2019: CASE LAW UPDATE S20:

Rotherham guidance on Consent; Capacity and use of S20

Recent case law has given clear guidelines about s20 consent. In particular this will apply when a child is being accommodated for safeguarding reasons and not because the parent has requested that their child is accommodated, for example if they feel that they are beyond their control.

Consequences of s20 being "misused" or "abused" include:

1. Applications by parents, or on behalf of the child under the HRA for a declaration of abuse.
2. Negative media attention with LA's being publicly criticised and scrutinised
3. Damages being awarded against the LA in favour of the parents and/or the child(ren). In some cases up to £40,000

The following areas are explored and reiterated within these cases:

AUTHORITY

You must ensure that the person providing consent has the authority to do so.

Are they:

a) A parent who has Parental Responsibility for the child? i.e. Mother/married father/father whose name is on the birth certificate of the child post 1 December 2003/parental responsibility order/parental responsibility agreement/child arrangements order giving a father residence of the child
b) Another person who has a Residence Order or Child Arrangements Order granting them residence of the child or a person who has an SGO in their favour
c) A person caring for a child under a guardianship arrangement

Have you also consulted with the other person with PR or a right to withdraw consent if they chose to do so?

NB – from hereon in the word "parent" is used where it may be any of the above authorised person who provided the s20 consent

CONSENT

Consent must be *freely given* and given by a person who has the *capacity* and *ability* to do so.

You should consider a number of issues in respect of this.

1. **CAPACITY**

a) Mental health difficulties.

If a parent has a psychiatric illness or mental health difficulties you will need to fully understand how severe these are. They must not be severe enough to affect their ability to provide this consent.

If you do not know if the parent has the ability to provide fully informed consent, you should ask a psychiatrist – the treating one if there is one - to undertake a capacity assessment in order to confirm this.

b) Learning Difficulties

You must be aware that when dealing with a parent who has LD (on any level) it is very likely that s20 will not be appropriate.

Be aware, that a parent must be capable of building an argument against s20 if they wished to do so.

c) Alcohol/Drug use

Any use of substances and/or excessive alcohol may result in a parent being incapable of providing proper and informed consent.

d) General issues

You must also remember that capacity can be **fluctuating.** This means that it is not always consistent over time. An example would be a parent who is well when they are compliant with medication, but becomes unwell (sometimes very suddenly) when they are non-compliant.

You should always bear in mind that s20 may well have been appropriate when this was given, but if a parent then became unwell, resulting in their being unwell so that they then lack the capacity to give a s20, this would mean that the s20 already consented to could become unlawful.

The result is that a s20 where capacity might become an issue must be kept under constant and repeated review

2. FREELY GIVEN CONSENT

Consent must be given freely by a parent – that means that it must NOT be given because the LA says that if this is not provided, they will issue care proceedings. There must be no duress or pressure placed upon the parent at any point.

3. CONSENT CAN BE WITHDRAWN AT ANY POINT THAT THE PARENT CHOOSES TO

You must be very clear that a s20 agreement does not require any notice to be given prior to withdrawal. You may ask for a short notice period to be given in the event that the parent decides to withdraw consent however it must be made clear both in the written document,

and verbally, that this is not legally binding and does not affect the parent's right to request the return of their child at any time.

4. CONSENT MUST BE INFORMED

Along with ensuring that all of the above is met, you must also ensure that the person understands the agreement that they are being asked to sign and allowed to ask any questions that they have.

If a person does not speak English, or doesn't speak it well, you must try and use a translated s20 agreement. If this is not possible you must use an interpreter and you must include confirmation of that on the agreement.

A parent should always be offered the opportunity to speak to a solicitor by telephone, or in person if needed, prior to signing any agreement.

PROACTIVE PLANNING AND INVOLVEMENT

1. PARENT(S) MUST BE INVOLVED IN THE LIFE AND PLANNING FOR THEIR CHILD

You must ensure that you are actively involving the parent in all decisions about their child whilst s/he remains in the care of the LA. Remember the LA does NOT have PR for the child under s20 and cannot care for a child without involving the parent. This includes ensuring that contact is taking place, albeit in line with the child's needs.

2. ENSURE THAT THE CHILD IS PLANNED FOR

It is not appropriate to leave a child in s20 for a long period of time, or when the prognosis for rehabilitation is poor, or (in particular with a young child) when the parent's needs are outweighing those of the child. This would include, for example, circumstances where a parent makes a decision to detox/rehabilitation with drug use. We would know this takes some time to ensure that they are "clean" for long enough to care safely for a child.

In all of the above such cases legal advice should be sought at an early stage as to whether the pre-proceedings PLO should be utilised, or whether the matter should be issued in order for the assessments to be undertaken.

