PRACTICE GUIDANCE FOR THE USE OF S20 PROVISION IN THE CHILDREN ACT 1989 IN ENGLAND AND THE EQUIVALENT S76 OF THE SOCIAL SERVICES AND WELL-BEING (WALES) ACT 2014 IN WALES

ORIGINS OF S20

1. S20 of the Children Act 1989 extended earlier legal provision dating back to 1948 which recognised that some parents were unable either on a single occasion or periodically to look after their child or children through no fault of their own. Looking after children on behalf of parents in stretched circumstances has therefore been a mainstream care system provision for over sixty years. In that time, many hundreds of thousands of children and parents have been supported and helped to stay together as a direct result.

CURRENT ISSUES

2. This practice guidance follows on from recent judicial concern about the current use of s20[1]. There is no existing statutory or judicial guidance about using s20/s76. We are concerned that recent judgements may lead local authorities to misinterpret the law and conclude that s20 care requires care proceedings to be issued in most if not all cases where a child becomes Looked After. At the very least, it seems likely that the strength of the judgements are encouraging local authorities to adopt greater caution in their use of s20. If caution brings about more robust reviewing when it is needed, avoiding damaging drift in care, that is a clear improvement for looked after children. The danger however is that caution is translated into a reluctance to use s20 when it is appropriate to do so. If this becomes the case, it will present a significant challenge to the no order principle at the heart of the 1989 Children Act. Furthermore, it limits the s20 offer of positive and strengths-based partnership working between social workers, children and parents.

3. We share judicial concern about those s20 cases which have drifted without decent care plans for children, where individual children looked after have suffered demonstrable harm or detriment as a direct result. This type of practice can never be excused or condoned. All local authorities should take steps to ensure they do not have a single s20 arrangement of this sort. This assurance can only be achieved by ensuring that every s20 case open to a local authority has been actively reviewed and that s20 status remains the appropriate <u>current</u> legal option and framework for the child. In this regard, the level of service received by the child must be the same

[1] Please note: In Wales from the 6 April 2016 the Social Services and Well-being Wales Act 2014 (SSW(W) Act 2014) will apply and s76 will replace s. 20 of the Children Act 1989 in Wales. References to s20 should therefore be read as references to s76 in Wales.

irrespective of the looked after child's legal status. Children subject to s20 care should never be second class citizens in the English and Welsh care systems.

4. Where current s20 cases are being reviewed or re-reviewed in the light of the recent judgments, local authorities should discuss any proposed large-scale conversions of s20 legal status to s31 applications with their local court and their local Cafcass or CAFCASS Cymru service manager. This is so that any special arrangements necessary as a result of a large number of applications can be timetabled and facilitated. When scheduling applications, a distinction should be made between those children who are stably placed but where the legal framework could be improved and children for whom a change in legal status is a pre-requisite for better outcomes in care. Applications in respect of the latter group of children warrant a top priority. All such applications must comply with the PLO and the relevant Practice Directions.

5. Judges have been especially concerned about drift in s20 arrangements for younger children. Paragraph 157 in Re N (2015) EWCA Civ1112 is the authority. The President says in his judgment, "s20 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 s20 as a prelude to care proceedings for as long as here is wholly unacceptable". The key issue is that s20 care is not a quick and inevitable prelude to s31 care proceedings for every child, only for those children, usually much younger children, for whom care proceedings has been identified as the likeliest route to achieve permanence for the child. Even then, s20 has a place in some pre-proceedings plans if it is the best way of maintaining a child-focussed dialogue with the child's parent/s, given that a move to issuing care proceedings can bring with it a greater fear in the parent of losing their child which then leads them to withdraw from both the dialogue with their social worker and co-produced casework. A balance needs to be struck, on a case by case basis, if a justified relationship of trust between certain parents and their local authority is to be safeguarded.

