor were any relatives willing to assist. In consequence, both subject children were taken into Police Protection. Under Article 65 of the 1995 Order, they can remain separated from their family by that means for up to 72 hours. That would be measured from on or about 11.00am on 1st April. They were now in a foster placement. It was also reported that, when the social worker delivered the draft summons that morning, 2nd April, the respondent mother was still intoxicated.

8. During my discussions with the Trust solicitor in the Family Proceedings Court (or FPC), matters ultimately resolved upon his suggestion that the summons be issued for the next available FPC, which was to be at Omagh on 4th April. I signed the summons accordingly. The situation would be governed by the Article 65 arrangements in the meantime, so there was obviously no risk of imminent harm to the children. Leave to

proceed *ex parte* was therefore refused. It also seemed to me that the period of grace might allow the respondent mother to get herself in a fit state to participate, if she was indeed currently incapacitated. No evidence was taken.

9. It was only on winding things up that I became aware that the other solicitor sitting silently in court represented the respondent father. She explained that her office had also received a telephone call from Social Services the previous day and she had attended accordingly. Her client did not yet know of these events. He had been in custody remand since the previous month on relevant domestic violence charges. She had not yet been able to consult with him and inform him of the proceedings.

10. I then asked about legal representation for the respondent mother. I was told that a solicitor known to act for her in the past was telephoned yesterday as well, but he had taken the view that he was not instructed as yet in this matter and would not be attending

11. I made directions for substituted service and appointed a Guardian Ad Litem for the children. The case will return in due course on foot of the planned application for a Care Order in respect of both children.

M (Mother) v South Eastern Health and Social Care Trust and F(Father): Department of Justice, Third Party.

12. M v South Eastern Trust and F [2019] NICA 11, which on the facts concerned an evening hearing, provides that where a Trust contacts parents to advise that it intends to apply to court to have their children removed and gives them details as to when the social worker (normally without legal representation) plans to arrive at the courthouse, then this constitutes notice of proceedings. If not at that point perhaps, but in any event where copy papers are supplied to the parents, or to just their solicitors, the action becomes one *inter partes*. It is entirely a matter for the Trust whether it is proceeding *ex parte* or, by such notice, *inter partes*. It is both the duty and a function of a District Judge (Magistrates' Court), when later approached, other than in the course of a regular Family Proceedings Court, to direct Court Service that a full Family Proceedings Court, including 2 Lay Magistrates, be convened, day or night, in order to vindicate the right of the parents to participate in an immediate hearing. Nothing less will meet the Article 6 and Article 8 Convention rights of the parents. Once an application is *inter partes*, it cannot subsequently be treated as though *ex parte*. In particular, it is unlawful for a District Judge (MC), sitting alone, to exercise the jurisdiction

afforded by Rules of Court to hear *ex parte* an application in respect of which the parents have been given notice and served with proceedings by the Trust.

13. The core of the Judgment is found at paragraphs [27] and [28]:

> [27] X Council v B foresees the need for ex parte applications to be made when (a) the case is extraordinarily urgent resulting in the parents not being able to be served with proceedings or (b) when alerting the parents to the application could prejudice the welfare of the child. It is agreed by all the parties that the instant case fits into neither of these categories: (i) the Trust advised the Appellant mother of their intention to move the application that day; (ii) the Trust served a copy of the proceedings upon the Appellant's solicitor; (iii) discussions occurred between legal representatives as to the venue for the hearing and subsequent arrangements; (iv) pursuant to the notice the appellant attended with her witness to contest the hearing but were both excluded from the court; (v) the legal representatives were permitted to be present but were expressly forbidden from making any representations.
>
> [28] … Had the jurisdictionally required court been convened the appellant's common law and Art 6 & 8 Convention rights could and would have been fully protected. In that scenario there would have been, as the Trust intended, an inter partes hearing, with the appellant and her witness present in court, able to fully participate and contest the EPO with the benefit of expert legal advice and representation. An inter partes hearing is the presumptive starting point of an application for an EPO. Such a hearing is generally necessary to vindicate the common law and art 6 and 8 rights of the parent. Such a hearing enhances the rigour and fairness of the proceedings by ensuring that the court is as fully informed as possible before being tasked with deciding whether the draconian step of removing a child from its parent(s) is necessary and justified. By proceeding ex parte and failing to convene a properly constituted court the District Judge acted unlawfully with the consequence that the appellant was denied her right to a fair hearing before a properly constituted court.

14. I find myself compelled to conclude, by reference to the statutory material and the statutory definition of relevant expressions and also to other case law binding on this inferior court, that key steps in the Court of Appeal's reasoning are demonstrably wrong. As a matter of law, the appellant was not served and the proceedings at first instance were properly *ex parte*.

15. The Court of Appeal also disregarded both primary legislation[3] and relevant Rules of Court in concluding that the respondent Trust had, by notifying the appellant informally, acquired a right to have the application heard and at a time of its choosing.

The statutory Framework

16. The primary statutory provision is the 1995 Order. Part XVI deals with jurisdiction and procedure. Article 165 there provides:

> *Rules of court*
>
> 165.—(1) An authority having power to make rules of court may make such provision for giving effect to—
>
> (a) this Order;
>
> (b) the provisions of any regulations or order made under this Order; or
>
> (c) any amendment made by this Order in any other statutory provision,
>
> as appears to that authority to be necessary or expedient.
>
> (2) The rules may, in particular, make provision—
>
> (a) with respect to the procedure to be followed in any relevant proceedings (including the manner in which any application is to be made or other proceedings commenced);
>
> (b) as to the persons entitled to participate in any relevant proceedings, whether as parties to the proceedings or by being given the opportunity to make representations to the court;
>
> (c) with respect to the documents and information to be furnished, and notices to be given, in connection with any relevant proceedings;
>
> (d) …
>
> (e) …
>
> (f) …
>
> (g) …
>
> (h) enabling the court, in such circumstances as may be prescribed, to proceed on any application even though the respondent has not been given notice of the proceedings;
>
> (i) authorising a resident magistrate or a member of a juvenile court panel to discharge the functions of a court of summary jurisdiction with respect to such relevant proceedings as may be prescribed;
>
> (j) …
>
> (3) In paragraph (2)—

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[3] For present purposes, I do not distinguish between enactments of the Stormont Parliament and Orders in Council made during direct rule.

