**SECTION 20 GUIDANCE**

**INTRODUCTION**

The following note is provided as a guidance document for the effective use of section 20, also referred to as voluntary accommodation. It does not consider the question of whether a placement is voluntary accommodation or a family arrangement.

**The Legislation**

Local authorities have a **duty** to provide accommodation for any child in need in their area who appears to them to require accommodation as a result of there being:

(a) no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

**Case Law**

The use by local authorities of section 20, under paragraph (c) above, has been the subject of judicial scrutiny and criticism in a number of cases recently.

The courts have identified four separate problems, often seen in combination:

* The failure to obtain the informed consent of the parent(s)
* The form in which the consent of the parent(s) is recorded.
* The arrangements continuing far too long
* The failure to return the child to the parents immediately upon withdrawal of consent.

It has been a concern of the courts that section 20 deprives the child of the benefit of having an independent children’s guardian to represent and safeguard their interests and deprives the court of the ability to control the planning for the child and to prevent and reduce unnecessary and avoidable delay.

The misuse of section 20 has led to awards of damages under section 7 of the Human Rights Act 1998 and local authorities and social workers have received significant criticism.

**“Local authorities which use section 20 as a prelude to care proceedings for lengthy periods or which fail to follow the good practice…identified, can expect to be subjected to probing questions by the court. If the answers are not satisfactory, the local authority can expect stringent criticism and possible exposure to successful claims for damages”.**

In the case of Re N (Children)(Adoption: Jurisdiction) [2015] the President of the Family Division gave guidance in addition to best practice for local authorities on how to accommodate under section 20 and agreements in writing.

**CONSENT**

The consent of the parent(s) should be **informed**, **capacitous** and **freely-given.** The implications of agreeing and not agreeing need to be explained to the parents. There must be genuine agreement.

* **Capacity**

A parent must have litigation capacity to consent to accommodation under s20. In obtaining such consent every social worker is under a personal duty (the outcome of which cannot be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so.

In taking consent the social worker must actively address the issue of capacity and take into account all the circumstances prevailing at the time and consider the relevant questions in determining capacity, particularly the ability of the parent at that time to weigh all relevant information.

When considering whether a parent has capacity you should consider the parent’s ability to:

* **understand** the information relevant to the decision,
* **retain** that information,
* **use or weigh** that information as part of the process of making the **decision** [i.e. whether the child should be accommodated], and
* **communicate** their decision.

If the social worker has any doubts about the parent’s capacity to agree to accommodation then no further steps should be taken to obtain the consent and advice should be sought from their team manager.

A full discussion of capacity is beyond the scope of this note however further assistance can be found in the Code of Practice accompanying the Mental Capacity Act 2005 which is freely available online.

* **Fully Informed**

The social worker must be satisfied that the consent is fully informed:

1. Does the parent fully understand the consequences of giving such a consent?
2. Does the parent fully appreciate the range of choice available and the consequences of refusal as well as giving consent?
3. Is the parent in possession of all the facts and issues material to the giving of consent?

If not satisfied that the answers to (a)-(c) above are all “yes”, no further attempt should be made to obtain consent on that occasion and advice should be sought as above and further consideration should be given to obtaining legal advice.

* **Freely Given**

**An arm around the waist, not an arm held up the back**

Consent must not be compulsion in disguise; submission in the face of asserted State authority; conflate absence of objection with actual consent; [given by a parent] who believe[s], quite erroneously, that a local authority has power, without any court order; or something approaching duress.

Undoubtedly, where the parent is asking for the child to be accommodated then the consent is likely to be freely given. Where the local authority lead the discussion then there is a greater chance of pressure being perceived by the parents of having been asserted.

* **Fairness**

Is the social worker satisfied that the giving of such consent and the subsequent removal is necessary, fair and proportionate. In determining this questions to consider may be:

1. What is the current physical and psychological state of the parent?
2. If they have a solicitor, have they been encouraged to seek legal advice and/or advice from/family or friends?
3. Is it necessary for the safety of the child for him/her to be removed at this time?
4. Would it be fairer in this case for this matter to be the subject of a court order rather than an agreement?

The document signed by the parents must be clearly worded and the parents must understand their right to remove the child from the local authority accommodation at any time.

In cases where the parent is not fluent in English it is vital to ensure that the parent has a proper understanding of what precisely they are being asked to agree to.

Local authorities will want to approach with great care the obtaining of s20 agreement from a mother in the aftermath of birth, especially where there is no immediate danger to the child and where probably no order would be made.

**RECORD OF CONSENT**

There is no legal requirement for the agreement to be in writing. However, a prudent local authority will always wish to ensure that parental consent is properly recorded in writing and evidenced by the parent’s signature. This is a requirement within Wiltshire Council.

The written consent document should be clear and precise as to its terms, drafted in simple language that the particular parent can readily understand.

The document should spell out, following the language of section 20(8), that the parent can “remove the child” from the local authority accommodation “at any time”.

The consent document should not seek to restrict the parent’s exercise of the parent’s right under section 20(8).