BEST PRACTICE WITH NEWBORN BABIES

6. Where a baby is being removed from parent/s at birth for the baby's immediate protection, care proceedings should be issued within five days, unless there are exceptional circumstances not to do so. (Nottingham City Council v (1) LM (2) DW (3) LW (By her Children's Guardian) (2016 EWHC 11). S20 is not usually appropriate in these circumstances unless the protection needed is only short-term and there is no welfare or parenting capacity issue in relation to the parent with parental responsibility, who can be supported to achieve the degree of protection for the child needed on the basis of a clear safety plan. Very exceptionally, s20 may be used in relation to babies and very young children where the circumstances for a shared care arrangement are identified in a robust social work assessment. The rationale for this must be clearly recorded, along with a record of management oversight.

POSITIVE USE OF S20

7. S20 is most obviously appropriate in circumstances where the child's parent is unable to care for them for a short period. This may be due to a hospital admission or for short breaks for a child with additional needs, for example, where there are no family or friends able to provide temporary care. S20 may be appropriate for a child with disabilities where her/his parent/s are not able to manage the level of need but can share parenting successfully, sometimes over a longer period of time.

8. Another positive use of s20 is with unaccompanied children from abroad, including those seeking asylum. S20 may be the best legal framework to use in conjunction with family and friends placements or semi-independent living arrangements.

9. Local authorities should satisfy themselves that voluntary agreements with parents for care away from home under either a child protection plan or a child in need plan, comply with the duties that flow from S20 such as regulating the placement and providing the support that a looked after child is entitled to under the relevant statute.

10. More commonly, s20 is used in circumstances where the relationship between the child and their parent(s) has broken down, and one or both of them feel unable to live together. In cases such as these, s20 is usually welcomed by the parent(s) and can be used as part of a package of mutually agreed strategies to support repair to the relationship in order to enable the family to live together successfully.

11. S20 can also be properly used when the parent/s has always intended that their child/ren should be placed for adoption and where the parent/s have consistently expressed their consent to accommodation, and where it is clear they have the capacity to do so. In such cases, consents under s19 and s20 of the Adoption and Children Act 2002 should be obtained. There is a risk in these cases that a mother changes her mind in the six weeks between the birth of her child and the minimum date when she can relinquish the child, leading to a short notice application for an Interim Care Order, but this is a manageable risk if the alternative is to automatically issue care proceedings on all babies, even where the intention to relinquish is thought through and genuine.

12. S20 continues to be an important legal option if a child's parent/s cannot identify suitable family friends or relatives to support them at a time of need. Best practice in the use of s20 hinges on a relationship of trust between the family and local children's services, well planned care episodes, and continuity of the child's carer/s e.g., if the child is in regular respite care. Where needed, intervention and support should be put in place to enable a parent/s to resume safe care of their child/ren as soon as possible.

13. Best practice in s20 also requires a local authority to promote effective contact between the child and her/his parents, even though it is not a duty under s20 (to promote contact) as it is under a s31 application.

14. Every day of their working lives, social workers are required to have complex and courageous conversations with parents about concerns they might have about the care of their children. In the main, we believe that they do this with skill, honesty, integrity and compassion. In this way, they establish relationships where difficult messages are shared and heard. If conversations about s20 accommodation take place in the right way, parents should feel that they have a painful decision to make, but that the decision is theirs.

DUTIES AND RESPONSIBILITIES OF A LOCAL AUTHORITY TO ITS CHILD ON S20 IN ENGLAND

15. Once a child becomes 'looked after' by a local authority, the local authority is subject to all the duties and responsibilities it has towards a child in its care (LAC provision). For example, each child subject to s20 care must be allocated an Independent Reviewing Officer (s25A of the Children Act 1989[2]) as well as a social worker, and each child must have their own care plan which is regularly reviewed at a LAC review (Regulation 4(2) of the Care Planning, Placement and Care Review (England) Regulations 2010[3] requires that where a child is accommodated under s20 a care plan must be prepared by the local authority 'before C is first placed by the responsible authority or, if it is not practicable to do so, within ten working days of the start of the first placement'.) Under s20 (6), the local authority should make an effort to find out what the child thinks about s.20 accommodation and give 'due consideration' to the wishes and feelings of the child[4].