"notice of proceedings" means a summons or such other notice of proceedings as is required; and "given", in relation to a summons, means "served";
"prescribed" means prescribed by the rules; and
"relevant proceedings" means any application made, or proceedings brought, under any of the provisions mentioned in sub-paragraphs (a) to (c) of paragraph (1) and any part of such proceedings.
…

17. The Court of Appeal's reasoning in para. [27], above, fails to address Article 165(3). It also fails to consider Rule 4 of the Magistrates' Courts (Children (Northern Ireland) Order 1995) Rules (Northern Ireland) 1996 (the 1996 Rules), which is what the Lord Chancellor, on advice of the Magistrates' Court Rules Committee and after consultation with the Lord Chief Justice of Northern Ireland has laid down as the procedure which alone leads to an *inter partes* hearing.

18. The rule-making authority in Northern Ireland did not provide for any alternative to a summons for commencing proceedings under the 1995 Order. In part, the options available are also circumscribed by the terms of the principal Magistrates' Court (Northern Ireland) Order 1981. This contrasts with the position in England and Wales. In consequence, care must be taken in the interpretation of relevant authorities in this field and emanating from our sister jurisdiction.

Making a Complaint to a Magistrates' Court

19. Article 77 of the Magistrates' Court (Northern Ireland) Order 1981 ("the 1981 Order") provides:

Issue of Summons on Civil Complaint

77. - (1) For the purposes of this Part "civil matter" means a matter in which proceedings other than proceedings under Parts V to VII, may be brought before a court of summary jurisdiction.

(2) Proceedings in a civil matter shall be upon complaint and in accordance with this Part.

20. Article 77 is framed in mandatory terms; proceedings must be instituted on foot of a complaint. Article 2 defines "complaint" to include an information.

21. To put it another way, civil proceedings do not come into existence at all until a complaint is made. Article 79 of the 1981 Order, as amended, further provides:

> *Issue of summons upon civil complaint*
> 79. Where a complaint in a civil matter is made to a lay magistrate upon which a court of summary jurisdiction has power to make an order against any person, the lay magistrate may issue a summons directed to that person requiring him to appear before that court to answer to the complaint.

22. *Valentine's* annotation on this statutory provision includes the following:

> The laying of a complaint initiates the procedure and service of a summons is an administrative step which calls a defendant to court to answer the complaint, but if it is not properly served the court has no jurisdiction to proceed to a hearing in his absence: *Re Farrell* [2005] NIJB 357 [2005] NIQB 6 (DC single judge, Girvan J) (criminal case).

23. A key authority on the jurisdiction of Magistrates' Courts is the Judgment of the Northern Ireland Court of Appeal (Civil Division) in Maguire v Murray [1979] NI 103, delivered on behalf of the Court by Lord Lowry CJ. At page 4 there appears the following:

> A magistrates' court derives jurisdiction exclusively from statute. Therefore, … I turn first to the Magistrates' Courts Act (Northern Ireland) 1964 in order to look at the jurisdiction in regard to complaints and to see in what way, if at all, the time for issuing a summons is statutorily controlled.

Emergency Protection Orders

24. Article 63 of the 1995 Order provides for Emergency Protection Orders. I set out paragraph (1)(a) here:

> *Orders for emergency protection of children*
> 63.—(1) Where any person ("the applicant") applies to the court for an order to be made under this Article 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;

25. Article 63 begins by making reference to an application being made to the court. The 1996 Rules, in turn, set out how such an application is to be made.

The Issue of Proceedings

26. Proceedings are commenced under the 1995 Order by issuing a summons, which commands the respondents on the Court's authority (as opposed to that of the Trust) to appear before a duly constituted Family Proceedings Court on a date and at an hour and place specified in the summons by the designated officer of the Court and issued over the signature of a Clerk of Petty Sessions, Lay Magistrate or District Judge (MC). Upon such a summons being duly served, the respondent is thereby required to attend court and his failure to do so will not prevent the Court proceeding in his absence.

27. Rule 4 of the 1996 Rules states:

> *Application*
> **4.**—(1) An application by way of complaint to a justice of the peace or clerk of petty sessions for an order under the Order shall be made in writing in Form C1 together with such of Forms C6 to C17 as is appropriate.
>
> (2) Subject to paragraph (3) any summons issued in consequence of such an application shall be prepared by the applicant in Form C1A and shall be served on each respondent to the application along with a copy of the written application the minimum number of days prior to the date fixed for hearing as is specified in relation to that application in column (iii) of Schedule 2 to these rules.
> (3) …
> (4) …

28. In other words, an application, in law, is one made to the Court by lodging papers there and providing the form of summons for signature and issue by a judicial officer. It is a judicial function (DPP v Long and Johnston [2008] NICA 15). Typically, the date for hearing as provided for in the summons will be a matter of weeks ahead, although special authorisation by the judge, as in the instant case, could have the matter listed within days. Where proceedings are instituted pursuant to Rule 4 they are properly designated as proceedings upon complaint, or proceedings on notice.

