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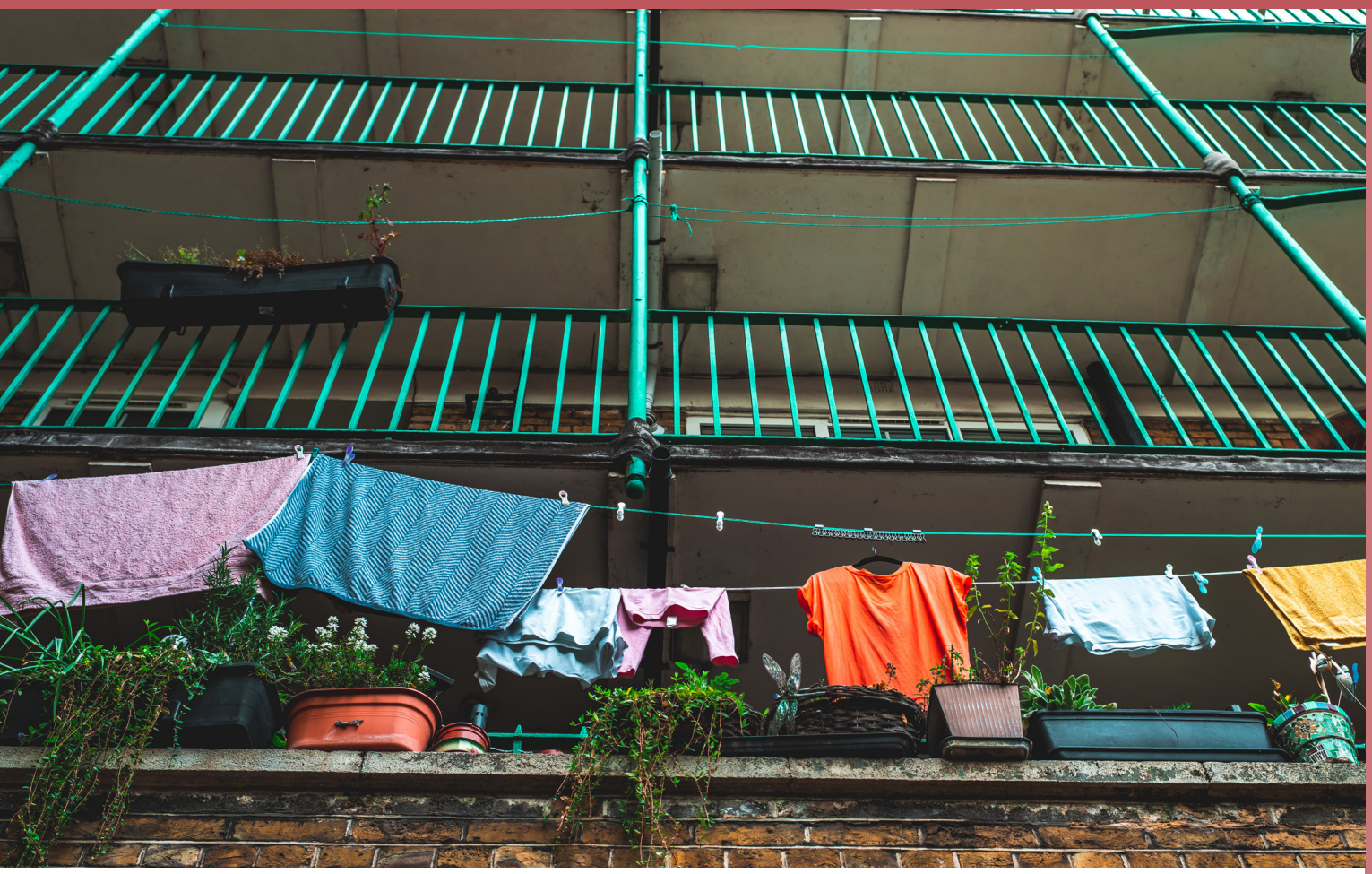

Voluntary care arrangements under section 20 (England) and 76 (Wales)

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Introduction

This briefing concerns the duties and powers of local authorities in England and Wales in providing accommodation for children under section 20 of the *Children Act (CA) 1989* and section 76 of the *Social Services and Well-Being (Wales) Act (SSWBA) 2014*. As well as setting out the legal framework, the briefing provides a background to the intentions behind the provisions; considers the issues identified in case law and research regarding the use of accommodation; and gives details of the practice guidance designed to address some of these issues.

