Putting parents on a level playing field: when is s 20 appropriate for the long-term care of a child?

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The Court of Appeal decision handed down on 5 January 2023 in *Re S (A Child) and Re W (A Child) (s 20 Accommodation)* [2023] EWCA Civ 1 examined the circumstances in which a child could remain in long-term local authority care under s 20 Children Act 1989 rather than under a s 31 order. This article will consider *Re S and Re W* in the context of a line of authorities which criticised the use of s 20 accommodation to demonstrate that s 20 can be used in appropriate cases as a long-term option. A key feature of *Re S and Re W* was that the parents agreed on the need for long-term accommodation, were willing to work in partnership with the local authority and there was no suggestion of the parents having been coerced into giving s 20 consent or seeking to have the child returned to their care in the foreseeable future.

From a parent's perspective, *Re S and Re W* is important, as a s 20 agreement means that their exercise of parental responsibility is not diminished, enabling them to advocate for their child on a level playing field with the local authority. Given that local authorities have to consider the financial implications of care planning for all the children in their care, parents with s 20 agreements are arguably in a better position to advocate on behalf of their child than if their parental responsibility has been restricted by virtue of there being an order under s 31.

Re S and Re W confirms that s 20 is not limited to the provision of short-term accommodation and it reiterates that the no order principle is firmly engaged in such cases. The court should not make a s 31 order if the making of no order is better for the child, thereby paving the way for a s 20 agreement for long-term care.

Key facts

The key facts of *Re S and Re W* are that S was 9 years old and likely to remain in residential care for most, if not all, his minority. The local authority at first instance argued that a s 31 order provided certainty and stability for the long-term future of S and prevented the risk that a parent may seek the return of the child or disagree with contact proposals. W was 15 years old and the local authority sought a care order to

ensure they had parental responsibility if the child developed challenging behaviour in the future. Furthermore, the court at first instance believed that s 20 could only be used as a short-term measure.

It is particularly relevant that threshold was met in both *Re S and Re W* on the grounds of the child being beyond parental control.[1] The parents in both cases were viewed as doing their best for their child. In *Re S* the child was accommodated in a residential placement at the mother's request; a decision supported by expert evidence as being the most suitable environment to meet the child's complex needs. In *Re W* the young person was in foster care after her relationship with her adoptive parents broke down. The common thread through both cases was that the parents had been the ones to seek support and placement of the child outside of the family home.

Historical context

The historical context to *Re S and Re W* is important as it followed a long line of authorities critical of the use of s 20 and a climate in which local authorities became wary of using its provisions. In *Coventry City Council v C, B, CA and CH* [2012] EWHC 2190 (Fam), [2013] 2 FLR 987 Mr Justice Hedley set out guidelines for the correct use of s 20 and the importance of ensuring that parental consent was willingly given. Further guidelines were added by Sir James Munby in *Re N (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2016] 1 FLR 621. There followed several cases in which local authorities were the subject of considerable judicial criticism for failing to follow the *Hedley* guidelines and in some cases damages were awarded.[2] In 2018, when delivering the key address at a child care conference, Mr Justice Keehan considered the cases in which s 20 had been inappropriately used, whilst also maintaining that s 20 can be a useful tool. Mr Justice Keehan listed examples of such use but all the examples related to situations where either the s 31 threshold was not met or the accommodation was intended to be short-term.[3] As was common knowledge at the time, Mr Justice Keehan referred to directors of children's services undertaking reviews of all the children accommodated by them under s 20 and pointed out that cases were still coming before the courts in which s 20 had been used inappropriately. Mr Justice Keehan added: 'the misuse and the abuse of s 20 accommodation must stop'.[4]

The tenor of thinking by professionals at the time is further illustrated by the ADCS/Cafcass/Cafcass Cymru Practice guidance for the use of s 20 provision in the Children Act 1989 in England and the equivalent s 76 of the Social Services and Wellbeing (Wales) Act 2014 in Wales) (2016)[5]:

> 'We are concerned that recent judgments may lead local authorities to misinterpret the law and conclude that s 20 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 judgments are encouraging local authorities to adopt greater caution in their use of s 20. 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 s 20 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 s 20 offer of positive and strengths-based partnership working between social workers, children and parents.'