29. In the instant case, the social worker's action in delivering the draft summons to the intended 1st respondent (alone) did not constitute service of a summons, nor of proceedings upon her; nor did it constitute notice of the hearing. The same can be said of the action of the Trust in the case with which the Court of Appeal was concerned, where the

application papers were sent by the Trust's legal representatives to the solicitors for the appellant direct. The proceedings had not yet been issued.

30. In any event, as we shall see, Rule 11(3) of the principal Magistrates' Courts Rules (Northern Ireland) 1984 ("the 1984 Rules") forbids service of a summons by the Trust. One might suggest that this is not only in order to avoid direct confrontation between litigants, but also to avoid identifying the liberties of the complainant too closely with the authority of the court, in the eyes of the other party.

31. Since inception of the 1995 Order Trusts in Northern Ireland have been proceeding without regard to Rule 4. All applications have been brought on the basis that the emergency is too acute, too compelling to allow for a summons to be issued.

32. Since the judgment in A Trust v M [2005] NIMag 33, in addition, Trusts have taken to notifying the parents concerned in the contemplated *ex parte* application and have been inviting, if not arranging, for the attendance of the parents or their representatives. In the early days the hearing was often at the private homes of lay magistrates; these days it is at a courthouse and lay magistrates are rarely involved. This, like the NICTS Circular addressed in M v South Eastern Trust and F[4], reflects one of the package of reforms to practice and procedure introduced in the wake of A Trust v M and under the aegis of the Children Order Advisory Committee (COAC) and the Judicial Studies Board. Should a District Judge (MC) err by being induced to proceed and hear both parties, it has never been in the face of an objection by the Trust[5].

33. The Court of Appeal's Judgment in M v South Eastern Trust and F, does cite Schedule 2[6], in acknowledging that the period of notice for

[4] *Ibid*. para. [31] *et sequi*.

[5] It is only fair to point out that so many of these applications, especially at an unsocial hour, involve social workers attending without legal representation. This is despite COAC's recommendation, following the guidance from McFarlane J on the point, in Re X (EPOs) [2006] EWHC 510 (Fam):

> 87. The importance of the lawyer for the local authority in an application for an EPO, whether it is made with or without notice, should not be underestimated. It is, in my view, even more important that a lawyer is there to present the application where it is made without notice than it is in an 'on notice' case.

[6] At para. [23].

applications under Article 63 of the 1995 Order is one clear day. That period, though obviously short, has evidently been measured by the rule-making authority as a proportionate acknowledgement of the Respondents' Convention rights, balanced against the emergency nature of the case. Schedule 2 is made pursuant to Rule 4(2). It has no relevance to the Trust's act in simply sharing draft papers.

Service of Proceedings

34. The conflation of the statutory procedure for the issue and service of a summons and the initiative on the Trust's part in contacting the parents informally a matter of hours before a court appearance is ostensibly endorsed by the Court of Appeal[7] by the observation that Rule 9(8)(b) can be invoked to abridge time for "service".

35. Rule 9(8)(b), like Schedule 2, does not apply to an *ex parte* application under Rule 5 (to which I come shortly). The fundamental point is that since the Trust has not had a summons issued by the Court it is not bringing the matter to the Court under Rule 4. The Court knows nothing about the matter without a complaint being made. It is the Court, not the Trust, which sets the date and time for an *inter partes* hearing.

> *Service*
> 9.—(1) Rule 11 of the Magistrates' Courts Rules (Northern Ireland) 1984 shall apply to the service of a summons under these Rules.
> …
> (8) In any relevant proceedings, where these rules require a document to be served, the court may, without prejudice to any power under rule 15, direct that—
> (a) the requirement shall not apply;
> (b) the time specified by the rules for complying with the requirement shall be abridged to such extent as may be specified in the direction;
> (c) service shall be effected in such manner as may be specified in the direction.

36. Rule 9 provides that service of the Summons, together with Form C1 and Form C8, is to be in accordance with Rule 11 of the 1984 Rules, as amended:

> *Service of summons*
> 11.- (1) [Case prosecuted by the Director of Public Prosecutions] ...

[7] *Ibid*. para. [23]

(2) In other cases, the summons shall, subject to paragraph (3A) [Fixed Penalties] and Rule 12 [Criminal casework] be served by-
(a) the summons server of the petty sessions district in which the proceedings are brought or in which the defendant or witness resides; or
(b) any person who has received permission from a district judge (magistrates' court) or other justice of the peace or from the clerk of petty sessions to serve the summons;
and any such permission shall be endorsed on the original summons and signed by the person giving it.

(3) Subject to paragraph (3A), in no case shall a summons be served by the complainant, or a director, partner or employee of the complainant.

(3A) [Fixed Penalties]…

(4) Subject to paragraph (3A), Rule 12A and Rule 13 [Backstop provision for service by post, duly authorised by the Court] every summons shall be served upon the person to whom it is directed by delivering to him a copy of such summons, or, where … the summons … is issued upon complaint in a civil matter …, by leaving it for him with some person apparently over the age of sixteen years at his usual or last known place of abode or at his place of business.

(5) …

(6) Every summons shall be served a reasonable time before the hearing of the complaint.

(7) In every case the person who serves a summons shall endorse on the original the date, place and manner of service and, unless service may be proved by an affidavit or a certificate of service in Form 109A, Form 109B, Form 109C or Form 110A shall attend at the hearing of the complaint to depose, if necessary, to such service and in the case of service by registered post or the recorded delivery service there shall be attached to the affidavit or certificate of service or be produced in court the certificate of posting and, subject to Rule 13(2)(a), the advice of delivery issued by the Post Office.

(8) Nothing in this Rule shall affect the provisions of any statutory provision dealing with the time and manner of service and the person who may serve summonses in particular cases.

