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Articles

At a crossroads: to issue or not to issue care proceedings

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The number of unaccompanied children seeking refuge together with a rise in the number of referrals in response to concerns about sexual exploitation have probably contributed to an increase in referrals to children’s social care and subsequently resulted in an increase in care applications in an attempt to protect and safeguard children who are vulnerable and require protection. However, arguably one of the reasons for the increase in the number of applications for care orders is in response to judicial criticism in relation to the use of voluntary care as an alternative to the local authority making an application for a care order.

*Re N (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2016] 1 FLR 621 has surely resulted in the same degree of uncertainty that followed the landmark judgment in Re B (A child) [2016] UKSC [AQ – citation] followed by *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146, [2014] 1 FLR 1035 whereby local authorities and social workers faced judicial criticism from both courts in respect of permanency decisions for children, and more specifically around the lack of a holistic assessment in these complex cases. A discussion around the politics of social work practice resulting in a remote-control approach away from the front-line and towards risk-averse practice is important but sadly falls outside the scope of this article. However, for a more in-depth probe into this landscape see K Holt, *Contemporary Family Justice: complex decisions in child protection* (Jessica Kingsley, 2016).

Section 20: a help or a hindrance

Social workers continue to face criticism for decision-making procedures with the President of the Family Division stating that ‘voluntary accommodation’ under s 20 of the Children Act 1989 has been the subject of abuse by local authorities. Sir James Munby, in *Re N* [AQ is this the same Re N as above?], issued guidance for local authorities stating that a failure to follow the guidance would result in both criticism and claims for damages. Sir James raised concerns about the placement of children in accommodation under s 20 for lengthy periods prior to an application for a care order being sought by the local authority and was forthright in stating that this was a misuse by the local authority of its statutory powers.

Use of s 20 is premised on obtaining informed consent from those who hold parental responsibility. A significant concern in *Re N* was a failure of the local authority to obtain informed consent from the parents from the outset. Furthermore, there is no requirement in law for the agreement to be in writing and yet it makes sense that such an important agreement is in writing and signed by the parents to evidence consent. A child who is accommodated under s 20 requires to be reviewed and this arrangement should not be allowed to continue and the child be left with no firm plans and without the oversight of the court. Sir James raised concern that local authorities are reluctant to return a child to the parents immediately following the withdrawing of parental consent. Furthermore, in his judgment he made it clear that the misuse of s 20 not only falls short of practice that is acceptable and reasonable – it is a breach of a child and his parent’s fundamental rights.

Where possible, the agreement of a parent to a s 20 arrangement should be properly recorded in writing and evidenced by the parent’s signature. The written document should be clear and precise and drafted in simple and straight-forward language that a parent can readily understand. The written document should spell out that the parent can ‘remove the child’ from the local authority accommodation ‘at any time’. The written document should not seek to impose any fetters of the parent’s right to withdraw consent. Furthermore, where the parent is not fluent in English, the written 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’.

The authors, who are both experienced in child protection decision-making processes, have long remained concerned about the use of s 20 as a form of reassurance to social workers in a climate of remote-control practice where families who are hard to reach present a level of risk. The solution is to remove the child without the requirement to undertake an assessment of risk. This provides evidence to a court that the threshold criteria for the making of a care order are met and to agree a care plan for the child. This necessitates a level of knowledge and analysis that requires face-to-face contact with the child and her family. This has been replaced by the VDU [AQ – what’s this? A visual display unit?] and the reliance upon secondary information.

The law

Section 20(1) of the Children Act 1989 provides:

‘(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 –

(a) there being 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.’

Furthermore, s 20(4) allows a local authority to provide accommodation for a child – even though a person who has parental responsibility is able to provide him with accommodation – if the local authority considers that to do so would safeguard or promote the child’s welfare.