> **Note:** Section 76 SSWBA came into force in April 2016. The duties imposed on local authorities by section 76 are the same as those imposed by section 20 *Children Act 1989*.

Legal Framework

Section 20 CA and section 76 SSWBA place a **duty** on local authorities to provide accommodation (with extended family, foster carers or residential provision) to children and young people of 16 and 17 who require it because:

- there is no one with parental responsibility for them
- or they are lost or abandoned
- or where the person who has been caring for them is prevented, either permanently or temporarily, from providing that care (s.20(1); s.76 (1)).

Section 20 and section 76 also place a **duty** on local authorities to provide accommodation for children of 16 and 17 whose welfare would be seriously prejudiced without the provision of accommodation by the local authority (s.20 (3); s.76 (3)).

Section 20, but not section 76, also gives the local authority a **power** to provide accommodation for a child even though a person who has parental responsibility for the child is able to provide the child with accommodation, if the local authority considers that providing accommodation would safeguard or promote the child's welfare (s.20(4)).

Children who are accommodated under section 20/76 are 'looked after' by the local authority so all the duties in relation to looked after children contained in legislation, regulations and guidance apply: taking account of the wishes and feelings of children and their families, being responsible for finding accommodation for the child, promoting contact between children and their families, developing a care plan in partnership with the child and family and ensuring the plan is reviewed, and providing the appropriate level of support for children who are leaving care .

Parents retain parental responsibility when children are accommodated under section 20/76 and local authorities do not share parental responsibility with parents. The CA provides that a local authority can only acquire parental responsibility (which is then shared with parents) when a care order is made.

A local authority cannot provide accommodation under section 20/76 if a person with parental responsibility, who is able and willing to provide accommodation for the child, or arrange for accommodation for the child, **objects** (s.20(7) and s.76(4)). Any person with parental responsibility can remove the child from accommodation at any time (s.20(8) and s.76(5)). These last two provisions do not apply where a child has reached the age of 16 and agrees to being in local authority accommodation (s.20(11) and s.76(8)).

Also part of the legal framework are the provisions of the European Convention on Human Rights incorporated in the *Human Rights Act 1998* (particularly relevant are Article 6, the entitlement to a fair hearing, and Article 8, the right to family life) and the provisions of the United Nations Convention on the Rights of the Child, which are incorporated into Welsh legislation in Rights of Children and Young People (Wales) Measure 2011, but not English legislation.

Background to the legislation on providing accommodation

Discussion papers during the drafting of the CA, guidance issued when the CA was first implemented and the positioning of section 20 within Part III of the Act (Local Authority Support for Children and Families) give a clear message **that the provision of accommodation is part of the range of services a local authority can use, and in some cases must use, to provide support for children and families**.

The drafting of section 20 was influenced by research that indicated the benefits of voluntary care arrangements in relation to planning for the child and co-operation between parents and the local authority once the child was in care (e.g. Packman et al., 1986). The voluntary nature of the arrangements arises from one of the key principles of the CA, which is the importance of working in partnership with parents wherever possible.

There is no duty on local authorities to prevent the use of accommodation, which was the position with voluntary reception into care under earlier legislation, and which remains the position in relation to compulsory proceedings (para. 7, Schedule 2, CA). Guidance at the time the Act was implemented noted: *The accommodation of a child by a local authority is now to be viewed as a service providing positive support to a child and his family* (DH 1991, para. 2.13). The circumstances in which accommodation can be provided are widely drawn and the guidance recognised that accommodation could be offered for both short and longer periods. It also suggested that in circumstances where the threshold for initiating care proceedings existed, local authorities should consider whether an arrangement for accommodation under section 20 would sufficiently safeguard the child's welfare (DH, 1991, para 2.30).

Further reading

A detailed overview of the intentions behind section 20 is contained in the Lynch (2017) report of the knowledge inquiry into the use of section 20/76.

Research

There is a lack of research evidence on the use of section 20/76 and its impact on outcomes for children. Some of the studies commissioned following the implementation of the Children Act in 1991 did look at the use of accommodation (Packman and Hall 1998, Aldgate and Bradley 1999, Brandon et al 1999, Hunt et al 1999, Thoburn et al., 1999). These studies were included in and commented on in the overview of research studies *The Children Act Now: Messages from Research* (Aldgate and Statham, 2001). Note that the SSWBA and section 76 were not in effect at the time of publication.