The Voice of the Child

37. Article 60(1) and (2) of the 1995 Order provide as follows:

> *Representation of child and of his interests in certain proceedings*
> 60.—(1) For the purpose of any specified proceedings, the court shall appoint a guardian ad litem for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.
> (2) The guardian ad litem shall—
> (a) be appointed in accordance with rules of court; and
> (b) be under a duty to safeguard the interests of the child in the manner prescribed by such rules.

38. Rule 11(1) of the 1996 Rules requires, in effect, that a Guardian Ad Litem be appointed at the time of the issue of the proceedings:

> *Appointment of guardian ad litem*
> 11.—(1) As soon as practicable after the commencement of specified proceedings[8] the court shall appoint a guardian ad litem unless the court considers that such an appointment is not necessary to safeguard the interests of the child.

39. It is instructive to note the powers vested in Guardians by Article 61(1) of the 1995 Order:

> *Right of guardian ad litem to have access to records*
> 61.—(1) Where a person has been appointed as a guardian ad litem under this Order he shall have the right at all reasonable times to examine and take copies of—
> (a) any records of, or held by, an authority or an authorised person which were compiled in connection with the making, or proposed making, by any person of any application under this Order with respect to the child concerned;
> (b) any records of, or held by, an authority which were compiled in connection with any relevant functions, so far as those records relate to that child; or
> (c) any records of, or held by, an authorised person which were compiled in connection with the activities of that person, so far as those records relate to that child.

Applications brought Without Issue of Proceedings (Ex Parte)

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[8] Applications for an Emergency Protection Order are specified proceedings, under Article 60(6)(g) of the 1995 Order.

40. Having set out all of that, one may finally place Rule 5 of the 1996 Rules in its proper context. It provides for cases of truly exceptional urgency, whereby all the detailed provision elsewhere, intended to secure the defending party's right to due process and a fair Hearing and with further provisions which accord a voice to the child, together with an investigatory role for a Guardian Ad Litem, may be set aside for compelling reasons, but only with leave of court.

41. Article 60 of the 1995 Order states:

> *Ex parte Application*
>
> 5.—(1) An application for—
>
> (a) …
>
> (b) an emergency protection order under Article 63;
>
> (c) …
>
> (d) …
>
> (e) …
>
> may with the leave of the court be made ex parte and in which case Article 77(2) of the Magistrates' Courts (Northern Ireland) Order 1981 (civil proceedings to be upon complaint) and rule 4 shall not apply.
>
> (2) …
>
> (3) Where the court refuses to make an order on an ex parte application it may direct that the application be made inter partes.

42. The longstanding practice on the part of Trusts in Northern Ireland purports to meld Rule 4 and Rule 5. It is the conclusion of the Court of Appeal in M v South Eastern Trust and F that this "Third Way" is legitimate and that it is therefore for judges and court staff to convene, if need be, an evening sittings of a full Family Proceedings Court. The Court has also ruled that it is not then necessary for the Trust to obtain leave of the Family Proceedings Court, because, at best, the Trust has copied papers to the parents or their lawyers and thereby rendered the proceedings *inter partes*. It does not appear that it is a condition precedent to such licence that the parents, or either of them, actually make an appearance.

X Council v B

43. In M v South Eastern Trust and F (at para. [27]) the Court of Appeal interpreted the expression "service of proceedings" in X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam) as meaning simply supplying the respondent or her solicitor with a copy of the application Forms. This was apparently with the concurrence of all the

parties appearing before it, including the Department of Justice. According to that reasoning, this initiative displaces the jurisdiction on the part of the District Judge (MC) or lay magistrate sitting alone to hear an application on the *ex parte* procedure, as provided for in Rule 2(5)[9] of the 1996 Rules. The judge can no longer consider the application to have been brought to the Court pursuant to Rule 5, so that any Order purportedly made via that route would be "unlawful". Later, at para. [33], it is stated that "The decision whether to move the application with notice is a matter for the applicant Trust…".

44. It is of course correct that the Trust will decide whether to move the application on notice. However, one has already established from the primary statute that to proceed on notice is to cause a summons to be issued by a designated judicial officer and served in accordance with the law. In Maguire v Murray [1979] NI 103, Lord Lowry CJ characterised a summons as an administrative means of informing the defendant of the charge against him and telling him when and where his case will be heard. In other words, it is the only form of notice recognised by law as of itself endowing the Family Proceedings Court with jurisdiction to proceed in the absence of the respondent. Equally, it is the only authoritative notice as to when and where the case will be heard.

45. I do not propose to recite the entire list of 14 precepts contained in X Council v B, but merely the two which are of direct relevance to the present considerations:

vii) *Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by a local authority for an EPO. They must also be given proper notice of the evidence the local authority is relying upon.*

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[9] *Matters prescribed for the purposes of the Order*

2.—(5) Where, in accordance with the Allocation Order an application is required to be commenced in a family proceedings court the following proceedings are prescribed for the purposes of Article 165(2)(i)—

(a) proceedings on an ex parte application under Article 63; 67 and 69; and under rule 5 are proceedings with respect to which a resident magistrate or member of a juvenile court panel may discharge the functions of a court of summary jurisdiction; and

(b) proceedings in accordance with rule 3, 6, 7, 11, 15, 16, 17, 18, 19 and 20 are proceedings with respect to which a resident magistrate may discharge the functions of a court of summary jurisdiction.

It is perhaps also worth noting, in passing, that these provisions do not authorise a District Judge (MC) sitting alone to hear an *ex parte* application for a residence order, or anything else under Article 8.

46. It is important to appreciate that the way in which EPO proceedings in England and Wales are issued and served is different to our summons procedure. No case law emanating from that jurisdiction will make reference to service of a summons.

47. In Re X (EPOs) [2006], McFarlane J remarks:

> 94. By Family Proceedings Rules 1991, r 4.4(4) an application for an EPO may be made 'ex parte' (as is the phrase that still appears in the rules). There does not appear to be any direct reported authority upon the use of the without notice procedure in EPO applications.

