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WHAT'S GOING ON WITH SECTION 20?

It can be a valuable tool in the social worker's kit providing short-term voluntary care to help keep families together. But the courts have increasingly come down on local authorities amid concern Section 20 arrangements are being used as 'compulsion in disguise' or a stepping stone to care orders, potentially fuelled by a drive to meet the statutory 26-week care proceedings target, says **Allan Norman**

Lord Justice Munby speaking at BASW's annual conference in 2014

The 'Nottingham Baby' case in 2008 attracted a certain amount of media attention. It involved a baby removed from an 18-year-old care leaver without a care order or her consent. The social worker involved in the case was scathingly rebuked by the court for using powers to voluntarily accommodate a child under Section 20 of the Child Act, based on the fact that there had been no objection. "To equate helpless acquiescence with consent [is...] unprincipled and, indeed, fraught with potential danger," said the judge hearing the case, now Lord Justice Munby, President of the Family Division of the High Court of England and Wales.

Fast forward four years and along comes another significant case involving a local authority in dispute with a mother over care of a child. This dealt with capacity to consent, and the need for judicial scrutiny if children are to be removed when parents lack capacity. Last year, there were at least three similar cases. So far this year, I have counted 12. So, you may ask, what's going on?

Munby recently referred to this as a "litany" of cases. Those familiar with litanies will know they are characterised by the same refrain being repeated over and over again. The word is apt. Issues around consent, capacity, and drift, with cases dragging on, are repeated time and again.

I have on occasion advised families in such circumstances and I invite you to imagine the scenario. A parent is invited to consent to voluntary accommodation of their child. As their advisor, I can tell them about the concern I have about the way consent is being pursued. I can even say I think the arrangements are unlawful. But I am conscious that where the issue could be the break-up of a family, the stakes are very high. If the threshold for an interim care order could be crossed, and if lack of cooperation might be used as an argument to help cross the threshold, then it might be unwise to tempt fate and oppose a section 20. Having decided to go with it, they may hope and expect some pay-back. If they agree as a family they would benefit from support, they will expect that support to be forthcoming. If they agree to voluntary accommodation in the short run so that they are not under pressure to have to present their case in a hurried and ill-prepared manner, then they may expect an opportunity to present a measured and properly prepared case further down the line. If they need a breather to turn their lives around, they might hope and expect to be able to get their child back when they feel they have done so.

While the early cases I referred to criticise the circumstances in which children were first accommodated, a theme over the course of this year has been the drift that occurs once a section 20 arrangment has been made. In one sad case last year, a two-year-old child was removed under section 20 and the case dragged on for two years before care proceedings were issued, during which a parenting assessment found the parents could care for their child.

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A generous interpretation of the drift is that, faced with limited resources and other pressing demands, a child who is deemed 'safe' is a lower priority. A less generous interpretation is that faced with the introduction of the statutory 26 week deadline in the Children and Families Act 2014, practitioners used Section 20 drift to allow themselves to be good and ready before the 26 week clock is set ticking.

Sadly, it cannot be said that lessons around capacity and consent have been learned. There have been a number of cases this year where damages have been awarded for the misuse of Section 20, the highest being £40,000. In this case, the local authority argued Section 20 accommodation was permissible provided only that there is no objection. Whatever the exact wording of the legislation, case law is also law, which means taking note of court rulings such as in the 'Nottingham Baby' case. I cannot help but wonder why the authority making the £40,000 payout had not taken heed of the lessons of seven years earlier. The admitted absence of objection was particular pernicious in this case, as the parent in question was completely unaware that their child had been voluntarily accommodated, and may have lacked the capacity to consent.

I defended the use of Section 20. I like the fact that there is a tool in the social worker's toolkit that allows us to avoid the use of compulsion even where the threshold is crossed, and enables us to provide support in the form of accommodation even where it is not. But the case for having such a tool, must be subject to a condition that it is not misused.

There is a concept which judges sometimes use, of an Alsatia. It comes from an historical London enclave where the Rule of Law did not run. Judges do not like an Alsatia. In particular, they do not like being told that there are matters for a social worker's discretion in which the courts should not interfere.

Section 20 has been something of an Alsatia. By its very nature, its use has not routinely required judicial oversight. This, however, is changing. Those advising families are taking courage from the raft of legal authority that they can challenge the unlawfulness of Section 20 decisions. Drift is no longer tolerated. Faced with a continuing misuse of Section 20 agreements, the Court of Appeal last month spelled out clear instructions to the profession that go well beyond anything found in Section 20 itself: consent must be drawn up in plain language. It must be "properly recorded in writing and evidenced by the parent's signature". It must include a clear explanation of the right of a parent to change their mind and be reunited with their child at any time.

That judges will now be proactive in regulating section 20 – a power which on its face requires no judicial oversight – could not be more clear. Munby said: "Judges will and must be alert to the problem and pro-active in putting an end to it. From now on, local authorities which use section 20 as a prelude to care proceedings for lengthy periods or which fail to follow the good practice I have identified, can expect to be subjected to probing questioning by the court. If the answers are not satisfactory, the local authority can expect stringent criticism and possible exposure to successful claims for damages."

We have been warned!

Allan Norman is an independent social worker and a qualified lawyer. He tweets on social work and the law as @celticknottweet