Is Time Running Out for Section 20 of The Children Act?

Julie Stather, barrister of 42 Bedford Row, examines the recent use of section 20 and considers its future in the light of the impending 26 week limit for care proceedings.

Section 20(1) has long been the section of the Children Act 1989 most likely to give rise to differences of opinion. Give a room full of lawyers a set of pertinent facts to work from and half of them would advise the parents to agree to s20 accommodation and the other half would advise them to fight it tooth and nail. This article examines the recent use of s20(1)(c) and the efforts of the judiciary to give guidance about that use, and considers what the future may hold in the increasingly tightly regulated world of care proceedings.

The statutory power to provide voluntary accommodation

Section 20(1) CA 1989 places a duty on the local authority to provide accommodation for a child in the following circumstances:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
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> (a) there being no person who has parental responsibility for him;
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> (b) his being lost or having been abandoned; or
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> (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."

As one can see, subsections (a) and (b) deal with obvious cases where the child appears to be without his or her parents. Subsection (c) places a duty on the local authority to accommodate a child where his or her parents cannot, at that time, provide an appropriate home or appropriate care.

In addition the local authority may also provide accommodation even where a parent is able to do so:

> "(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare."

The powers provided by s20(1) and (4) are however restricted. The local authority cannot provide accommodation if anyone who has parental responsibility and is able to provide a home (whether himself or through another) objects to that course of action (s20(7)). Further, anyone with parental responsibility can remove the child from accommodation provided by the local authority at any time and without notice (s20(8)). (In practice a notice period is often built into the preamble of the order, but this is not strictly enforceable.) The ability to object or remove in ss20(7) and (8) does not apply, however, where ongoing consent to accommodation has been provided by a person who has a residence order in respect of or is a special guardian of the child, or who cares for the child by virtue of an order made in the exercise of the inherent jurisdiction of the High Court (s20(9)). In these circumstances the consent of that person overrides the objections of the person who merely has parental responsibility.

Taking all of the statutory provisions together, it can be seen that there are circumstances where parents (or others with parental responsibility) can agree to their children being accommodated by the local authority both in situations where they can and cannot provide accommodation for that child. It is in situations where parents are willing and able to provide a home for their children, but agree to those children being accommodated by the local authority under s20(4), that the most divergence of legal opinion arises.

How far can a local authority go under s20?

Consent under s20 is often given on the basis of a misconception that the local authority cannot proceed with care planning to any significant degree under that agreement. This was addressed specifically in *The London Borough of Merton v CB (a child)* [2013] EWCA Civ 476. The child was taken into police accommodation in March 2008 when she was almost two years old and had been found home alone. Her mother consented to s20 accommodation a couple of days later and whilst she expressed the intention to withdraw that consent on several occasions, she never actually did so because she was never able to provide suitable accommodation. Proceedings were issued in June 2011, but the child remained voluntarily accommodated owing to the application of the 'no order' principle. In July 2012 a placement order was made in the family proceedings court. McFarlane LJ granted permission to appeal that order, one of the grounds of appeal being whether it had been permissible for the local authority to issue an application for a placement order where the child was voluntarily accommodated.

On appeal the leading judgment was given by Ryder LJ. Reliance was placed on s22 of the Adoption and Children Act 2002 Act:

"22 Applications for placement orders

(1) A local authority must apply to the court for a placement order if-

(a) the child is placed for adoption by them or is being provided with accommodation by them,

(b) no adoption agency is authorised to place the child for adoption,

(c) the child has no parent or guardian or the authority consider that the conditions in section 31(2) of the 1989 Act are met, and

(d) the authority are satisfied that the child ought to be placed for adoption.

(2) If-

(a) an application has been made (and has not been disposed of) on which a care order might be made in respect of a child, or

(b) a child is subject to a care order and the appropriate local authority are not authorised to place the child for adoption,

the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption".

Therefore, where a child is accommodated under s20, and the local authority are satisfied both that the s31(2) threshold has been met and that the child should be placed for adoption, then it must apply for a placement order by virtue of s22(1). In the circumstances of this case, the local authority, having issued an application for a care order and being satisfied that the child should be placed for adoption, was also bound to apply for a placement order under s22(2).

The appeal was dismissed on the basis of the statutory requirement to make the application as set out above. Nowhere is it suggested that the ability of the local authority to undertake preparatory planning for the child should be curtailed because of the lack of an order.

Therefore, consent to s20 should only be given or continued in the knowledge that such consent allows the local authority to present the case to the Agency Decision Maker and then take it to a final care and placement order hearing.