The messages in relation to the use of section 20 were that:

- Initially the impact of the 'no order principle' in section 1 of the CA and the emphasis on working in partnership with parents had led to a rise in the use of voluntary arrangements to accommodate children, but then the use of accommodation began to decline in comparison to a rise in care proceedings.
- Accommodation was being used more frequently in cases where there were child protection issues, which previously might have gone to court in care proceedings.
- There was evidence of parents feeling coerced to agree to section 20 accommodation in some of those cases where there were child protection issues.
- There was evidence in some cases of local authorities' reluctance to make use of section 20 because of the view that care by a local authority was a 'last resort'. This was linked to a view that care proceedings were a 'last resort' and is despite the fact that the legislation did not place a duty on local authorities to prevent use of section 20. Seeing the provision of accommodation as a last resort reduced the opportunities for planning for a child to come into section 20 care in partnership with parents and children. This could lead instead to a crisis that could cause an unplanned entry to care.
- There was evidence of parents and children being involved in meetings but overall a lack of real partnership working.
- Short term care arrangements, similar to those provided for children with disabilities as respite, were also used for families under other forms of stress. Findings in relation to these arrangements were largely positive, with measurable benefits for both children and parents.

Evidence from the studies presented a complex picture but the research review concluded that overall '*the evidence comes down on the side of accommodation being a helpful service*' (p.52). The review recommended closer attention to the needs of individual children and families, greater use of short periods of accommodation as a family support service, and review of policy and practice of the use of accommodation in safeguarding cases. There is no evidence that these recommendations were acted on.

Roberts (2016) carried out qualitative case study research about the use of support care as a service for families at risk of breakdown and long-term separation. In the schemes examined, services provided short breaks with the same carer for children over a time limited period (6-12 months) to assist parents in a variety of circumstances. Outcomes reported by stakeholders included:

- tangible improvements in family circumstances, for example, overcrowding issues being resolved
- progress with substance use issues
- and developmental improvements in speech and mobility for younger children.

The research also found that this type of service was under pressure in times of budget cuts and austerity.

In 2016 Your Family, Your Voice Alliance received funding to a carry out a Knowledge Inquiry into the use of section 20/76 (Lynch, 2017). This was in the context of the rise in care proceedings and the criticisms of local authority practice in relation to section 20/76 in court judgments. Respondents to the Inquiry (including parents, lawyers and social workers) raised similar issues to those that had been raised in earlier research in relation to:

- problems arising from the lack of clear guidance about practice in relation to section 20/76 and in relation to working in partnership with parents.
- confusion over consent and how to evidence it.
- parents, particularly younger parents, feeling coerced into agreeing to section 20/76 arrangements.
- insufficient legal advice and advocacy for parents and young people.
- particular problems in relation to the use of section 20/76 where parents had learning disabilities.
- problems arising when placements with relatives were identified as private arrangements, excluding any financial support from local authorities.
- concern about the placing of babies in foster to adopt placements under section 20/76.
- and queries about the appropriateness of section 20/76 as the framework for providing care to unaccompanied children who have no one with parental responsibility for them.

Respondents were positive about the use of short periods of accommodation as part of a family support package but noted how little this was used for non-disabled children.

The recommendations from this inquiry include the need for clearer guidance on the use of section 20/76, better training on the law for social workers, improved access to legal advice and advocacy for parents and 16 and 17-year-olds, and more research into the use of section 20/76.

The Care Crisis Review carried out in 2017-18 (FRG, 2018) considered issues in relation to section 20/76 in both the main report and the background review of contributing factors. The review raised similar concerns to the above about section 20 and recommendations were made in relation to the need for more detailed guidance, better advice for parents and young people and the need for more data and research evidence.

Case law

Case law has confirmed that when a child is accommodated under section 20/76, the general duties on local authorities to safeguard and promote the welfare of the child do not entitle the local authority to make decisions, in this case regarding placement, which were contrary to the wishes of the parents, (*R v Tameside MBC ex parte J* [2000] 1FLR 942).

It has also established that homeless young people of 16 and 17 should be provided with accommodation under section 20/76. In ***R (on the application of G) (FC) (Appellant) v London Borough of Southwark (Respondents) [2009] UKHL 26***, the House of Lords decided that where a homeless 16-year-old could potentially be provided with accommodation under housing legislation, it was more appropriate for such young people to be provided with accommodation under section 20 by the local authority. Following this decision specific guidance was issued on this point (MHCLG and DfE, 2018).