Assessments should be undertaken during the time the child is in s20 and these should be purposeful and LA must have regard to these when planning.

The child cannot simply wait in a placement whilst the LA waits to see if the parent will be able to make and sustain these changes.

The child must be subject to active parallel planning to ensure delay is reduced.

You may wish to consider

3. TIME LIMIT THE ASSESSMENTS BEING UNDERTAKEN

Ensure that all assessments are done in a purposeful and timely fashion. The concerns about the prolonged use of section 20 are that although a child would have an IRO, it deprives the child of the benefit of having a children's guardian to represent and safeguard his/her interests; and it deprives the court of the ability to control the planning for the child, and to prevent or reduce delay.

You should also be aware that parents would often not have legal advice if the case is being held outside of the PLO process.

THE CASE LAW

These cases have already been circulated with a synopsis of what the cases mean to the LA however by way of recap:

In ***Re N (Children) (Adoption: Jurisdiction)*** [2015], Munby P drew attention to the misuse by the local authority in this case of section 20 CA 1989 and said 'steps must be taken as a matter of urgency to ensure that there is no repetition ever again'. He gave clear guidance in respect of his view of the proper use of s20.

In this case the children were placed in accordance with s20 in May 2013 yet proceedings were not issued until January 2014. This case was one where the children may have been placed outside of the jurisdiction due to their heritage. Munby P said that 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 it as a prelude to care proceedings for a period as long as here was 'wholly unacceptable'. He drew attention to recent case-law in which local authorities were condemned for misuse, and in some cases plain abuse, of s.20 including cases resulting in awards of damages. He said that misuse of s20 in a case with an international element is 'particularly serious'.

Munby P considered that the recent case-law illustrated to an alarming degree four separate problems, all too often seen in combination:

1. The failure of the local authority to obtain **informed consent** from the parent(s) at the outset. Local authorities must heed the guidance set out by Hedley J in Coventry City Council v C, B, CA and CH[2012] EWHC 2190 (Fam), [2013] 2 FLR 987 at para 46 (cited at [164]). Where a parent is not fluent in English it is vital to ensure the parent has a proper understanding of what precisely they are being asked to agree to.
2. The form in which the consent of the parent(s) is recorded. A feature of recent cases has been the serious deficiencies apparent in the drafting off too many s.20 agreements.
3. Far too often the arrangements under s.20 are allowed to continue for far too long.
4. The seeming reluctance (or failure) of local authorities to return the child to the parent(s) immediately upon a withdrawal of parental consent. A local authority which fails to permit a parent to remove a child in circumstances within s.20(8) acts unlawfully, exposes itself to proceedings at the suit of the parent and may even by guilty of a criminal offence. Munby P was 'exceedingly sceptical' as to whether a parent can lawfully contract out of s.20(8) in advance by agreeing with the local authority to give a specified period of notice before exercising their s.20(8) right to remove the child

Munby P stated that for the future good practice requires the following, in addition to proper compliance with the guidance given by Hedley J:

1. Wherever possible the agreement of a parent to the accommodation of their child under s.20 should be ***properly recorded in writing*** and evidenced by the parent's signature.
2. The written document should be ***clear and precise as to its terms, drafted in simple and straight-forward language*** that the particular parent can readily understand.
3. The written document should spell out, following the language of section 20(8), that the parent can ***'remove the child' from the LA accommodation 'at any time'.***
4. The written document ***should not seek to impose any fetters on the exercise of the parent's right under s.20(8)***.
5. ***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'.***

Munby said that the misuse and abuse of s.20 is a denial of the fundamental rights of both the parent and child, 'it will no longer be tolerated' and 'it must stop'.

Medway Council v M & T [2015] where HHJ Lazarus ordered the local authority to pay £40,000 for breaching the mother and child's Human Rights (£20,000 for each). This was in circumstances where the council had removed a child when the mother was detained under s3 of the Mental Health Act, then accommodated the child for 2 years using s20, including several months where the mother was not informed that the child was in care. At para 61 the judge states:

"It may be reasonable, in rare and very clear cases where such enquiries could be reasonably considered as likely to bear fruit, to wait for at most a day or two while the local authority explored the possibility of an imminent return to a parent's care. I bear in mind here that both in logic and principle such a period should be less than the time limit of 72 hours which is stipulated in the Children Act as applicable to PPOs. However, otherwise, save perhaps for the first few hours while the child's status is considered, and advice sought and steps taken to issue proceedings, it must be right that proceedings are brought as immediately as possible for all the reasons discussed above. "

HHJ Lazarus provided a helpful table in order for future damages to be assessed in similar types of cases.

