Section 20 and care proceedings

By Emma Griffiths
3PB Barristers

A recent experience in court highlighted that misunderstandings still exist around s 20 of the Children Act 1989 (the CA 1989). Here is a whistle-stop tour of key principles, authorities and Guidance to signpost practitioners when faced with an issue about the appropriate legal framework for accommodating children who are subject to care proceedings.

Those who practice public law will be familiar with the concept of 'consent to s 20' when a parent agrees for their child to be 'taken into care' for a period of time, usually before proceedings are issued and sometimes during their currency. Section 20(1) CA 1989 places an obligation on a local authority to provide accommodation to any child in need as a result of (a) there being no person with parental responsibility for them; (b) his being lost or abandoned or (c) the person who has been caring for him being prevented (whether or not permanently for whatever reason) from providing him with suitable accommodation or care. In care proceedings, the latter is the most commonly encountered scenario.

Crucially, a local authority cannot place a child in local authority accommodation or retain a child already accommodated under s 20, if a person with parental responsibility objects and that person is willing and able to provide accommodation or to arrange for accommodation to be provided – for example, a parent places a child with a family member (s 20(7))[1]. Faced with a child who they consider to be suffering or at risk of suffering significant harm and a parent's objection to removal, the local authority's only recourse is an application to court for an emergency protection order (s 44 CA 1989) or an interim care order (s 38 CA 1989). Only the police are empowered to remove a child notwithstanding a parent's objection and without recourse to the court, for a time-limited period of no more than 72 hours (a Police Protection Under pursuant to s 46 CA 1989).

Therefore, fundamental to the use of s 20 is a parent's agreement. As to what constitutes lawful agreement, in *Williams v Hackney LBC* [2018] UKSC 37, Baroness Hale stated that it

[1] Note that if a person has a lives with order under s. 8 in their favour or is a special guardian or caring for a child under wardship, and agrees to local authority accommodation, a parent with PR cannot object (s. 20 (9))

may be confusing to talk of 'consent' in this context. In agreeing to s 20 a parent is delegating their parental responsibility to the local authority 'for the time being' and 'that delegation can be real and voluntary without being fully informed' [39]. While formal consent may not be a legal requirement, the Public Law Working Group's Guidance (March 2021) outlines best practice when seeking a parents' agreement and uses the term 'consent' throughout. It makes clear that best practice requires a local authority to ensure a parent has capacity to agree, is fully aware of the consequences of their agreement, the full range of options available to them and that they can withdraw their consent at any time. It also highlights that consent is a positive act and may be invalidated if given in the face of threats to issue court proceedings and that separation of a newborn or a young baby is deemed scarcely appropriate under s 20 (§ 20-34). The Guidance is of course not 'law' but encapsulates principles to be found in case law. For a distillation of those principles, practitioners are referred to the *Hackney* case at paragraphs 38-50.

Section 20 is not simply a short-term solution but may be the proportionate legal framework when the long-term plan for a child is local authority accommodation. In *Hackney*, the Supreme Court confirmed there is no statutory time-limit on s 20 [49]. In the conjoined appeals of *Re S and Re W (A Child)* [2023] EWCA Civ 1 the Court of Appeal laid to rest the misconception that s 20 should only be used for short-term or interim accommodation [63]. *Re S and Re W* concerned two children with complex needs. Threshold was met under the limb of 'beyond parental control' and the care plans (placements in a residential unit and foster care respectively) were agreed. Both appeals against the making of care orders were successful. At the heart of each case was the 'no order' principle and whether the courts at first instance had been justified in making care orders which empowered the local authority, under s. 33 CA 1989, to limit the parents' use of their parental responsibility. Common features of each case were the parents' support of the children's settled, long-term placements and the lack of any (or any cogent) evidence of a risk that the parents' consent to the placements was likely to be withdrawn.

It is not uncommon to hear it advanced in support of an interim care order instead of a s 20 agreement, that a care order will ensure a child receives the support that they need. In practice, the combination of judicial oversight, legal representation and the appointment of a children's guardian may very well result in a more robust and thorough assessment of a child's needs. However, this is due to the fact of proceedings, not any additional duties on the local authority imposed by a care order. A child is 'accommodated' by the local authority whether under s 20 or a care order and the duties on the local authority are the same: see s 22 CA 1989 and the Care Planning, Placement and Case Review (England) Regulations 2010.

In many sets of care proceedings, where there are grounds for removal and separation at an interim stage, there will be corresponding grounds for the local authority to hold parental responsibility that can 'trump' that of a parent. However, there will be cases where the evidence is that the parents have co-operated, and will continue to do so, notwithstanding that threshold is crossed. In those cases, any risks to the child may be safely managed under the less-interventionist framework of a s 20 agreement, bolstered by a robust written agreement; an interim care order would therefore be unnecessary and disproportionate.

18 February 2025

Emma Griffiths

Barrister
3PB Barristers

0330 332 2633
Emma.griffiths@3pb.co.uk

3pb.co.uk