



# Can I, should I, must I... ...take this baby into care?

Solicitor and social worker Allan Norman examines the legal and ethical imperatives in the case of the Nottingham baby – baby K – at the centre of significant controversy when removed from its 18-year-old mother shortly after birth in February of this year, emphasising the presumption against removing a child from its parents

Much has been said and written about the ‘Nottingham baby case’. The extreme camps are those who believe that the social work profession is irredeemably infiltrated by baby snatchers, and those who believe that the case was unique and that the resulting social work bashing was wholly unjustified.

Neither camp has my support. What is invaluable about the case is that because both the judgments of Justice Munby in restoring baby K to his or her mother and in the subsequent Judicial Review are public, we can all learn the lessons. And they are not hard to learn. In this article, I set out a framework for legal, ethical and professional practice. The framework can be applied to this case, but can be applied to many other comparable professional dilemmas too.

#### Can I?

As social workers, we cannot do anything without legal authority. So we begin by asking whether what we propose to do is something

we are permitted to do. There are those who believe that the simple message of this case was that a baby cannot be removed without a court order. This is not correct. A court can order something which is against the will of either of the parties, and indeed the role of the courts generally in civil proceedings is to adjudicate where agreement cannot be reached. But baby K could have been removed from his or her mother at birth with explicit, informed consent.

The second judgment of Justice Munby contains a detailed discussion of the mistakes of Nottingham social workers in this respect. These include a failure to understand the nature of informed consent, and of explicit consent, and in this they offer simple learning points for us all. The judge was concerned that the social workers sought to argue that the absence of the mother’s opposition amounted to consent. Justice Munby makes clear that you cannot imply consent from the absence of any vocal opposition. Consent is, at least in circumstances such as these, active

rather than passive.

He was concerned also by the need for informed consent. Apparent acquiescence to a proposed course of conduct may arise from a lack of knowledge of our rights, from a belief that we are powerless to assert any rights that we might have, or simply from a complete physical exhaustion that prevents us from having the energy to try to exercise them. Each of these possibilities was canvassed in

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Justice Munby’s judgment, leading to the inexorable conclusion (surely troubling to any social worker concerned about the misuse of state power) that ‘submission in the face of asserted state authority is not the same as consent’.

It remains the case, however, that explicit, informed consent to the proposed course of action would have been a lawful alternative to a court order. In all this, the judge is reminding us of some basic principles of social work practice, that include the principle that we use compulsion as little as possible, that we ensure that our service users are aware of their rights, and that we do not abuse the power that arises from our position as social workers.

### Should I?

Having established that we can pursue a course of action, the most troubling question is whether we should. Sometimes we will fear that we ought to do something that we do not wish to do, on other occasions that we ought not to do something that we do wish to do. Using the dialectical approach suggested by this article, we should concentrate next on examining whether there are arguments against the course of action that we propose to pursue. In this case, since we propose to seek an interim care order, the question we must ask is, are there reasons why we ought not to do so?

The answer is, wherever we look, yes, yes, and yes again. Let’s start with the Children Act. It contains a presumption of making no order. An order is only made if this is better than making no order at all. And yet ‘care orders almost tripled between 1992 and 2002’ according to a Department of Constitutional Affairs statistical bulletin.

Why? Has there been a tripling of the incidences of significant harm to children? Or of awareness of it? Or has there been a tripling of the level of our professional aversion to risk? The latter is a serious possibility. But as a ground for making a care order, it is inconsistent with the ethos of the Children Act. And as one blogger on *Community Care’s* website observed: ‘is the state a really good parent if we have to remove new born babies from mothers who have been brought up by the state?’

Before we can be satisfied that it is better to take the baby into care than not, we should have regard to the outcomes for children in care. The presumption against the making of a care order operates legally after it has already been decided that there is a risk of significant harm, so it must be the case that the risk itself is insufficient for a care order to be made.

Let’s try a Human Rights approach. Any intervention to remove a child from his or her parent is interference in family life, which engages Article 8. It is an interference that can, of course, be justified. In particular, in the context of child protection, it can be justified where it is necessary for the protection of the child. But necessity implies the lack of any viable alternative, and therefore leaves the presumption of non-interference except where there is no alternative.

Our Code of Ethics also has something to say – indeed, quite a lot to say – about the use of compulsion. It emphasises the minimum use of compulsion, and that throughout any use of compulsion, its use must be justified by necessity. It also emphasises that the rights of service users must be respected, and that they should be actively assisted with a potential challenge to our own use of power.

So, no matter whether we approach the question from a human rights perspective, from a legislative perspective, or from the framework of our Code of Ethics, we equally arrive at the conclusion that the presumption would be against removing baby K from his or her mother, a presumption that could be rebutted but only on limited grounds and with significant safeguards being afforded.

### Must I?

It might seem a reasonable assumption that the answer to the question “Must I?” is determinative – if you must, what is the point in first asking whether you should? I dare to suggest this assumption is dangerous. It makes all the difference in the world to know whether we are required to do something that we believe we ought to do, or something that we believe we ought not to do. In the latter case, there will be a great deal more anxious scrutiny of what we are doing, and how we approach the task than in the former. We will



also consider the weight of the authority far more carefully. In extreme circumstances, we will withdraw from a course of action on grounds of conscience.

Let’s deal with the weight of the authority. On the facts of this case: ‘The separation of G and K was effected by staff of the NHS Trust... at the express direction of a local authority social worker... to assert that it was not for the NHS Trust to question the legality of the “authority” supposedly provided by the local authority is simply not acceptable’. There in a nutshell, in the unquestioning bowing to apparent authority, is the danger of not applying anxious scrutiny to the question, “Must I?”

But, of course, the child protection framework is one that is mandatory. The local authority must enquire, and if it is concluded that action is required, it is mandatory to take the action. So despite the doubts I have raised about whether a child should be taken into care as readily as happens, it is clear that action to safeguard or promote the child’s welfare is mandatory. How that is achieved is a moot point.

In the present case, in considering the appeal from the Nottingham judge who made the care order, Justice Munby noted it was ‘an appropriate case in which to direct... a residential assessment of G and K...’ It is entirely right that this is what happened.

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BASW’s seminar series “Can I? Should I? Must I?” runs between May and September, and will be delivered by Allan Norman. For online booking information, go to [www.celticknot.org.uk/training](http://www.celticknot.org.uk/training), or see the display advert on page 16. Allan Norman is a social worker, a solicitor, and a member of BASW’s Standards and Ethics Board.