**Best Practice Guidance on the use of S20**

**Introduction**

Further to the recent re-launch of the PLO by the President of the Family Law Division, and the updated guidance on the use of s20, this guidance has been produced in order to assist social workers feel more confident about the appropriate application of s20.

There have been a number of high profile cases that have reflected upon the use of s20 and offered principles which shape this guidance. The case law is set out in the appendix to this guidance.

When deployed appropriately, s 20 of the CA 1989 can be very positive and is a necessary tool in a social worker’s arsenal of strategies, in working with families to prevent the need to start court proceedings.

That said, however, the use of s20 over the last 8 years has been subject to significant judicial oversight which in turn has seen the use of s20 diverge regionally.

There have been a number of high profile and damming judgements concerning the use and application of s20. One of those notably being made against HC, which as a result has given rise to significant anxiety around its use.

The cases illustrate a number of problems with the use of section 20, in particular (please see appendix 1 for case law):-

* Children languishing on s20 for considerable periods of time before proceedings are contemplated or even issued.
* There is a failure of some local authorities to have a mechanism to continually review cases of children who are subject to s20.
* There is a failure to care plan effectively or at all for children while they are accommodated under s20.
* Separation of a baby from the mother at or shortly after birth without police protection or a court order, where a mother has not delegated the exercise of her parental responsibility to the local authority
* Retention of a child in local authority accommodation after one or both parents have indicated a desire to care for the child or even formally asked for his return;
* A lack of action where the perception is that the parents do not object to the accommodation, even though this means that no constructive planning for the child’s future takes place.
* These cases also illustrate the dilemma posed to the local authority: something has to be done to look after the child but there are serious doubts about whether the parent can validly delegate the exercise of her responsibility.
* Equally, they illustrate the dangers if the local authority proceed without such delegation or obtain it in circumstances where the parents feel that they have little choice.
* Even though the parents may have consented to s20, there is still the ongoing failure to work collaboratively to get to the point of the children being able to return home.

It is perhaps not surprising that these cases have forced Local Authorities, Herefordshire in particular, to step away from the use of s20 in an effort to escape falling into legal error and abusive practice. The consequence of this however has created the completely opposite effect in that there is evidently a limited use or trust in the use of s20.

**Guide to Good Practice**

**Where we are now**

The importance of s 20 was re-emphasised by the UK Supreme Court in **Williams v London Borough of Hackney [2018] UKSC 37 which endorsed its continued use** provided there is sufficient and robust monitoring mechanism to ensure that children do not remain on s20 for longer than is necessary. The public law working group on the matter has made it clear that s20 can be used in the case of new born babies but suggested its application should be rare. In all circumstances it must be considered on a case by case basis.

**Legal Summary**

Statutory provisions: s 20, CA 1989

Part III, CA 1989 - S 20 provides for two classes of duty on the local authority to accommodate children: a mandatory duty and a discretionary duty.

The Act places:

• a mandatory duty to provide accommodation for a child in circumstances where:

1. there are no persons with parental responsibility for the child,
2. the child is lost or abandoned,
3. the person caring for the child is prevented from providing suitable accommodation for the child, or,
4. A child in need who is within the local authority’s area is at least sixteen years old and whose welfare is “likely to be seriously prejudiced if they do not provide” the child with accommodation.

* a discretionary duty to provide accommodation for a child in circumstances where

1. it is considered that it will safeguard and promote the child’s welfare even where a person with parental responsibility can accommodate the child, or
2. a person who is sixteen years old but under twenty-one years old may be accommodated in a community home which takes children who have reached the age of sixteen if to do so is considered to safeguard and promotes the child’s welfare.

A local authority is not permitted to accommodate a child under s 20 if a person with parental responsibility who is willing and able to provide or arrange for accommodation objects. A person with parental responsibility may at any time remove the child from local authority accommodation that is provided under this section. There is no requirement to give notice.

The only exceptions to that person being able to remove the child from local authority accommodation are:

* when a person with a “lives with” child arrangements order, a special guardian or a person in whose care the child is put under the High Court’s inherent jurisdiction agrees to that accommodation;
* when a child who is 16 or over agrees to being accommodated.

The statute does not prescribe any time limits or maximum duration for any accommodation under s 20 and it was common ground that case law up to this point had focused on section 20 accommodation as a short-term or temporary solution for children.  That position has now altered with the Court of Appeal endorsing the use of s20 as a long term measure where that placement is supported by the parents. Any such accommodation is the subject of the local authority’s duties that are set out in s 22, CA 1989, as reinforced by the Care Planning and case Review (England) Regulations.

**Working with families**

Working with parents and families collaboratively is an essential part of s 20. Partnership is key and the best results can be achieved where there is a full and frank conversation with all parties, where the meaning, use and application of s20 is clearly understood by the family.

Identify the context and purpose for which s 20 is being considered. This may be short-term accommodation during a period of assessment or respite; alternatively, it may be a longer period of accommodation, including the provision of education or medical treatment.