Similarly, in an article published in 2017, academic Penelope Welbourne suggested:

1 Section 31 (2)(b)(ii) Children Act 1989.
2 See for example: *Kent County Council v M and another* [2016] EWFC 28 and *Medway Council v M and T (by her Children's Guardian)* [2015] EWFC B164.
3 'Reflections of a Judge of the Family Division' [2018] Fam Law 1514.
4 Ibid.
5 www.basw.co.uk/resources/practice-guidance-use-s 20-provision-children-act-1989-england-and-equivalent-s76-social.

> 'It would be a loss if use of s 20 and the partnership opportunity it offers were restricted because of lack of confidence in its use on the part of social workers. It would be helpful to have more exploration in future of ways in which it can offer positive benefits to children and parents, as well as clarity about when its use becomes impermissible. A pervasive fear that relying on parent's PR as a legal basis for accommodation would be unacceptable to the courts could deprive some parents of the opportunity to work in partnership, and do them an injustice by encroaching unnecessarily on their right to exercise their PR, as set out by Hedley J in Re CA. Parents and children need to be empowered to use their right to make legitimate choices as well as protected from poor practice that infringes their rights.'[6]

Following *Re N (Adoption: Jurisdiction)* (above), further judicial guidance on the use of s 20 was handed down by the Supreme Court in *Williams and Another v London Borough of Hackney* [2018] UKSC 37, [2019] 1 FLR 310. Baroness Hale considered the line of authorities in which judicial criticism was made of the inappropriate use of s 20. Quoting Mr Justice Hedley in *Coventry City Council* (above), Baroness Hale considered the dilemma for local authorities between bringing proceedings and yet rushing unnecessarily into compulsory procedures when there is still scope for a partnership approach with the parents:

> '. . . the emphasis in Part III is on partnership . . . any attempt to restrict the use of section 20 runs the risk both of undermining the partnership element in Part III and of encroaching on a parent's right to exercise parental responsibility in any way they see fit to promote the welfare of their child.'[7]

In *Williams v Hackney* (above) Baroness Hale highlighted the advantages that bringing proceedings can bring, including rigorous scrutiny of the need for an order, assessment of the child's needs and care plan, provision of a children's guardian and public funding for the parents.[8] The court also pointed to the fact that it is not a breach of s 20 to keep a child in long-term accommodation but it may be a breach of other duties under the Children Act, regulations or the child's and parents' rights under the ECHR.[9]

It was against this background of uncertainty, confusion and reticence by professionals to use s 20 that *Re S and Re W* came before the Court of Appeal. The state of professional uncertainty was highlighted by the decision of the judge at first instance in *Re W*. The judge was of the view that s 20 should not be used as a long-term tool and that where W was to be in foster care in the medium to longer term there is a need for a care order, notwithstanding that the parents and local authority were working well together.[10]

Court of Appeal

The Court of Appeal was referred to the Public Law Group Final Report (March 2021)[11] and the statistics within that report showing a significant decrease in the numbers of children accommodated under s 20 and an increase in the numbers of children looked after under a care order. The PLWG report observed:

> 'It is widely perceived that the judgments in *In the matter of N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112, [2016] 2 WLR 713 significantly contributed to the decline in the (appropriate) use of s 20 / s 76 across England and Wales. Furthermore, guidance on the use of s 20 is spread across various sources.

6 'Parents' and children's rights and good practice: section 20' [2017] Fam Law 80, Penelope Welbourne.
7 Judgment of Baroness Hale at para [34] / Ibid paras [25] and [26].
8 Ibid at para [51].
9 Ibid at para [52].
10 *Re S and Re W* judgment of King LJ at para [33].
11 Public Law Working Group (March 2021) – Recommendations to achieve best practice in the child protection and family justice systems: www.judiciary.uk/wp-content/uploads/2021/03/March-2021-report-final_clickable.pdf.