The provision in law for parents to request their child to be accommodated by the local authority in an emergency – for example where a lone parent requires medical treatment and a period of hospitalisation and there is no one who is able to care for the child – is useful, facilitative and supportive to children and their families during times of stress. However, the problem seems to be where the local authority is using s 20 to coerce parents into agreeing to their child being accommodated under s 20 rather than parents face the prospect of the local authority making an application for a care order. Parents may feel they have no choice but to agree to the advice given by the local authority and, in the absence of independent legal advice, the local authority is left largely unchallenged (K Holt, ‘Territory Skirmishes with DIY Advocacy in the Family Court: a Dickensian Misadventure’ [2013] Fam Law 155. In practice, the use of s 20 has resulted in drift for children, with months and years passing without either a return home or an application for care proceedings made.

Consent

Significantly, local authorities are under pressure to front load assessments due to the impact of the 26 week deadline for the completion of care cases once an application to court is made (in accordance with s 14(2) of the Children and Families Act 2014). The introduction of the 26-week deadline and the increased scrutiny of the courts in relation to permanency (see *Re B (A Child)* and *Re B-S (Children)* (above) have undoubtedly influenced local authorities’ approach to seeking alternative ways to reduce risk to the child without the need to issue proceedings. While seeking to divert cases away from the court by resolution within a pre-proceedings stage was one of the aims of the Public Law Outline, the increased use or rather misuse of s 20 has been an unintended consequence of the reforms to family justice.

The authors are not persuaded by a view that in the majority of cases s 20 is used by local authorities as a period for the undertaking of detailed assessments which will inform a decision as to whether an application to court is required. While it is the case that local authorities do not assume parental responsibility for the child under s 20, in reality the child is living away from the family and the responsibility for the child’s daily routines will lie with local authority and those acting on its behalf. The local authority determines the pace of any assessment period and this can often result in children remaining in local authority accommodation for lengthy periods, making a return home increasingly problematic (E Farmer, W Sturgess, T O’Neill and D Wijedasa, (2011) *Achieving Successful Returns from Care: What Makes Reuni cation Work?* (British Association for Adoption and Fostering); J Wade, N Biehal, N Farrelly and I Sinclair, *Caring for Abused and Neglected Children: Making the Right Decisions for Reunification or Long-term Care* (Jessica Kingsley, 2011). The difficulty for the parents is they are located between a rock and a hard place – to agree to s 20 or else the local authority will make an application to court for a care order to remove the child. The voluntary aspect of s 20 in this context appears anything but consensual and parents are often unwilling to risk the case proceeding to court (J Doughty, ‘More judicial guidance for local authorities in care proceedings’ [2016] *Journal of Social Welfare and Family Law* [AQ – page number]).

Hedley J in *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190, [2013] 2 FLR 987 provided guidance on the duty of a local authority to be satisfied that the person consenting to a s 20 accommodation of a child by the local authority has capacity to do so, is fully informed and that there are reasonable grounds for removal, with such removal being proportionate. Furthermore, Hedley J stated, ‘willingness to consent cannot be inferred from silence, submission or even acquiescence. It is a positive stance’ (para [44]). Notwithstanding the issue of consent, the length of time a child that a child can remain placed outside the family under s 20 has no limits and there are cases where children remain living away from their birth families for years without the scrutiny or oversight of a court and where parents feel they cannot challenge the decision for fear of the ultimate sanction - an application to court and the child placed for adoption (*Re P (A Child: Use of section 20)* [2014] EWFC 775). Given the current context of a government drive to increase the number of children in care placed for adoption, the fear for parents is if they do not agree to whatever demands the local authority makes, they risk losing contact with their child permanently (K Holt, *Contemporary Family Justice* (above)).

Judicial comment

Arguably the strongest criticism on the use of s 20 has been from the Sir James Munby in *Re A (Application for Care and Placement Orders: Local Authority Failings)* [2015] EWFC 11, [2016] 1 FLR 1, at para [99]:

‘Quite apart from all other serious failures, the delay in this case was shocking. A was born on 11 January 2014. There had appropriately and commendably been much pre-birth planning. Yet it was not until 16 September 2014 that the care proceedings were issued. The delay is, to all intents and purposes, unexplained. The gap was covered by the local authority’s use of s 20 in a way which was a misuse, indeed, in my judgment, an abuse, of the provision.’

