



Is Section 20 a long-term solution?

Re S (A Child) and Re W (A Child) (s20 Accommodation) [2023] EWCA Civ 1

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1. On 5 January 2023, the Court of Appeal considered two appeals in the matter of **Re S (A Child) and Re W (A Child) (s20 Accommodation) [2023] EWCA Civ 1.**
2. In both matters, the parents had appealed the making of a final care order under Section 31 of the Children Act 1989 ('CA'), in circumstances where they argued this was disproportionate and matters could remain regulated under Section 20 of the CA.
3. Both appeals concerned children who were settled in long-term placements, where both the placements and the accompanying care plans were supported by the parents.
4. The case of **Re S and Re W** was the first time consideration has been given to the long-term use of Section 20 in such circumstances.
5. The issue to be considered was whether and in what circumstances, threshold having been established and there being in place an agreed care plan, the court should decline to make an order under Section 31 of the CA 1989 and instead make no order in accordance with the 'no order' principle as set out in Section 1(5) of the CA 1989.

Section 31 orders

6. As per Section 31 of the CA 1989, on the application of a local authority, the court may make an order:
 - a. Placing the child with respect to whom the application is made in the care of a designated local authority; or
 - b. Putting him under the supervision of a designated authority.
7. The court may only make such an order if it is satisfied:
 - a. The child concerned is suffering, or is likely to suffer, significant harm; and
 - b. That the harm, or likelihood of harm, is attributable to:
 - i. The care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
 - ii. The child's being beyond parental control.

8. A finding that the above 'threshold' is crossed does not automatically lead to the making of a care or supervision order, the Court must conduct a welfare analysis having regard to the 'no order principle'.
9. Under Section 33(3)(a) of the CA 1989, when such an order is made the local authority acquires parental responsibility for the child. Under Section 33(3)(b)(i), the local authority may determine the extent to which a parent may meet their parental responsibility. In other words, the local authority may trump a parent in order to safeguard or promote a child's welfare.

Section 20

10. Section 20 of the CA 1989, provides for the provision of accommodation for:
 - a. Any child in need within their area, due to the person who has been caring for them being prevented (for whatever reason) from providing that child with suitable accommodation or care; or
 - b. A child within their area, even if someone with parental responsibility is able to provide that accommodation, if they consider that to do so would safeguard or promote the child's welfare.
11. The parameters of Section 20 of the CA 1989 are as follows:
 - a. Parents may ask the local authority to accommodate a child;
 - b. A local authority cannot provide accommodation if a person who has parental responsibility that is able to provide care and accommodation objects;
 - c. There is no statutory limit upon the duration of an order under Section 20;
 - d. In agreeing to the making of a Section 20 order, a parent is delegating the exercise of their parental responsibility to the local authority; and
 - e. Any person with parental responsibility may at any time remove the child from Section 20 accommodation.
12. The leading authority on the use of Section 20 of the CA 1989, is **Williams v Hackney LBC [2018] UKSC 37**, in which Baroness Hale quoted from the Government White Paper:

"An essential characteristic of this service should be its voluntary character, that is it should be based clearly on continuing parental agreement and operate as far as possible on a basis of partnership and co-operation between the local authority and parents [15]."
13. In that case, Baroness Hale concluded her analysis by saying that:

“Thus, although the object of section 20 accommodation is partnership with the parents, the local authority have to also be thinking of the longer term [49].”

14. In **Worcestershire County Council v AA [2019] EWHC 1855 (Fam)**, Keehan J set out a non-exhaustive list of examples of cases in which it might be appropriate to accommodate a child under Section 20 without making an application under Section 31 for a care order.
15. Until the appeals of **Re S and Re W**, decisions of the Senior Courts concerned the use of Section 20 in place of a Section 31 care order related to accommodation of a child as a short-term or temporary solution.
16. However, a common feature (albeit dicta) in the previous cases was the need by parents who are not at fault to secure longer term support and services by way of accommodation without the need for a Section 31 order in circumstances where they would work in partnership with the local authority.
17. In March 2021, the Public Law Working Group published a report which gave best practice guidance concerning Section 20 orders. A number of recommendations were made, one of which was:

“There should be no imposition of time limits for the use of s20. There are no legal time limits in place. The imposition of time limits will be counterproductive. However, it is recommended that, where possible, the purpose and duration of any s20 accommodation is agreed at the outset and regularly reviewed” [234].

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18. The case concerned two appeals, which considered the interplay between care orders which had been made pursuant to Section 31 of the Children Act 1989 (‘CA 1989’) and the voluntary accommodation of children in need under Section 20 of the CA 1989 (‘Section 20’).
19. The issue to be considered was whether and in what circumstances, threshold having been established and there being in place an agreed care plan, the court should decline to make an order under Section 31 of the CA 1989 and instead make no order in accordance with the ‘no order’ principle as set out in Section 1(5) of the CA 1989.