48. McFarlane J there highlights that the Rules use the term "*ex parte*" to mean without due notice in accordance with the Rules. The significant difference between the 1991 Rules and our own of 1996 is in respect of applications on notice. The following is taken from the Rules applicable in England and Wales:

> *Application*
> 4.4—(1) Subject to paragraph (4), an applicant shall–
> (a) file the application in respect of each child in the appropriate form in Appendix 1 to these rules or, where there is no such form, in writing, together with sufficient copies for one to be served on each respondent, and
> (b) serve a copy of the application, endorsed in accordance with paragraph (2)(b), on each respondent such number of days prior to the date fixed under paragraph (2)(a) as is specified for that application in column (ii) of Appendix 3 to these rules.
>
> (2) On receipt of the documents filed under paragraph (1)(a) the proper officer shall–
> (a) fix the date for a hearing or a directions appointment, allowing sufficient time for the applicant to comply with paragraph (1)(b),
> (b) endorse the date so fixed upon the copies of the application filed by the applicant, and
> (c) return the copies to the applicant forthwith.
>
> (3) The applicant shall, at the same time as complying with paragraph (1)(b), give written notice of the proceedings, and of the date and place of the hearing or appointment fixed under paragraph (2)(a), to the persons set out for the relevant class of proceedings in column (iii) of Appendix 3 to these rules.

49. In England and Wales, an application does not entail a summons. The application papers, once endorsed by the court as to the date, time and

place, are served by the applicant, who simply files a Certificate of Service[10]. Munby J was concerned to emphasise in his precept (vii) that applications for an EPO should normally be thus issued and then served upon the respondents by the local authority no later than the minimum period of days in advance of the scheduled hearing as stipulated in their Appendix 3. The equivalent in Northern Ireland would be our Rule 4 and Schedule 2, which provides for issuing a summons, with the time and date endorsed by Court Service staff. Unlike the position in England, though, the summons here is normally to be served personally by a process server, rather than by the applicant using first class post. In this jurisdiction, the applicant Trust is prohibited from serving it, by virtue of Rule 11(3) of the 1984 Rules[11]. The time taken to serve notice may therefore be longer than in England and Wales, absent a direction being obtained from the Judge, pursuant to Rule 9(8) of the 1996 Rules.

50. It may be that the legal position in Northern Ireland would be considered unsatisfactory in this respect by some, when compared to the speedier and more efficient procedure for service in England and Wales, particularly in an emergency situation. Nonetheless, that is a matter for the legislature, not the judiciary.

51. Munby J's point was that, in addition to the hearing details and application Forms, the parents should normally be served at the same time with proper notice of the evidence, a point expanded in precept (xi)[12]. Only truly exceptional circumstances would warrant an application made without proper notice.

52. The other precept directly relevant to the issue in hand reads as follows:

viii) *Where the application for an EPO is made ex parte the local authority must make out a compelling case for applying without first giving the parents*

[10] *Ibid.* Rule 4.8(7).

[11] The 1996 Rules could have exempted proceedings under the Children (NI) Order 1995 from that interdict, but did not do so.

[12] This was something also addressed by McFarlane J in Re X (EPOs) [2006] EWHC 510 (Fam);

> 51. As a matter of future guidance, 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 has been one), unless there are very pressing reasons to the contrary.

notice. An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency -- and even then it should normally be possible to give some kind of albeit informal notice to the parents ---- 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. [Underlining added]

53. Precept (viii) begins by making clear that it does not address cases where due notice has been given. It addresses explicitly those cases where the local authority brings the matter *ex parte*, which is to say without due notice. It is the one upon which Trusts have been relying since the judgment in A Trust v M [2005] NIMag 33 when notifying parents a matter of hours before the *ex parte* appearance before a District Judge or lay magistrate sitting alone, often at night. That does not constitute due notice. If it were to be considered formal notice, one would wonder what informal notice might be.

54. No summons (or, in England and Wales, no application) has been served and the parents have not thereby been required to attend. Munby J was not suggesting that informal notice constituted the "adequate prior notice" to which he alluded in precept (vii) or even "notice" in compliance with what is our Rule 4[13].

55. Munby J is also addressing exclusively the circumstances of a regular, scheduled, daytime Family Proceedings Court when he commends the practice of considering "informal notice". At no point does he address the circumstances of a magistrate sitting alone to hear an *ex parte* application and his suggestion that informal notice be considered is to be seen as strictly in the circumstances of a full Family Proceedings Court. The learned judge makes specific reference to a Family Proceedings Court in precepts (i), (ii), (x), (xi) and (xiv).

56. In the case of Re ES [2007] NIQB 58, Gillen J considered the challenging circumstances of an *ex parte* Emergency Protection Order:

> [91] EPOs clearly contemplate an infringement of the rights of parents. The interests at stake in such cases are of the highest order given the impact that public action to separate parents and children may have on all of their lives. Physical removal of a child from parental care constitutes one of the most disruptive forms of

[13] For Northern Ireland, of course, the issue is dealt with conclusively by the terms of Article 165(3) of the 1995 Order (see para. 16 above).

> intervention known to the law but at times it is necessary in order to protect children. Children are highly vulnerable. Society has an interest in protecting them from harm. The administration of justice and fair process must therefore reflect this fact. Where the protection of their interests diverges from the protection of parental rights to freedom from public intervention it is the interests of children which are paramount even within the ambit of the Convention. Conceptually this provides the valid policy justification for permitting ex parte applications where the situation poses a risk to a child's life and health by the delay and degree of notice sometimes associated with an inter partes hearing.
>
> [98] Moreover I recognise that the Convention is not a catechism for purists. It has been described as a living instrument which must be interpreted in light of present day conditions unfettered by doctrinal allegiances. The needs and resources of the community and of individuals must be taken into account in its interpretation.