Furthermore, at para [100], reference was made to further judicial criticism of the misuse of s 20:

‘There is, I fear, far too much misuse and abuse of section 20 and this can no longer be tolerated. I draw attention to the extremely critical comments of the Court of Appeal in *Re W (Children)* [2014] EWCA 1065, and *Northamptonshire County Council v AS and Ors* [2015] EWHC 199 (Fam).’

The misuse of s 20 was raised in Re H (A Child – Breach of Convention Rights: Damages) [2014] EWFC 38, when HHJ Bellamy awarded damages of £6,000 for unjustified and inexcusable delay in issuing proceedings. Delay was only part of the issue as the concern for the court was the parent’s lack of understanding of what they were agreeing to. In *Re X, Y and Z; Re (Damages: Inordinate Delay in Issuing Proceedings)* [2016] EWFC B44, HHJ Farquhar addresses the issue of human rights:

‘There have been a number of recent authorities dealing with issues of damages and declarations for breaches of Article 6 and 8 rights in relation s 20 agreements to which I have been referred. As is well known, Art 6 relates to the right to a fair trial and the allegation is that by the extraordinary length of the s 20 agreement then the mother and children were denied that right. Article 8 relates to the right to respect for private and family life and the interference with that is obvious in a case such as this as there are three members of the family and none of them is having contact with the other two.’ (para [10])

Furthermore, HHJ Farquhar questioned the application of the exercise of parental responsibility in practice:

‘There was a period of almost two and a half years whilst the children were subject to the s 20 agreements. It is submitted by the applicants that during all of this period that the local authority was purporting to exercise parental responsibility for these children. The number of decisions that the local authority must have made on their behalf during this period would have been vast. The children had several placements, they attended different schools, no doubt their health care needs were attended to and it is possible (although there was simply no evidence on the point) that decisions in relation to religion were taken as well. (para [36])

In such circumstances the local authority simply did not have the authority to make such decisions and the same is true for all such decisions for the following two and a half years.’ (para [37])

There has been a longstanding concern around the independence of the Independent Reviewing Officer (IRO) to effectively challenge the local authority (K Holt, *Child Protection Law* (Palgrave, 2014)). The importance of an independent robust challenge to local authority decision making processes is pivotal where children are accommodated under s 20, and the IRO may be the only independent professional involved with the child and their family. This matter is addressed by HHJ Farquar in *Re X, Y and Z* (above):

‘The IRO failed to challenge the conduct of West Sussex and did not promote care proceedings. The functions of the IRO are set out within s 25 Children Act 1989 and they include monitoring the performance of the Local Authority of their functions in relation to the child’s case. In the case of *A and S v Lancashire CC* [2012] EWHC 1689 at para 168, it was submitted (and Jackson J did not demur) that the task of the IRO was to “monitor, persuade, cajole, encourage and criticise fellow professionals in the interest of the child”. Their roles are more fully set out within the IRO Handbook which provides the relevant statutory guidance. In the Lancashire case it was found that the failures of the IRO amounted to a breach of the children’s rights. (para [51])

The lack of urgency in the case is breath-taking and it is simply wrong to point out the failures of the IROs to force the issues as an “area for development”. It was a total failure to “monitor, persuade, cajole, encourage and criticise fellow professionals in the interest of the child” as they should have been doing. This was clearly a case that should have come before the courts years before it actually did yet the IRO did not appear to put any pressure upon the Local Authority to ensure that this occurred. There is power within s 25 B (3) Children Act 1989 for an IRO to refer the case to Cafcass if it is considered it was appropriate to do so. It is difficult to understand why such action should not have been carried out in this case in order to ensure that the welfare needs of these children were fully protected.’ (para [54])

The failures of the IRO to protect the rights of the children and their mother to family life and a fair trial were found to be a breach. The court went on to make a declaration that West Sussex County Council acted unlawfully and in violation of the Convention Rights of X, Y and Z and awarded damages of £40,000.

Is judicial involvement in pre-proceedings practice the solution?