Where the parent is not fluent in English, the parent should be assisted by an appropriately qualified interpreter in any discussions leading to parental consent being given. The consent document should be translated into the parent’s own language and the parent should sign the foreign language text, adding, in the parent’s language, words to the effect that “*I have read this document and I agree to its terms*”. If it is not possible for a translation of the form to be prepared as the time consent is given, the form of consent should contain a statement confirming that it has been read over to and explained to the parent in his or her own language.

**LENGTH OF ACCOMMODATION**

Local authorities should not use section 20 as a prelude to care proceedings for lengthy periods. This is particularly so in cases with an international element.

**REMOVAL FROM ACCOMMODATION**

A local authority which fails to permit a parent to remove a child in circumstances within section 20(8) acts unlawfully, exposes itself to proceedings by the parent(s) and may even be guilty of a criminal offence.

The President has stated that he is “exceedingly sceptical” as to whether a parent can lawfully agree in advance to give the local authority a specified period of notice before exercising their section 20(8) right.

**PRACTICAL IMPLICATIONS**

The conversation around section 20 is likely to be different depending on the circumstances and why the child is coming into care. The following elements should be present when accommodation is at the suggestion of the local authority.

1. Explain the local authority concerns and that the local authority thinks that it would be in the child’s best interests for the child to be looked after for a period of time. The parents should have all the facts and the issues relevant to giving agreement explained.
2. Explain the implications of what will happen if the child becomes accommodated. This should include consideration and explanation of:
	1. The purpose of the accommodation. Care should be taken around explaining the purpose so that the goalposts do not shift in the future. If the purpose is, for example, while the parents clean the property then there is a legitimate expectation that the children will come back when the property is clean. The social worker will need to be clear about all the concerns that are at play in the family.
	2. The likely duration of the accommodation.
	3. Contact arrangements.
	4. What the family circumstances would need to be so that the child can come back home i.e. the expectations on the parents of what should change and how the local authority will support this.
	5. The legal situation for the child. This includes that the Local Authority does not gain parental responsibility, and that an IRO would be appointed as part of the LAC process. Any legal steps that are being considered such as further legal advice/pre-proceedings/court should be set out. It should be clearly explained that there is no obligation for the parents to agree to s20 accommodation.
	6. **It should be explained that the parents have a right to withdraw the child at any time.**
3. Explain the implications of what will happen if the parents do not agree to accommodation i.e. the consequences of refusal. This needs to be explained carefully, avoiding creating a sense of duress, or of the possibility of parental submission or compliance, or creating the impression of a right by the local authority to have the child accommodated. If referral to court is being considered then it is important to explain that the parent would be able to be legally represented for free within any such proceedings and it would ultimately be for the Judge to make any decision. You may wish to explain the role of the children’s guardian.
4. You may wish to have the parents repeat back the key elements to ensure that they understand the situation as explained to them.
5. The parents may want to speak to a solicitor. They may have one already if they are involved in the pre-proceedings process. This should be encouraged. If not, they may be able to secure legal aid under the Legal Help Scheme to obtain legal advice. Some firms of solicitors may also provide free initial advice.
6. Any agreement should be recorded in writing.  The written document should be clear and precise as to its terms, drafted in simple and straight-forward language that the particular parent can readily understand. The written document should spell out that the parent can remove the child from the LA accommodation at any time. The written document should not seek to impose any limitations on the parents around removal such as the requirement of a notice period. Where the parent is not fluent in English, the consent document should be translated into the parent’s own language and the parent should sign the foreign language text, adding, in the parent’s language, words to the effect that “I have read this document and I agree to its terms”.

Social workers are responsible for monitoring the physical and psychological state of the parent during these discussions and ensuring that they are in an appropriate state to make any agreement. For example, is the parent prevented from understanding the situation due to being emotionally overwhelmed? Significantly affected by drugs or alcohol? Feeling that they have no option but to sign the document? Having just given birth? Any of these issues may mean that the parents are not in a situation to properly agree to the child’s accommodation making seeking such agreement inappropriate.

The social worker is responsible for ensuring that they have not coerced or forced a parent into agreeing to accommodation. They are required to police their own conduct and monitor the impact on the parent during the conversation. Part of good social work practice is for social workers to promote change through constructive challenge of parents and promoting reflection. Attention should be paid by the social worker to the impact upon the parent of such challenge to ensure the conversation remains appropriate and does not become coercion or duress, whether actual or perceived. Proper reflection and consent may promote the recognition of the need for change and be an active step by the parent.

The social worker will need to consider whether it is necessary for the safety of the child for them to be removed at this time, and also whether it might be fairer if the matter is put before the court, including the impact on the parents of any such proceedings.

**NB: In the event that the situation is considered to be unsafe and there is no parental agreement to accommodation then advice should be sought from HOS for an EPO.**

**The social worker should record the above clearly in a case note**, including details of the parent’s state and understanding.

Other situations

A child coming to live with a family member may not come about immediately through the actions of the local authority. The police may exercise their powers of protection and (incorrectly) leave the child with a family member, or create such a circumstance through family arrangement which could be considered to be compulsion.