As far as it is reasonably practicable identify, locate and consult with every person who has parental responsibility for the relevant child. The giving of consent is a positive act. Do not treat silence, lack of objection or acquiescence as valid consent;

Involve the wider family as they may be central to the placement of children.

For cases that are in PLO and where the use of s20 may be appropriate, it is good to discuss this with the families within this forum as they will be supported with legal representatives. It is hoped that this will take the sting out of seeking s20 at short notice where parents have been unaware or ill prepared for its use.

**New born babies and separation from mother.**

The use of s20 for new born babies has been a source of some divergent practice and Herefordshire appears to have ceased using this when considering separation at birth. While we cannot clearly nexus the two positions, there has been a considerable upturn in the issuing of urgent application with the concurrent down turn in the way we use s20 for this cohort.

At present, some 70% of hearings listed are listed with 3 days’ notice (figures provided from CAFCASS for April-December 2022). This is a relatively high proportion as compared to the national average we are currently looking at ways in which as a LA we could reduce the number of urgent short notice hearings.

A recent meeting was held to discuss this issue with the DFJ, a number of options were explored and one of the options was the way in which the LA uses s20, particularly with new born babies. At the moment it is almost never applied in the case of new born babies here in Herefordshire and we often have to rely on hospitals to keep babies in hospital long after they are fit for discharge, so that we can secure an urgent listing of the Court.

While guidance in the recent public law working group on the matter has suggested that the use of s20 should be rare, it was confirmed by the DFJ that he supports the use of s20 with new born babies. This is especially the case where a family has been subject to a pre-proceedings process and the expectant parents have had access to legal advice, and that this is done on a case by case basis. He confirmed his view that he considers the appropriate use of s20 is far preferable to a mother enduring a fully contested hearing so soon after giving birth, thus allowing a new mother a greater recovery period following birth before a contested removal hearing and therefore affording a greater opportunity to parents to access legal advice. This would in turn reduce the number of urgent hearings for the local authority.

Issuing care proceedings at birth raises a number of distinct challenges regarding procedural fairness. When proceedings are issued on an urgent basis the local authority applies to the court for a hearing with abridged notice, cases can be listed the same day in the worst case scenario or best case still as little as 1-2 days. Given moves towards a shorter notice period, it is questionable whether safeguards for parents are, in practice, materially better than those afforded by s20 agreement. For a new mother, agreeing to s20 for a short period of time may be less dramatic than being propelled into a contentious court hearing that seeks urgent removal.

While there is no prohibition on the use of s20 with new-borns or young babies, it is an area that requires much more care and consideration. The separation of mother and baby therefore should not be routine, or as suggested in the PLWG, it should be rare and considered on a case by case basis.

In appropriate cases discussions about the use of s 20 can commence some time prior to birth, and as part of a pre-proceedings process, so that the parents have time to consider all of the options and be assisted in making an informed decision with the benefit of legal advice. It is best that they have legal advice during this time so that the legal implications are made clear to them.

* the social worker is under a personal duty to be satisfied that the person giving consent has capacity;
* consent must be fully informed;
* the obtaining of such consent and the subsequent removal must be both fair and proportionate.
* Capacity is issue- and situation-specific.

It is proposed that advice would be given at legal gateway in respect of the use of s20 in appropriate circumstances with unborn babies and the PLO process.

**Continuous review of s20**

Key to the appropriate use of s20 is the regular review of the purpose and duration of the period of accommodation. In addition to that the needs of the child must to be continuously assessed including their educational, psychological and therapeutic needs.

Have particular regard to the child’s age. Different considerations, including the purpose and duration may The following should done,

1. The frequency of the reviews should be agreedat the time that the agreement is signed and recorded in that document.
2. The appropriate frequency will depend on the facts of each case but should be heavily influenced depending on the age group of the relevant child. Consider the groups as follows (1) new born and very young babies, (2) toddlers up to five years of age, (3) six years old to pre-teens, (4) teens but under sixteen years old, and (5) sixteen years old or older when the child can consent to accommodation. Generally longer-term provision of accommodation can be reviewed in line with looked-after child reviews. However, short-term provision of accommodation may require more frequent reviews.
3. The accommodation should be reviewed as soon as it is practicable when there has been a material change in the circumstances. This is key to ensuring that continued s20 accommodation remains suitable and lawful.
4. Accommodation reviews should be undertaken by an IRO who at each accommodation review may alter the agreed frequency of the subsequent accommodation review.
5. The review should involve all persons capable of continuing to give informed consent to accommodation.

**Consent from those with PR**

When consulting with the person who holds parental responsibility, ensure that they have capacity to consent. Capacity can change and it should be reviewed as necessary. The issue of capacity must be decided by applying s.1-s.3 of the Mental Capacity Act (2005). If there are doubts about any relevant person’s capacity, take no further steps until the question of capacity has been addressed. A person may have capacity to agree but have extra needs. Consider if these needs can be met by engaging adult services or an intermediary.

Cognition is different to capacity and low cognition is not mean a person lacks capacity. The threshold for capacity is very low, in that a person must be able to make a specific decision, understand that decision and communicate it.