There were a number of judgments during 2014 and 2015 which raised serious concerns about the use of section 20 by local authorities. In some of these cases the misuse of section 20 had amounted to a breach of the child's and parent's human rights. Many of these cases were referred to in ***N (Children) (Adoption: Jurisdiction)*** [2015] EWCA Civ 1112, a case heard by the then President of the Family Division, Sir James Munby. In this case Sir James set out the main problems with practice in relation to the use of section 20 and warned local authorities that they could expect to be challenged in those cases where such poor practice continued. He said:

> *the misuse and abuse of section 20 in this context is not just a matter of bad practice. It is wrong; it is a denial of the fundamental rights of both the parent and the child; it will no longer be tolerated; and it must stop.* (*N (Children)* [2015] EWCA Civ 1112: para. 171)

The judgments are listed here because it is helpful to read them to get a better understanding of the reasons for the strength of the criticisms and concerns expressed.

R(G) v Nottingham City Council [2008] EWHC 152 (Admin),

Coventry City Council v C, B, CA and CH [2012] EWHC 2190 (Fam),

Re P (A Child: Use of S.20 CA 1989) [2014] EWFC 775,

Re H (A Child: Breach of Convention Rights: Damages) [2014] EWFC 38

Northamptonshire County Council v AS and Ors [2015] EWHC 199 (Fam)

Newcastle City Council v WM and Ors [2015] EWFC 42.

Re N (Children) [2015] EWFC 37

M*edway Council v A and Ors (Learning Disability: Foster Placement)* [2015] EWFC B66

Gloucestershire County Council v M and C [2015] EWFC B147,

Gloucestershire County Council v S [2015] EWFC B149,

Re AS (Unlawful Removal of a Child) [2015] EWFC B150

Medway Council v M and T (By Her Children's Guardian) [2015] EWFC B164

The criticisms of local authorities were in relation to:

- Accommodating children for long periods of time before issuing care proceedings in circumstances where the local authority had decided that proceedings should be issued. The periods varied from eight months to over two years.
- Failure to plan effectively for the child, progress the case, or involve and assess the wider family during long periods of accommodation.
- Insufficient attention paid to whether or not the parent had the capacity to consent to accommodation in cases where parents had learning disabilities or severe mental health problems.
- Insufficient attention paid to whether a mother who had just given birth after a difficult labour was in a condition to provide consent.
- Placing parents under undue pressure to agree to the accommodation of their child.
- Failure to explain properly to parents the legal position in relation to section 20 and their rights.
- Failure to take account of the needs and level of understanding of parents for whom English was a second language.
- Misunderstanding of what was meant by consent.

Following these decisions, the Supreme Court of England and Wales looked in detail at the use of section 20 in ***Williams and another (Appellants) v London Borough of Hackney [2018] UKSC 37***. The judgment reviewed a number of earlier cases involving the use of section 20, including some of those described above. The *Williams* case provides a helpful overview of the background to section 20 and the key legal issues that should be borne in mind in any situation where section 20 (or section 76 in Wales) is relied on, including removal at birth.

The key points from the *Williams* case and the other cases are:

- Section 20/76 is a voluntary delegation of parental responsibility by parents.
- The delegation must be real and voluntary and the best way of ensuring this is to give parents full information about their rights under this section.
- Given the voluntary nature of the arrangement, it follows that the delegation should not be compulsion in disguise.
- If parents request the return of their child, the local authority must comply and if the local authority think the child will suffer significant harm if returned, it should apply for an emergency protection order or commence care proceedings.
- Section 20 is '*a service to parents in need of help with the care of their children*' (*Williams* para 20*).*
- Section 20 can be used immediately after birth, '*rushing unnecessarily into compulsory procedures when there is still scope for a partnership approach may escalate matters in a way which makes reuniting the family more rather than less difficult*' (*Williams* para 34).
- Assuming voluntary delegation immediately after a difficult birth simply because there is no objection would risk removal being unlawful.
- There are no restrictions on the length of time that a child can be in section 20 accommodation but the local authority must comply with all the duties imposed on it in relation to the placement and planning for looked after children.

Use of section 20/76

The most recent statistics for England on children looked after by local authorities indicate that in 2022 there were 82,170 children who were looked after. The commentary on the statistics notes that the number and proportion of children under a care order has decreased slightly from last year (77% instead of 79%), whilst the number and proportion looked after under a section 20 voluntary agreement has increased (17% up from 15% in 2021). The reasons given for this adjustment is the rise in the number of unaccompanied asylum seeking children who are usually accommodated under section 20/76. However, the report on the statistics also notes that half of the 31,010 children who began to be looked after in England in the year 21-22 were initially accommodated under section 20.