The Single Jurisdiction

57. If the matter is brought before a Family Proceedings Court, Munby J evidently considers that the parents should be heard. There is no doubt that the full FPC may hear the parents on the leave issue. If brought before a District Judge (MC), pursuant to Rule 2(5)[14], though, the judge in such circumstances must conduct the proceedings only on an *ex parte* basis. In deciding whether to grant leave, one of the factors to be considered would be whether the Application could be brought before a regular Family Proceedings Court.

58. Following the commencement of The Justice (Northern Ireland) Act 2015 and Rule 20 of The Magistrates' Courts (Miscellaneous Amendments) Rules (Northern Ireland) Order 2016, parties are able to issue proceedings in any Magistrates' Court in Northern Ireland since 31st October 2016. The Lord Chief Justice's Directions (Court business in the Magistrates' Courts and County Courts) No. 5/16 lays down guidance as to which administrative division within the single jurisdiction may be chosen. Nonetheless, given the obligation upon the Courts to interpret

[14] Given Rule 2(5), it is difficult to understand why the Department of Justice advised the Court of Appeal that no provision has been made under paragraph 3 of Schedule 7 to the 1995 Order (Cf. para. [19] of the Judgment in M v South Eastern Trust and F). Granted, the enabling provision in that Schedule merely refines the broad authority contained in Article 165(2)(i) of the 1995 Order (see para. 16, above). Of course, I may be missing something.

legislation, so far as possible, in a manner compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms[15], I expect that some latitude would be permissible in this context.

59. It follows that, with a little bit of forward planning, the Trust could bring *ex parte* applications before a sitting Family Proceedings Court on many more occasions than at present. There is a Family Proceedings Court sitting in Belfast, for example, every day of the week, bar Wednesdays. That consideration might also be factored into the discussions between the Directorate and the parents' solicitors during the day, when settling arrangements between themselves. I believe there are multiple choices of forum on most days, so long as the Directorate contacts the target Court soon enough. The Article 6 Convention rights of the respondents and the Article 8 rights of the family have a part to play at this stage too, the Trust being a public body.

The Consequence of Either Parent not Appearing

60. To illustrate the difficulties arising from any hybridisation of Rules 4 and 5 of the 1996 Rules one might consider the situation where a Trust has indeed supplied papers informally to the parents, some hours before attending before a properly constituted Family Proceedings Court (such as in the instant case, in respect of the first respondent at least). According to the reasoning in M v South Eastern Trust and F, the Trust has converted the case into one being conducted on notice – an *inter partes* hearing and the Court cannot legitimately treat it thereafter as *ex parte*. Let us suppose that neither the solicitors nor the parents attend the hearing (as often happens and as was the position in the instant case)[16]. One might then turn to the following passage in M v South Eastern Trust and F for guidance:

> [33] … The decision whether to move the application with notice is a matter for the applicant Trust not the DJ[MC]. The only judicial supervision required by the legislative scheme is if the Trust apply to move the application *ex parte* in which case leave is required. The provision in the Circular is also inconsistent with the established case law as to the exceptional circumstances required to justify an *ex parte* application. This is because the process envisages, as happened here, the conversion of an *inter*

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[15] Human Rights Act 1998, Sec. 3(1)

[16] Or attended only to challenge jurisdiction, for want of adequate notice.

parte [sic] application into an *ex parte* application. In the case of an *inter parte* [sic] application the courts [sic] role is confined to determining that application in the proper way with a properly constituted court. If an *ex parte* application is made the DJ[MC] or a lay magistrate sitting alone are [sic] empowered under Rule 2(5)(a) of the 1996 rules to deal with the *ex parte* application for an EPO. Such *ex parte* applications, for which leave must first be obtained, will only be justified in exceptional circumstances…

61. Once again, it is important to appreciate that, within the lexicon of the 1996 Rules, an *inter partes* hearing is one grounded upon complaint, pursuant to Rule 4 of the 1996 Rules. The role of a Court always includes determining that it has jurisdiction. On the Court of Appeal's current approach, whereby these EPOs are *inter partes,* should the respondents not appear, despite having been supplied with papers by the Trust direct, some hours before, the Court cannot proceed to hear that *inter partes* application. Service of a summons, obviously, cannot be proven. The Trust, on the Court of Appeal's approach, non-suits itself by having supplied those papers to the absent parents. That much is enshrined in the Article 81(2) of the 1981 Order:

Non-appearance of defendant
8l. - (2) The court shall not begin to hear the complaint or proceed in the absence of the defendant, unless either it is proved to the satisfaction of the court, upon oath or by affidavit or in such other manner as may be prescribed, that the summons was served on him within what appears to the court to be a reasonable time before the hearing or adjourned hearing or the defendant has appeared on a previous occasion to answer to the complaint.

62. *Valentine's* annotations on these provisions include the following:

This underlines the principle that proceedings should not be conducted in the absence of a defendant unless he has been given an opportunity to attend, and should apply to interim orders: *Re Northern Ireland Housing Executive* [2005] NIQB 71 [2006] NI 234 (Girvan J).
Service or evasion of service is a condition precedent to jurisdiction if the defendant does not appear: *Maguire v Murray* [1979] NI at 107G. An order in his absence will be quashed on judicial review if evidence shows that he was not duly summoned: *In re AG's Application for Certiorari*, QBD, NI, 2 Dec 1964. Personal appearance or appearance by a solicitor or authorised agent is a waiver of service; but appearance by a solicitor or agent instructed to dispute service is not waiver: *Minister of Agriculture v McGeough*

> [1955] NI 139; and fortuitous appearance of the defendant in court on some other charge is not waiver of service: *Anderson v Higgins* (1977) [1979] NI at 109-10.