Common uses of section 20

Practitioners will be aware that s20 is often used as a short term solution when a matter is first listed for hearing and there is insufficient time for a contested application for an interim care order to be heard. In a similar way, when a situation arises unexpectedly (for example a premature birth or an injury) s20 is often used outside of the court arena to allow the child to be looked after by the local authority until proceedings are issued and an interim care order hearing can take place.

But is s20 being used for longer periods of time, and in situations in which it is not appropriate? There is no statutory or judicial guidance as to the use of s20 in general terms, but comments have been made and situation specific guidance has been given in several cases.

Removal shortly after birth

In *Coventry City Council v C, B, CA, CH* [2012] EWHC 2190 (Fam) a child was removed from her mother under a s20 agreement made on the day of her birth. The pre-birth plan had allowed for the child to remain with her mother for a couple of days. The mother had suffered dreadfully during the birth to the extent that she needed life-saving surgery, and at the time of signing the s20 agreement she was receiving morphine. The mother was never told by social workers that if she refused consent her child would remain with her in the safety of the hospital for a few more days, nor was she told that the local authority would oppose any return of the child to her care. She was not encouraged to speak to her solicitor. Perhaps unsurprisingly the local authority resolved the mother's claim under section 7 of the Human Rights Act 1998 on the first day of the hearing, agreeing in a preamble that a s20 agreement should not have been sought on the day that it was and that removal was in any event not a proportionate response to the risks that existed at that time.

Hedley J observed that s20 should only be used in good faith. It should not be used to exert force on the parent, it should be suggested only where the parent clearly has the mental capacity to give consent, and it should never be used to achieve accommodation when the local authority knows, believes or suspects that an interim care order would not be made. The remainder of the judgment then deals with the specific situation of post-birth accommodation. Hedley J comments that s20 can be properly used as a longer term solution when the mother has always intended that the child be placed for adoption, where the parents have consistently expressed their consent to accommodation, and where the parents have sought such accommodation because of their own circumstances. Most helpfully for practitioners, Hedley J then provides a set of guidelines for social workers seeking s20 consent immediately after birth. Those guidelines have been specifically approved by the then

President, Sir Nicholas Wall. The guidelines are at paragraph 46 of the judgment and are intended to apply to those cases which are likely to result in proceedings (i.e. not those cases identified above when s20 can be properly used in the longer term):

"i) Every parent has the right, if capacitous, to exercise their parental responsibility to consent under Section 20 to have their child accommodated by the local authority and every local authority has power under Section 20(4) so to accommodate provided that it is consistent with the welfare of the child.

ii) Every social worker obtaining such a consent is under a personal duty (the outcome of which may not be dictated to them by others) to be satisfied that the person giving the consent does not lack the capacity to do so.

iii) In taking any such 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 questions raised by Section 3 of the 2005 Act, and in particular the mother's capacity at that time to use and weigh all the relevant information.

iv) If the social worker has doubts about capacity no further attempt should be made to obtain consent on that occasion and advice should be sought from the social work team leader or management.

v) If the social worker is satisfied that the person whose consent is sought does not lack capacity, the social worker must be satisfied that the consent is fully informed:

a) Does the parent fully understand the consequences of giving such a consent?

b) Does the parent fully appreciate the range of choice available and the consequences of refusal as well as giving consent?

c) Is the parent in possession of all the facts and issues material to the giving of consent?

vi) 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 the social work team should further consider taking legal advice if thought necessary.

vii) If the social worker is satisfied that the consent is fully informed then it is necessary to be further satisfied that the giving of such consent and the subsequent removal is both fair and proportionate.

viii) In considering that it may be necessary to ask:

a) what is the current physical and psychological state of the parent?

b) If they have a solicitor, have they been encouraged to seek legal advice and/or advice from family or friends?

c) Is it necessary for the safety of the child for her to be removed at this time?

d) Would it be fairer in this case for this matter to be the subject of a court order rather than an agreement?

ix) If having done all this and, if necessary, having taken further advice (as above and including where necessary legal advice), the social worker then considers that a fully informed consent has been received from a capacitous mother in circumstances where removal is necessary and proportionate, consent may be acted upon.

x) In the light of the foregoing, local authorities may want to approach with great care the obtaining of Section 20 agreements from mothers in the aftermath of birth, especially where there is no immediate danger to the child and where probably no order would be made."

In summary, the social worker dealing with the obtaining of consent has a personal duty to ensure that the mother has capacity to give fully informed consent, and must actively address that question in the decision making process. The removal must be fair, proportionate and necessary to ensure the safety of the child and much caution should be exercised in dealing with consents given in the aftermath of birth.