Re S

20. S, aged 9, had a number of complex needs including ASD, ADHD and significant behavioural issues.

21. S's Mother and Father were separated.
22. After a period of support from the local authority, S's Mother reached a stage where she could no longer care for S at home. In May 2021 Mother signed a section 20 agreement and S moved to a residential unit. Mother told the local authority she could not envisage caring for S as he grew older and stronger, but she did not want the local authority to issue proceedings.
23. S's Father was not told about him moving to a residential placement until the transition had begun, he was initially against this but, after learning S had settled well, signed a section 20 agreement.
24. The local authority sought a care order, on the basis that section 20 was not an effective or appropriate mechanism for long term care and did not provide security or stability. The Guardian supported this, and raised a concern that whilst Father had been supportive to date, his position may change in the future and he may disrupt the placement in the future.
25. The Mother and Father agreed to S's continued placement at the unit, however opposed this being under a care order.
26. The Court found threshold to be met on the basis S was beyond parental control, and made a care order.
27. The parents appealed, and the appeal was heard by the Court of Appeal comprising King, Arnold and Warby LJ. The lead judgment was given by Lady Justice King who noted:
 - a. The Judge did not fall into the trap of proceeding on the basis that a section 20 order should only be made for limited duration;
 - b. However, the Judge fell into error in the assessment of risk posed by the Father;
 - c. Whilst Father had initially refused to sign a section 20 agreement, he did so, and has never interfered in the placement or suggested he would withdraw his consent;
 - d. The incorrect analysis as to the level of risk led to the making of a disproportionate order;
 - e. The attention of the Judge was not drawn to Section 20(9)(a) which would have the effect of depriving the Father of the ability to withdraw his consent in the event there was a live with order in favour of S's Mother, which Father was agreeable to.

Re W

28. W was adopted in 2008 when she was a little over a year old. She also had a diagnosis of ASD, ADHD, ARND, FASD, attachment disorder, dyspraxia, dyslexia, sensory processing difficulties and bladder bowel dysfunction.

29. As W grew older, the relationship with her adoptive Mother deteriorated and it became clear they could no longer live under the same roof. In September 2021, W's adoptive Mother and Father signed a section 20 agreement and in October 2021 she was placed with foster carers.
30. During this time, W had overnight contact with her parents.
31. The local authority made an application for a care order. This was supported by the Guardian, but opposed by the parents on the basis it was disproportionate and the arrangements under section 20 should continue.
32. The Court made a care order, stating that section 20 should not be used as a long-term tool.
33. The parents appealed. King LJ considered:

"It is clear that the judge was heavily influenced by her belief that section 20 orders should only be used as a short-term measure. That error led the judge to approach the risk and proportionality exercises with the balance too heavily weighted in favour of the making of a care order [74]."

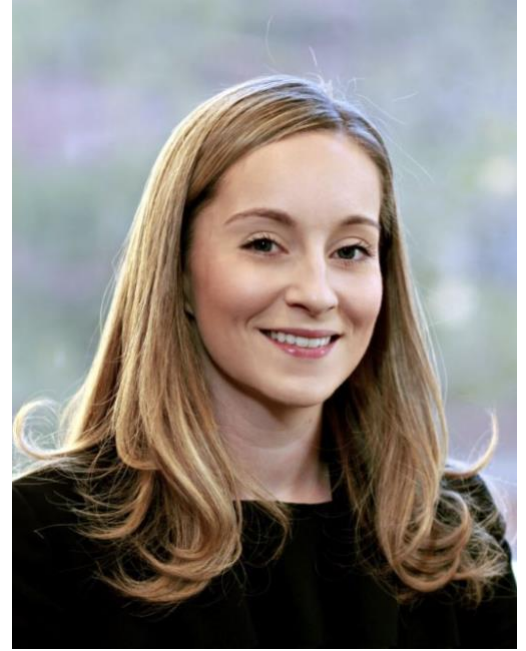
Outcome

34. Both appeals were allowed.
35. No party in either appeal suggested that the matter should be remitted for reconsideration, and it therefore followed that both children would remain in their long-term placements under section 20.
36. Lady Justice King concluded:

"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 has 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. Nothing I have said should on any view be taken to seek to undermine or dilute the Supreme Court's decision in Williams v Hackney LBC."

CONCLUSION

37. *Re S (A Child) and Re W (A Child) (s20 Accommodation)* when taken together with *Williams v Hackney* now provides a comprehensive and authoritative clarification on the law regarding section 20. The Public Law Working Group report adds a gloss to the best practice points. It follows that there would need to be extremely good reasons for this particular section of the Children Act 1989 to be considered further at the appellate level.
38. In *Re S and Re W* type cases, section 20 accommodation *can* be a long-term solution where arrangements for children are agreed. This largely boils down to a child-centred assessment of risk and a robust, fair proportionality analysis by public bodies intervening in family life. It would be for the local authority to discharge the burden of persuading a court that it needs the statutory power under section 31 of the Children Act 1989 to override a parent's PR. Each case is liable to be fact specific.
39. Those facts should be regularly reviewed. This is not just a best practice point but one which is mandated in secondary legislation. As King LJ helpfully reminds us all, whether arrangements for a child are managed under an order or by a voluntary delegation of parental responsibility under section 20, the Care Planning, Placement and Case Review (England) Regulations 2010 still apply. Rule 33(2) requires reviews at least every six months and the thirteen separate considerations which are contained within Schedule 7 should be considered.



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Law is correct as at 16 February 2023

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