Alternatively, a parent may simply not agree to a child being accommodated but then go on to make family arrangements in circumstances where a s20 duty on the local authority exists.

Where a s20 situation is considered to exist, regardless of how it came about, the considerations around capacity, consent, and paperwork need to be addressed. Whatever the outcome, care should be taken to record the circumstances in writing to parents and carer including noting where support will come from. In the event that the local authority is prevented from fulfilling their s20 duty but the child is outside the family home, it is important that planning for the child actively and purposefully continues even without the scrutiny of the LAC process.

Short Term Use of s20

Section 20 remains an appropriate way of working in partnership with parents. Any short term use of s20 however must be **purposeful** and part of an active plan for the child. Social workers may wish to consider the following factors.

*What is short-term?*

By way of guidance, the Local Authority is required to have a **plan for permanence** by the second LAC review, i.e. **before 4 months**.

Munby LJ noted in *Re N (Adoption: Jurisdiction)* that section 20 may, in an appropriate case, have a proper role to play as a *short-term* measure pending the commencement of care proceedings, but the use of section 20 as a prelude to care proceedings for a period as long as in that case **[8 months] is wholly unacceptable**.

Duration is inextricably linked to the child’s age and the circumstances and caution should be expressed around using absolute durations.

*What has led to the need to accommodate?*

If the need to accommodate is part of a short term issue then it is likely to be more appropriate to provide accommodation to get past the current circumstance than seeking court intervention. Examples of this may be a bereavement, or a short term decline in mental health with a good prognosis for recovery (care should be taken around capacity). The impact on the parent of formal proceedings should be considered as bringing proceedings may destabilise the parent. If the need to provide accommodation is part of a pattern of long standing concerns then recourse to court proceedings may be more appropriate at an early stage. These situations may be difficult to balance.

The social worker will wish to consider what the likelihood of parental change is when considering the duration of the accommodation. If there is little prospect of change then this is likely to indicate a need to issue proceedings. Conversely if the prognosis is good then this may warrant a longer period of accommodation for changes to be made.

In cases where there is a significant injury which is believed to be non-accidental and a court hearing will be required to determine how it happened then proceedings should be issued as soon as possible. It is the same when there are allegations of sexual abuse which will require adjudication by the court. Whilst it is not inappropriate to voluntarily accommodate within this period the court will expect care proceedings to be commenced within days.

*Drift or Purposeful Planning?*

When intervening in family life the key question the court will consider is “Who will the child live with?” A purposeful intervention is one which is actively seeking to address this question, looking at multiple care options **alongside** **actively seeking reunification**. If care options are not being assessed or reunification is not progressing then the accommodation may no longer be purposeful. The fact of the child being safe is not progressing an active plan for the child.

Where there is no active purposeful planning the matter will drift. This is not acceptable and will result in judicial criticism.

Long Term Use of Section 20

Section 20 remains a proper way of working in partnership and may be appropriate for use longer term depending on the age of the child and circumstances of the family. Around 30% of the LAC population is through section 20 nationally, and between 40-50% of children accommodated under section 20 are reunified with their families.

Long term use of section 20 is most is most likely to be appropriate when:

* The parents are fully in agreement with the child being accommodated and are working in partnership with the local authority. This includes constructive planning around contact, and the consent being revisited at each LAC review.
* The parents are actively exercising their parental responsibility.
* If the parents sought the child’s return you would not seek an order preventing the return, although a package of work and support may be required. (NB this should be being actively reviewed and supported in any event).
* More suitable for older children. If the child is 16 or over and wishes to remain in care they are able to override any parental wish for them to return home.

The above presents a picture of working in partnership.

Long term use of section 20 is less likely to be appropriate if:

* The child is young / very young.
* The parents are ambivalent about section 20, or occasionally appear to be change their minds. This may include a lack of clear agreement around contact.
* No-one is consistently exercising parental responsibility or there is a dispute between the parents, even if one or other has a child arrangements/residence order and can technically override the wishes of the other parent.
* If the parents wanted the child home you would be concerned and would want the child to remain in care under a court order.
* The above presents a picture of acquiescence or begrudging acceptance of local authority involvement.

Long term use of section 20 is not appropriate if:

* The parents do not have capacity.
* The parents do not agree to section 20 or would only agree after pressure is exerted upon them.
* The parents cannot be found or are not engaging or exercising parental responsibility.

It has been suggested by HHJ Wildblood QC DFJ at Bristol that any decision around longer term approval or use of section 20 is taken by a senior manager and such decision is recorded clearly on the file.

Difficulties

The statute describes the parental right as one to object which is subject to a requirement that the parent is willing and able to provide or arrange accommodation for the child. This has yet to be tested and may have some relevance to advice given in short term situations. However, the existence of bail conditions preventing a parent caring for a child does not mean that, for the purposes of section 20, the parent is prevented or incapable of providing care for the child. The parent would still need to actively consent to section 20: Williams and Another v London Borough of Hackney (2015).

16.02.16