Re AS (unlawful removal of a child) [2015], is a case involving LB Brent the mother was awarded £3,000 for a breach of her Human Rights after the child was taken into s20 accommodation when she was detained under the Mental Health Act. The timeline was:

- The child was taken into foster care on 9 October 2014
- LPM took place on 13 October 2014 and a decision taken to issue care proceedings.
- A letter was sent to mother first informing her that the child was in foster care and of the intention to issue on 16 October 2014
- Proceedings were issued on 11 November 2014.

This was considered by the Court (HHJ Rowe QC) to be unlawful by the LA.

Coventry City Council v C, B, Children Act & CH [2012] EWHC 2191 (Fam). Hedley J provided clear guidance on obtaining s20 consent. He outlined the principles in respect of s20 at paragraph 25 onwards: "*section 20 appears in Part III of the Act…. The emphasis in Part III is on partnership and it involves no compulsory curtailment of parental responsibility*" and at paragraph 27: "… *the use of s20 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 under s20 must be considered in the light of ss1-3 of the Mental Capacity Act 2005. Moreover, even where there is capacity, it is essential that any consent obtained is properly informed and, at least where it results in detriment to the giver's personal interest, is fairly obtained*". And at paragraph 37: " …. *whatever the context, s20 agreements are not valid unless the parent giving consent has the capacity to do so….'*

Kent County Council v M and K (Section 20: Declaration and Damages) [2016] EWFC 28

On 14 December 2011, K was accommodated by KCC under section 20, CA 1989. Care proceedings were issued on 16 November 2015. It is of obvious note that there was NO dispute between LA, M or CG that a CO was absolutely the right final order.

The claim under HRA 1998 was for declarations that Kent County Council (KCC) breached K's article 6 and 8, ECHR, rights and for damages. Three areas were argued in respect of the LA's apparent failures:

1. KCC's failure properly to assess K (no updating core assessment; no life story work undertaken; no psychological / psychiatric assessments of K **and her family**)
2. KCC's failure to meet K's needs (7 placement breakdowns; non-receipt of appropriate therapy)
3. KCC's failure to issue proceedings (which resulted in their depriving K of proper court oversight and, therefore, support and assessments).

KCC argued that unlike in many reported cases, there was no dispute about KCC's care plan for K; K's mother was involved from 2011 – 2015; the non-issue of proceedings was not causally related to the breakdown of placements; multiple referrals were made to CAMHS; and, the assertion that K has been harmed by KCC's actions was speculative.

Theis J held that KCC had breached K's article 6 and 8, ECHR, rights in that it had:

(1) failed properly to assess K from March 2012 until July 2015;

(2) failed to implement a care plan that met K's needs from March 2012 until July 2015;

(3) in doing so, failed to provide K with a proper opportunity to secure a long-term placement and settled home life (article 8, ECHR); and

(4) failed to issue proceedings in a timely manner from March 2012 until November 2015, which deprived K of protection under the CA 1989, access to court and the procedural protection of a children's guardian (articles 6 and 8, ECHR).

Theis J went back to HHJ Lazarus's summary of the level of awards previously made in *Medway Council v M and T* (above). Theis J considered that the award should be £17,500.

Costs

Additionally, K sought her costs. KCC resisted the application. Theis J ordered that "where the breaches continued for such a long period of time", at [84], KCC should pay K's costs, limited to the HRA application. No order for costs was made between KCC and K's mother.

Police Protection

The power is derived from s46 CA1989.

46 Removal and accommodation of children by police in cases of emergency.

(1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may—

(a) remove the child to suitable accommodation and keep him there; or

(b) take such steps as are reasonable to ensure that the child's removal from any hospital, or other place, in which he is then being accommodated is prevented.

"Wherever possible, a decision to remove a child from a parent should be made by a Court not as an administrative decision".

CONCLUSIONS

S20 is NOT a long term care measure, and does NOT allow the LA to decision make for a child.

1. Ensure that the person giving consent has the **authority** to do so – PR
2. Make sure you are satisfied as to the parent's **capacity** to give consent
3. Make sure that the person has the **understanding** to consent – e.g. language issues
4. Make sure that the person has been clearly told that this is a voluntary agreement and that they **can withdraw their consent at any time**

5. Make sure that the person has had an **opportunity to ask any questions and seek legal advice if they choose to do so.**

6. When you are issuing proceedings make sure you are clear about what has taken place since the child was placed in s20 i.e. as to planning/contact/consent/involvement of the parent

If at any point you have any doubt about the person signing s20, most particularly as to capacity, **DO NOT** continue to seek this. You should telephone or speak in person to your manager (or another in their absence) as a matter of urgency in order to discuss this.

If you need further assistance or guidance following management consultation refer the matter to legal as an urgent general query or LPM