Section 20 where factual issues are to be determined

Lord Justice McFarlane addressed the issue of delay in *In the Matter of U (a child)* [2013] EWCA Civ 1022. In that case, a child aged almost 2 had been accommodated under s20 when unexplained bruising had been discovered in August 2012. Unfortunately, the local authority did not then issue proceedings until the mother stated in April 2013 that she would withdraw her agreement to s20. The concern raised by McFarlane LJ was that since a finding of fact hearing was obviously going to be required to determine the causation of the bruises and to make any other ancillary findings, the timetabling of that hearing and the evidence required for it had been needlessly delayed for the entirety of the period of accommodation prior to the issue of proceedings (ie 8 months). To

compound matters, a sibling had been born within that 8 month period, the planning for whom would also be affected by the delay. In short, the guidance from McFarlane LJ seems to be that where s20 is used but proceedings will obviously be required to determine a disputed fact, then there should be no delay in issuing those proceedings.

A similar situation occurred in *Medway Council v Mother & Ors* [2014] EWHC 308 (Fam). A child, aged 8 weeks, had sustained a serious head injury which resulted in subdural haematomas and retinal haemorrhages. The injuries were only detected some weeks after their being sustained because of significant swelling to the head. There was a differential diagnosis to include a possibility that the child had been shaken, and a number of CT and MRI scans and retinal examinations were planned to assist in determining the exact nature and causation of the injuries. Whilst the results of those examinations were awaited the local authority relied on the s20 consent given by both parents and did not initiate proceedings. The investigations and the resultant disclosure of results took far longer than expected and the local authority did not issue proceedings for 12 weeks, during which time the baby had been released from the hospital into the care of local authority foster carers. When the case came before Theis J for a finding of fact hearing some nine months after the injuries were first detected in hospital, the local authority applied to withdraw its application for a care order on day five of that hearing as the burden of proof could not be discharged to the requisite standard. On granting leave for the application to be withdrawn, Theis J took the opportunity to make observations about delay in issuing proceedings:

> 1. Until the local authority issued proceedings the parents did not have access to effective legal advice, and there was no mechanism for their being involved in further medical investigations.
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> 2. Where there is a differential diagnosis it is important to await the results of CT, MRI and eye examinations, but if the local authority still maintain their allegation of shaking in the light of those results, serious consideration should be given to issuing proceedings promptly.
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> 3. Once proceedings have been issued the court is in a position to manage the timetable of the case generally as well as any further medical investigations to be undertaken. In the instant case further delay was occasioned because full disclosure was not made to the local authority despite repeated requests.
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> 4. Great caution was urged regarding the use of s20 where complex medical evidence may become involved. Parents may feel that they have to agree to s20 in order that they are seen to cooperate and they may have little or no access to legal advice.

5. The 'no delay' principle in s1(2) Children Act 1989 applies not only to the conduct of proceedings but also to the issue of proceedings.

The guidance given in this case echoes that given by McFarlane LJ in *In the Matter of U*: where it is highly likely that proceedings will be required to determine a factual issue, proceedings should be issued as soon as possible rather than relying on the s20 agreement in existence.

Section 20 and the 26 week time limit

It is clear that s20 is a powerful tool in the family justice system, and one which can relieve the pressure on the court system when used properly. It can avoid the need for contested interim hearings in cases of general neglect and emotional harm, it can properly be used to take an uncontested case right through to final hearing, and its use allows local authority care planning to continue in accordance with statutory provision. However, it should be treated with extreme caution. With mothers only recently out of labour, consideration needs to be given to whether the risks can be managed by the security in place within the hospital, and whether those mothers have capacity to give informed consent.

Perhaps one of the most important factors to bear in mind is the 26 week statutory time limit. It may be that s20 is seen as a convenient way to buy more time before the clock starts ticking, especially where an unexpected or early event has occurred and the local authority finds itself not quite ready to issue proceedings. In a 26 week world, even 2 weeks' extra time might be seen as invaluable. However, what can be seen from *In the Matter of U and Medway Council v Mother & Ors* above is that delay where there are and always will be factual issues to determine may be storing up problems for the future. The comments of Theis J in the latter case, namely that s1(2) CA 1989 includes the period prior to issue, could well become a more common criticism in the event that s20 continues to be used when proceedings are inevitable. It has until now not been possible to legislate to determine maximum lengths of s20 accommodation prior to the issue of proceedings given the infinite variety of cases and evidential bases which present themselves to the court, but where there is unjustified delay, judicial criticism should be expected. If, in line with Theis J's comments, the 'no delay' principle applies to any period of accommodation before proceedings are issued as well as the period after issue, we are likely to see even factually disputed cases finalised more swiftly than ever before. Whether the same thinking which has produced the statutory 26 week time limit will be applied to the period prior to proceedings remains to be seen.

17/4/14