16. The main differences between s20 or voluntary care, and compulsory state care under s.31, are that:

- Under s20, the parent/s with parental responsibility (PR) retains control and responsibility over major decisions in respect of the child. Day to day responsibility rests with local authorities, in practice either with foster carers or with staff in residential care. The planning assumption for s20 care from Day 1 is that the children will return home, often in a matter of days or weeks.
- The parent/s with parental responsibility can take the child out of care at any point (s20 (8)). If the local authority wants to retain the child in care, it should initially discuss its concerns with the parent/s, and if an agreed way forward

[2] In Wales, the requirement for the appointment of an Independent Reviewing Officer is set out in s99 of the SSW(W) Act 2014

[3] Regulation 4(3) of the Care Planning Placement and Care Review (Wales) Regulations 2015 sets out the same requirement upon Welsh local authorities.

[4] S6 of the SSW(W) Act 2014 will apply. This places an overarching duty upon Welsh local authorities to ascertain and have regard to the views, wishes and feelings of children looked after by them.

cannot be negotiated, the local authority must initiate care proceedings under s31 of the Children Act 1989 to maintain legality.

- S20 (4) states that the local authority in England can take the child into care (even though a person who holds parental responsibility is able to provide accommodation) in order to 'safeguard and promote' their welfare[5], but s20(7)[6] states that they cannot do this if a parent who is willing and able to provide or arrange accommodation for their child objects. As a result, the local authority must obtain signed written consent from the parent/s both to the accommodation and the proposed care plan. The s20 agreement must comply with the requirements of Re N (2015) EWCA Civ 1112 Paragraph 170). This is best done in a single short and easy to follow letter to the parent/s. It is important that the local authority tracks whether consent is continuing over time and that the parent remains in control, informed and sufficiently powerful in the situation to consent.
- Case law makes it clear that the local authority must also ensure that the parent/s have sufficient capacity to understand what they are agreeing to. Consent must be informed consent. It must never be 'compulsion in disguise'. An inability to evidence a fair consent process may ultimately result in a damages claim under s7 of the Human Rights Act 1998. Particular care should be exercised when either or both of the parent/s has a learning disability or where there are language or communication difficulties.
- If a parent is unable to understand English to a sufficient standard, an interpreter should be arranged to ensure the parent/s fully understand the nature of the agreement and their legal rights.

17. As soon as the care plan changes away from a return home to a need for a longer period in care, the child should be subject to the same permanency planning considerations as all other children in care. This could still lead to a negotiated way forward with the parent, for example in respect of an older child in a stable long-term fostering placement. Alternatively, a legal planning meeting to consider starting care proceedings may be appropriate for another child. In any event, this decision should be taken pro-actively by the local authority in consultation with parents and the child, and should be subject to rigorous review by the IRO within a robust care planning process, whatever the child's age or situation. The importance of the IRO as a check and balance for the looked after child cannot be overstated, especially as the IRO role (set out in the IRO handbook) is 'to consider the legal status of the child, for example where the child is looked after under s20'. Parents must be supported to actively exercise their parental responsibility (PR). S20 placements must not be allowed to drift into becoming long term arrangements by default.

18. Used correctly, s20 has much to offer children and families though not at the expense of a child's long-term health and well-being.

[5] In Wales, s75(1) & (2) SSW(W) Act 2014 requires local authorities to provide accommodation for children whose circumstances are such that it would be consistent with their well-being to do so.
[6] S76(4) SSW(W) Act 2014

19. Please note that the relevant statutory guidance in relation to Wales will change with the introduction of the Social Services and Wellbeing (Wales) Act on 6 April 2016 (s76 is the relevant section). The Part 6 Code of Practice (Looked After and Accommodated Children) should be referenced when drawing up plans for a child who is voluntarily accommodated. The Part 6 Code emphasises that:

"Achieving 'permanence' will be a key consideration from the time a child becomes looked after and the Part 6 care and support plan should set out from the outset how this is to be achieved" (s38).

20. The English and Welsh frameworks are different in law but they are identical in terms of social work practice.

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