The issue of legal representation for parents within the formal pre- proceedings process was examined in some depth by Holt, K.E., Kelly, N., Doherty, P. & Broadhurst, K. (2013) Access to Justice for families? Legal advocacy for parents where children are on the ‘edge of care’: an English case study. Journal of Social Welfare and Family Law, 35, 2, p. 163-177. 15. The paper was in response to reforms that were aimed at reducing the length of care proceedings and the authors raised concerns at that stage following a detailed examination of pre-proceedings practice that effective advocacy, representation and oversight within pre-proceedings practice will be essential because parents will have less time to retrieve their position when a case progresses to court. The reform of the family justice system is premised on effective pre-proceedings practice. The reality on the ground is that the relationships between social workers and parents is an unequal one – the local authority holds the power. The discretion as to whether to issue proceedings or accommodate a child under s 20, is a broad, vague and ambiguous application. (Swain, P., 2009. Procedural fairness and social work practice. In: P. Swain and S. Rice, eds. In the Shadow of the Law: the legal context of social work practice. Annandale, New South Wales: The Federation Press, 85–97).

Given the concerns raised by Holt and others above around the ambiguous nature of pre-proceedings work and the judicial comments particularly from the President in respect of the use of s 20, it is no surprise to the authors that the President announced at the Annual Dinner of the Family Law Bar Association earlier this year and published in March [2016] Fam Law 316, that schemes for judicial and Cafcass involvement in the pre-proceedings phase will be piloted in selected courts. The President went on to discuss the tension of the involvement of the judiciary at a pre-proceedings stage but stated that the need for new and innovative ways of working to ensure that the child remains a priority and that their journey through the system both seamless and timely. The President said new ways of thinking about the interface between the pre-proceedings phase and the actual proceedings “might go a long way to addressing the problems surrounding the use, and on too many occasions the mis-use, of s 20 – problems which, unhappily, have drawn much all too merited judicial criticism in recent months”.

The Children Act 1989 and the Guidance issued in 2008 [AQ – which Guidance?] emphasises the important of achieving consensual solutions with respect to the welfare and safety of children. Holt and others ((2013) above) at p 65, highlighted the ethical issues involved in the use of s 20 where parents may lack the capacity to give informed consent with reference to Re CA (A Baby) (EWHC 2190 (Fam) 30 July 2012). In that case Sir James Munby emphasised the difference between informed consent and acquiescence in the face of a compulsory course of action:

‘. . . the use of s 20 is not unrestricted and must not be compulsion in disguise. In order for such an agreement to be lawful, the parent must have the requisite capacity to make that agreement. All consents given under s 20 must be considered in the light of ss 1- 3 of the Mental Capacity Act 2005. Moreover, even where there is capacity, it is essential that any consent so obtained is properly informed and, at least where it results in detriment to the giver’s personal interest, is fairly obtained. That is implicit in a due regard for the giver’s rights under Arts 6 and 8 of the European Convention on Human Rights. Having made those observations, it is necessary specifically to consider how that may operate in respect of the separation of mother and child at the time of birth. The balance of this judgment is essentially limited to that situation, the one that arose in this case, though some observations will have a more general application.’ (paras 27-29).

Conclusion

The impetus to achieve a 26-week deadline for the majority of applications for care orders once an application to court has been made, appears to be shifting important decision making to a pre-proceedings stage. This is undoubtedly increasing the volume of work for front line professionals who are already under considerable pressure. Despite the rhetoric of the support for increased autonomy for social workers, there is evidence from practice of more regulation and control than ever before, and this is resulting in less time for the important face-to-face contact between social workers and families. Families who are experiencing a range of complex vulnerabilities require direct contact with experienced social workers. Located within a context of increased pressure, timescales, targets and more recently judicial declarations, it is no surprise that social workers are attempting to stem the flow of referrals with sticking plasters or voluntary care that provides immediate relief. But this seemingly voluntary action has unintended consequences for the child and their family who may then find it more difficult within such a climate to seek either reunification or a permanent placement away from the home.