**Unaccompanied asylum seeking children**

For unaccompanied asylum-seeking children in the UK with no parent or carer able and willing to provide accommodation the presumption is that they fall within the scope of section 20. R v Hillingdon London Borough Council [2003] EWHC 2075 (Admin)(HC) confirmed that UASC under 18’s should be accommodated as looked after children under s20 of the Children Act 1989 and no other provision.

If however a child’s vulnerability means that their welfare could be prejudiced then consideration should be given to applying to the court for a care order under s31 of the Children Act. These situations will be rare, but could include where a child develops complex medical needs or where a trafficked child remains at risk while in the UK.

**Conclusion**

The way we use s20 should be reviewed in light of the current case law, the views of the public law working group and other prevailing circumstances. While changes, in particular the use of s20 in new born babies will represent a paradigm shift to what we are currently accustomed, it would help us move towards best practice and reduce the number of urgent hearings.

**February 2023**

Appendix 1

**The Case Law**

**Re S (A Child) and Re W (A Child) (s 20 Accommodation) [2023] EWCA Civ 1**

With respect to **Re S**, the court concluded that granting a care order was not a proportionate response to an unsubstantiated risk that the child's father might disrupt the placement and remove the child from the accommodation. While S's father could, in law, remove the child, there was insufficient evidence he would.

Regarding **Re W**, the court found that the trial judge erred in believing that section 20 accommodation could only be a short-term measure, which had disproportionately weighted her analysis in favour of a care order. Further, in any case it was disproportionate to make a care order primarily to grant the local authority parental responsibility as a means of setting boundaries and responding to a mere risk that the child would develop challenging behaviour in future.

*Finding*

The Courts declined to make a care order in respect of the children and ordered that the children remain in their current long-term placements but under section 20.

**H (A Child: Breach of Convention Rights: Damages) [2014] EWFC 38 (29 October 2014)**

This case involved the placement of a new born baby with foster carers on discharge from hospital. Both parents had learning difficulties and agreed to the baby being placed with a particular couple. At that stage the local authority considered this an informal arrangement rather than section 20 accommodation. Only five months later did they decide to seek the parents’ retrospective consent to section 20 accommodation. Care proceedings were not issued until the child was nearly a year old.

*Findings* - The local authority accepted that they had breached the rights of both parents under articles 6 and 8 of the ECHR in a variety of ways - mainly by failing to involve them properly in the decision-making process, by seeking consent in the way that they did, by placing insufficient weight on the parents’ clearly expressed wish to care for the child, and by delaying both the assessment of the parents and the issue of proceedings.

**Northamptonshire County Council v S [2015] EWHC 199 (Fam),**

Here the mother agreed to the accommodation of her two-week-old baby and care proceedings were issued nearly four months later.

Findings - The local authority accepted that they had acted in breach of the rights of both mother and child under article 6 and 8, largely because of the delays both before and after proceedings were issued, which were seriously prejudicial to the child’s welfare and the ability of both to enjoy family life with members of the family.

**Re: AS, London Borough of Brent v MS, RS and AS [2015] EWFC B150, 7 August 2015,**

The case concerned a boy aged eight at the material time, both of whose parents had severe mental health problems. Very shortly after he had been returned to his mother’s care when she came out of hospital, she suffered a relapse and called an ambulance, leaving the child with a neighbour. A social worker was called and decided that neither the neighbour nor the paternal grandparents were suitable and so the child should be accommodated. The following day the mother was compulsorily admitted (“sectioned”) under section 2 of the Mental Health Act 1983.

*Findings* - There were doubts about mother’s capacity, which fluctuated, and her consent to the accommodation was never obtained. Care proceedings were not issued until a month later. Judge Rowe QC cited that in the absence of parental agreement, a child could only be removed under an interim care order, emergency protection order or into police protection.

**Medway Council v M and T [2015] EWFC B164**.

This too concerned a child (aged five) who was placed in emergency foster care after his mother was detained in hospital under the Mental Health Act. The mother was then too unwell to discuss section 20. The local authority thought that there was no need to issue care proceedings as there was no-one to exercise parental responsibility and the mother was not requesting the child’s return. Consent was eventually obtained six months later after the mother had left hospital but there were doubts about whether it had been validly obtained. Care proceedings were not issued until the child had been accommodated for more than two years.

Findings - There was needless and unjustifiable delay.

**Herefordshire Council v AB and CD and Herefordshire Council v EF and GH [2018] EWFC 10.**

GH was born in early 2008.  He was born with significant disabilities and spent the first five months of his life in a special care baby unit in Hereford hospital.  GH was accommodated pursuant to section 20 of the 1989 Act in September 2008. .  He was not made the subject of public law care proceedings until September 2017 when he was nine years of age; a period of nine years under section 20 accommodation. The same was the case of CD who spent 8 years on s20 and continued to do so even when his mother has written to the Local Authority requesting his return.

*Findings* - Criticism was directed at delays of eight years (between the ages of eight and 16) in the case of CD and nine years in the case of GH. In CD’s case, the mother had written to the local authority formally withdrawing her consent to his accommodation when he was about nine and had only been accommodated for five months.