In Wales, published statistics indicate that on 31 March 2021 6,215 children were looked after under a care order and 510 children were looked after under section 76 (just over 7% of the total).

In comparison, on 31 March 2016 there were a total of 70,440 looked after children in England, and more than a quarter of those children (27%) were looked after under section 20 while in Wales there were 5,660 looked after children of whom 905 (16%) were looked after under section 20 (Lynch, 2017: para 4.4.1. Note that section 20 CA was still the relevant legislation in Wales at this time).

The statistics indicate that the use of section 20/76 is declining and it is likely that this arises from criticisms made in judgments and a resulting confusion about the appropriate use of section 20/76.

Guidance

When the CA was first implemented, statutory guidance issued alongside the Act referred in many places to the importance of working in partnership with parents and to the ways in which this could be done. Some detail was given about how section 20 could be used. In the guidance, voluntary arrangements were clearly seen as one of a suite of measures designed to facilitate the provision of support for children in need and their families (DH, 1991). The guidance made it clear that there was no distinction between a series of short pre-planned placements and longer-term provision of accommodation. In addition, guidance stated that even where a child was suffering or likely to suffer significant harm, in the majority of cases work with parents to achieve an agreement to accommodation '*will usually ensure that the ongoing plan for the child can be operated in partnership with his parents.*'

As statutory guidance linked to the CA was amended over time, there was less mention of working in partnership with parents and children, and any detail on the use of section 20 was removed.

In 2010, following the *Southwark* judgment on homeless young people, statutory guidance for children's social care and housing departments was issued, and this has recently been updated (see MHCLG and DfE, 2018).

Following the judgments in 2015, particularly in ***N (Children) (Adoption: Jurisdiction)*** [2015] EWCA Civ 1112 ADCS, Cafcass, and ADSS Cymru published guidance because of their concern that local authority reaction to the criticisms in these judgments was leading to a rise in care applications and a reluctance to make use of section 20/76 even in circumstances where this was appropriate. The guidance suggested that local authorities should review all open section 20 cases 'to ensure that section 20 status remains the appropriate current legal option and framework for the child', while identifying the situations where section 20/76 could helpfully be used.

Also at this time the Transparency Project issued guidance on the use of section 20/76, which has been updated several times, most recently in 2022.

In 2021 the Public Law Working Group published best practice guidance on the use of section 20/76 (2021) as it was felt that despite the judgment in the *Williams* case, some detailed guidance on practice would be helpful.

All the different versions of practice guidance listed above stress the continuing importance of having a statutory provision that enables accommodation to be provided to children on a voluntary basis, without the necessity of undertaking court proceedings. They all set out the legal framework and stress the importance of parents, and young people of 16 and 17, being given information about their legal rights and the purpose of the use of section 20/76, and of making sure they have understood the situation and are in agreement with it.

The issue of consent is dealt with in paragraphs 22-34 of the PLWG best practice guidance.

The key points made there are:

- Ensuring parent, or older child, has capacity to consent.
- When planning pre-birth, have discussions early to allow parents time for an informed decision.
- If close to or immediately after birth, ensure that the mother can make informed decision and if necessary seek medical advice.
- Ensure the parent or young person has all the relevant information they need in a format and language they can understand.
- Ensure the parent knows they can remove the child at any time.
- Ensure that the decision is not made under duress.
- Consent is a positive act, silence should not be taken as acquiescence.
- The parent or child should have access to legal advice.
- The purpose and duration of accommodation should be clear .
- It is good practice to have an agreement in writing.

They set out examples of the circumstances in which section 20/76 can be used and the factors local authorities should consider. They emphasise the possibility of providing short-term support as part of a package of family support services, and they stress the importance of planning, regular review, and taking account of the wishes and feelings of parents and children.

The practice guidance comes from the practice experience of those drafting it and draws on the points made in the judgments included earlier in this paper. In relation to the use of section 20/76 for newborn babies, guidance from the PLWG suggests that this will rarely be appropriate. This departs from the comments made by Lady Hale in the *Williams* case (see above) where she suggests that the use of section 20/76 may be more helpful in supporting the eventual reunification of the family. In the very difficult circumstances of the removal of a baby at birth, the key issues will be a very careful planning in advance and good information sharing among all those working with the family (Mason et al., 2022). Further research into the use of section 20/76 would assist in the development of future practice or statutory guidance.

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