> The varying interpretation and application of the current guidance has led to inconsistency in the approach to the use of these important statutory provisions. In some areas, these provisions are no longer used.[12]
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> In recent work by the MoJ and the DfE, many social workers reported being unclear on when it was appropriate to use s 20 and were cautious of being criticised by managers and the judiciary. This was the case even when they believed that s 20 accommodation was the most appropriate option for the children. Some felt this was leading to a "disproportionate use" of court proceedings and subsequently to more children becoming looked after when it was not necessarily in their best interests.'[13]

Lady Justice King, giving the lead judgment in *Re S and Re W*, undertook a comparison of s 20 and s 31 saying:

> 'Miss Fottrell KC summarised it by saying that a section 31 care order is the more draconian order and more interventionist. This is undoubtedly the case as not only does a local authority acquire parental responsibility pursuant to section 33(3)(a) CA 1989 when a care order is made, but also under section 33(3)(b)(i) CA 1989 the local authority may "determine the extent to which a parent may meet his or her parental responsibility" for the child in question. In other words, as it was put in argument, when a care order is made, the local authority may (by section 33(4) CA 1989), in order to "safeguard or promote the child's welfare", "trump" the parents whenever there is an issue between them. By contrast, as Ms Fottrell says, a section 20 accommodation order facilitates partnership and where it is functioning well under an agreed care plan, not only is the making of a care order not necessary but it is disproportionate. To make a care order in such circumstances would not she submitted, pursuant to section 1(5) CA 1989, be "better for the child than making no order at all".' [38]

Having reviewed the case law, Lady Justice King re-iterated the well-known principles that the aim of the court should be to adopt the least interventionist possible order. She also emphasised that s 20 is unambiguous; there is no time limit on the length of a s 20 agreement 'provided that proper consideration is given to the purpose of the accommodation and that the regular mandatory reviews are carried out'[14]. Both appeals were allowed with the children remaining in their current long-term placements under section 20 with no orders being made on the local authority's applications for care orders.

Lady Justice King concluded her judgment in *Re S and Re W* by saying:

> '. . . each of these two cases must be viewed in the context in which they have come before this court, that is to say in relation to children who are settled in long-term placements which are meeting their respective needs in circumstances where both the placements and the accompanying care plans are supported by the parents. As the judge in *Re W* observed, no court has hitherto considered the use of a section 20 order in this type of situation and it is hoped that this appeal will have served to fill that gap.'[15]

So where does that leave the law now?

So where does that leave the law now? Of course, whether it is appropriate for a local authority to issue care proceedings will very much depend on the circumstances of each individual case. The fact that threshold has been met, particularly in those cases where threshold is met on the basis of the child being beyond parental control, should not

12 Ibid at para 229.
13 Ibid at para 230.
14 *Re S and Re W* at para [62].
15 *Re S and Re W* at para [84].

detract from the appropriateness of there being no order. Where there is a risk of significant harm, it will likely be appropriate for the local authority to have the 'trump card' when it comes to parental responsibility. But where parents and local authority agree on long-term accommodation and are able to work in partnership with each other, a s 20 agreement is the least draconian, least interventionist and more appropriate course, with the court making no order on an application or the local authority recognising that it need not bring proceedings.

Re S and Re W is a reminder to professionals working in social care and the judicial system that s 20 can be used for long-term care and that parents do not need to have their parental responsibility restricted when they turn to local authorities for the provision of services for their children. No doubt the Ministry of Justice will hope that a consequence of an increase in use of s 20 will be a commensurate decrease in the numbers of applications being made to the courts. As Lady Justice Hale said in *Williams v Hackney* (above): 'Compulsory intervention in the lives of children and their families requires the sanction of a court process. Providing them with a service does not'. The parents in *Re S and Re W* had to be parties to care proceedings and an appeal in order to protect their parental responsibility and to ensure that the children's placements were secured under s 20. As a result of their appeals, it is hoped that other parents, who are willing and able to work in partnership with the local authority, will be able to do so on a level playing field.

Joan Connell appeared as junior counsel in Re S and Re W*, led by Deidre Fottrell KC and instructed by Elen Davies of Taylor Rose MW solicitors. Tatiana Rocha is a pupil at FOURTEEN and assisted in the preparation of the* Re S *appeal.*