63. I remain of the view that where no summons has been issued and served through the Court in accordance with Rule 4, the Trust is at all times to be taken to be proceeding on the without-notice basis, which is termed *ex parte* in Rule 5 .

64. Neither party – but more especially the Trust - has acquired a right to a Hearing before a Family Proceedings Court by the Trust's resort to "informal notice". The Trust still requires leave to proceed, which will only be granted upon compelling reasons being established. It follows that there can be no legitimate expectation, on the part of either party, that a full Family Proceedings Court will be specially convened, especially out-of-hours.

The Powers of a District Judge (Magistrates' Courts)(Northern Ireland)

65. To quote another passage from the judgment of the Court of Appeal in M v A Trust and F:

> [30] Given that there is specific provision under the rules for *ex parte* EPO applications to be heard by a DJ (Magistrates' Court) or lay magistrate sitting alone but no such provision for *inter partes* applications we were surprised to learn that it is not uncommon for some DJ's, even within normal hours, to sit alone to determine *inter partes* EPO applications. Whether in or out of normal hours the legislative requirement is clear: EPO applications must be commenced before a properly constituted Family Proceedings Court. If the urgency of an EPO application required an *inter partes* application to be heard out of hours there is no legislative restriction on the ability of the DJ to convene the requisite court. The NICTS would in discharge of its duties be required to make the necessary arrangements to operate the legislative scheme and ensure the attendance of the lay magistrates as necessary. If a lay magistrate failed to attend the Court could invoke the provisions in para 4 of Schedule 2 of the 1968 Act to continue in that members absence. Such out-of-hours applications would in any event only be warranted where some urgency required it[17]. The rules already allow for expedited

[17] The Court of Appeal fails to explain how it finds that leave to proceed is not required, while also asserting that out-of-hours applications would only be warranted where some urgency required it. It had already ruled that to proceed on what it terms an *inter partes* basis is a matter for the Trust. Presumably, the Court was of the view that it was for the Trust to decide whether the matter was urgent.

> hearings within normal hours. In light of what we were told DJ's should be reminded of their duties under the current legislative provisions. (Underlining added)

And again:

> [32] In a section entitled "Inter-Partes Hearing" it is noted that there is no legislative authority to make provision for a lay magistrate to deal with an *inter parte* (sic) application. It also states that there is similarly no legislative provision for a DJ[MC] to deal with an *inter-parte* (sic) application "out of hours". However, Court listings and sittings are matters for the judiciary. Article 11 of the Magistrates' Courts (NI) Order 1981 provides for directions by the LCJ as to ordinary court sittings. The listing of matters outside of normal court hours is a matter for the presiding District Judge. There is no limitation on when a court may be convened. No such legislative provision is required. The role of the NICTS is to provide administrative support for the arrangements which the judiciary directs in order to give effect to the legislative requirements surrounding the exercise of judicial authority.

66. The Court of Appeal is relying here upon Article 3(1) of the Children (Allocation of Proceedings) Order (Northern Ireland) 1996, which states that an application for an EPO must be commenced in a Family Proceedings Court (though that is precisely what did not happen in that case, nor in any other to date). From there, it contends, at para. [30], that all applications for an EPO must therefore be heard before a Family Proceedings Court, whether in or out of normal hours. This is to treat the words "commencement" and "hearing" as one and the same. It does concede [para. 14] that Rule 2(5) constitutes an exception but, again, asserts that this applies only to *ex parte* applications, which brings us back to the issue as to what the Rules mean by that expression.

67. In those circumstances, the question as to whether a District Judge (MC) has an inherent jurisdiction in this context (and also the issue as to when a lay magistrate becomes a "member" of an FPC, in order to be deemed to have failed to attend) need not be taken further, save to recall the competing precept that a Magistrates' Court derives jurisdiction exclusively from statute (para. 23, above).

The Need to Obtain Leave

68. The requirement for leave of the Court to proceed subsists irrespective of whether a respondent parent attends and intimates that he or she wishes to make representations or adduce evidence to the (FPC) Court. The leave application must be carefully and anxiously considered by a Family Proceedings Court, *per* X Council v B, just as keenly as it will be considered by a District Judge (MC) sitting alone out of hours.

69. Where a Trust has not complied with Rule 4, it is therefore advancing the application pursuant to Rule 5: those are the only two avenues available under the Rules and they are mutually exclusive. All the 14 precepts set out in para. [57] of X Council v B, which also reflect the law in Northern Ireland[18], then apply in full. The burden remains upon the Trust at the outset to establish that the circumstances are so exceptional and the risk of imminent and significant harm to the child(ren) so acute that the Trust must be allowed to present its case without the child being represented and without the parents and Guardian being afforded their allotted time to consider and investigate the Trust's evidence. The mere attendance of the parents is not to be taken as waiver on their part of the legal requirements as to due process, not on their part and certainly not on behalf of the child. This judicial function must be defended, even where the parents can be heard on the point before a properly constituted Family Proceedings Court.

70. While the Respondents may well be able to mount argument to assist a Family Proceedings Court, as such, in considering whether to grant such leave to the Trust, parents face obvious difficulty in mounting a proper answer to the substantive case, on the spot; they have been supplied only with the bare court forms, if even that. The most expert legal representative would find that challenging, on 2 hours' notice, inclusive of travel, as in M v South Eastern Trust and F , never mind the challenge for an inebriated mother, supplied with court forms for a hearing which was then getting under way in Dungannon, as in the instant case.

The Human Rights Issue

71. Although the Court of Appeal opted to formulate an obligation on District Judges to eschew their jurisdictional authority and, on the basis of an inherent jurisdiction, direct a full FPC to be convened, the premise nonetheless is that the current legislative arrangements are not Convention-compliant.

[18] In Re ES [2007] NIQB 58, para. [31]

72. In the case of In Re ES [2007] NIQB 58, Gillen J recognised the extremely challenging issues raised by Emergency Protection Order proceedings, in the context of Convention rights. The judgment involved both a deep and extensive consideration of the authorities, including practice elsewhere in the world, as well as the judgments of the European Court of Justice. The issue was addressed by the learned judge from various angles:

> [21] The very nature of EPOs creates a need to balance speed and justice in compulsory intervention for child protection by allowing applications to court on either a day's notice to the parents (and children) or, with leave, without notice, or on abridged notice. Allowing applications to be heard without notice enables an immediate response and one which does not alert the parents. This can reduce the risk to a child, for example where the parents might otherwise disappear, taking the child.
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> [29] At paragraph 35 of the case [X Council v B (Emergency Protection Orders) [2005] 1 FLR 341], Munby J went on to state:
>
> > "In a number of cases the Strasbourg Court has recognised that the emergency removal of children under an EPO (or its equivalent) is in principle entirely compatible with the Convention and, moreover, that there may be cases where an ex parte (without notice) application is justified: see generally K and T v Finland [2000] 31 EHRR 18, … P, C and S v United Kingdom [2002] 35 EHRR 31, Venema v The Netherlands [2003] 1 FLR 552, Covezzi and Morselli v Italy [2003] 38 EHRR 28 .. But however compelling the case for intervention may be, both the local authority which seeks an EPO and the justices in the FPC who grants such an order assume a heavy burden of responsibility.
>
> [49] In Covezzi and Morsselli v Italy [2004] 38 EHRR 28 the European Court of Human Rights unanimously held that there had been no violation of Article 8 on account of the emergency care order made in respect of the applicant's children. At paragraph 108 the court said:
>
> > "The court recalls that it has already been accepted that when an emergency care order has to be made, it may not always be possible, because of the urgency of the situation, to associate in the decision-making process those having custody of the child. Nor may it even be desirable, even if possible, to do so if those having custody of the child are seen as the source of

an immediate threat to the child, since giving them prior warning would be liable to deprive the measure of its effectiveness. The court must however be satisfied that in the present case the national authorities were entitled to consider that there existed circumstances justifying the abrupt removal of the children from the care of the applicants without any prior contact or consultation. In particular, it is for the respondent State to establish that a careful assessment of the impact of the proposed care measure on the applicants and the children as well as of the possible alternative to taking the children into public care, was carried out prior to the implementation of a care measure".

[100] I share the view of Munby J predicated in the X Council case that judicial review might well lie to correct error or injustice during the 72 hour impasse in a context where there is no effective right of appeal and where the court has done no more than authorise the Trust to take the child from the family to a place of safety.

[105] Child protection authorities are human and are prone to err in their assessment of whether a child is in need of this degree of protection. They may intervene unnecessarily. Hence the need for close, probing and ongoing judicial scrutiny. Years of experience in determining cases in the Family Division serve to yield up the unhappy truth that there may be a tendency in ex parte proceedings to defer to the Trust's assessment particularly when these cases are being dealt with largely by Lay Magistrates often at a late hour. There may also be a tendency in ex parte proceedings to defer to the Trust assessment of the situation given the individualised nature of such proceedings and the highly charged atmosphere generated by the prospect of children in peril. In such ex parte proceedings, neither the child nor the parent nor, importantly, a guardian ad litem will have made any input. The strict rules of evidence will not have applied (see paragraph 25 of this judgment). It is a situation rife with risk of injustice and such circumstances in my view create an imperative for swift redress should the circumstances so merit it.

Discharge of an EPO

73. At para. [105] in the judgment, however, Gillen J did rule that the specific statutory prohibition on any application to discharge an EPO for an initial period of 72 hours was incompatible with the Convention. In consequence, it was swiftly removed from the 1995 Order by the Children (Emergency Protection Orders) Act (Northern Ireland) 2007. On the facts in M v South Eastern Trust and F, however, the parents

were nonetheless not permitted to move an application to discharge the EPO next day when they sought to do so before another Family Proceedings Court. The judgment deals with this:

> [16] Art 64(9) provides that there is no appeal against the making of an EPO. Under Art 64(7) the parents can apply to the Court for the EPO to be discharged. However, this is limited by Art 64(10) which precludes such an application being made by someone who had been given notice of the hearing at which the order was made and was present at that hearing. An application by the appellant to discharge the EPO was refused on this basis.

And again:

> [29] As a result of the manner in which the DJ proceeded the appellant suffered further prejudice by reason of the operation of Art 64(7), (9) and (10) of the 1995 Order. These provide that there is no appeal from the making of an EPO. The effect of this provision is mitigated by the ability of the parent to make an application to discharge the Order. However, a parent is not entitled to bring such an application if she was given notice of the hearing and was present at the hearing. It is not clear to us that the latter condition applied in the present case since she was excluded from the hearing. However, we were informed by the appellant that an application to discharge was brought the following day but was not able to be listed in light of Art 64(10).

74. Article 64(10), where relevant, is actually drawn in the following terms:

> (10) Paragraph (7) does not apply—
> (a) where the person who would otherwise be entitled to apply for the emergency protection order to be discharged—
> (i) was given notice (in accordance with rules of court) of the hearing at which the order was made; and
> (ii) was present at that hearing;
> …

75. As a matter of law, then, without a summons being duly served, the appellant had not been given notice of the hearing. She was therefore entitled to seek a discharge of the Emergency Protection Order next morning, whether the previous evening's hearing had been before a full Family Proceedings Court and she present, or before a District Judge (MC) alone.

Judge John Meehan

District Judge (Magistrates' Courts)
Dungannon Family Proceedings Court