



Trips and Traps of threshold drafting – physical and sexual abuse

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Introduction

- The starting point for writing a threshold document
- The law on threshold
- *Re ABC (Children: Overlaying Children)* [2020] EWFC 57 – the approach to take in fact finding hearings.
- Practical guidance and evidence gathering
- Examples of good and bad threshold documents



The Starting Point

- Balance of Probabilities
- Section 31(2) Children Act 1989
 - That the child concerned is suffering, or likely to suffer, significant harm; and
 - 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
- This is an objective test – *Re D (Care Order: Evidence)* [2011] 1 FLR 447, CA
- The Court of Appeal has also held that threshold is to be approached from the perspective of the children, not from the perspective parents – *Re H-L (Children: Summary Dismissal of Care Proceedings)* [2019] EWCA Civ 704



The Law on Threshold

- Firstly, the Local Authority **MUST** rely on facts that can be **PROVEN**, not mere assertions or reports.
- A lot of material the Local Authority relies upon is in case records or social work chronologies. This is often, for example, a previous social worker's note, a police summary or a report from school, which is hearsay. If disputed, the Local Authority needs to call direct evidence to support that allegation.



The Law on Threshold

- In *Re A (A child)* [2015] EWFC 11 – The President of the Family Division set out the need to:
 - link the facts relied upon by the Local Authority with its case on threshold,
 - i.e. the need to demonstrate why, as the Local Authority asserts, facts A + B + C justify the conclusion that the child has suffered, or is at risk of suffering significant harm of types X, Y and Z.
- The President highlighted the judgment of Macur LJ in *Re Y (A Child)* [2013] EWCA Civ 1337, para 7, in a judgment agreed by Arden and Ryder LJ

“No analysis appears to have been made by any of the professionals as to why the mother’s particular lies created the likelihood of significant harm to these children and what weight should reasonably be afforded to the fact of her deceit in the overall balance.”



The Law on Threshold

- The President reminded Judges and practitioners of the judgment of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, para 50:

“Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.”



The Law on Threshold

- Further, the President expressly approved the judgment of HHJ Jack in *North East Lincolnshire Council v G & L* [2014] EWCC 77 (Fam) where he said,

“The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts.”



The Law on Threshold

- Following on from *Re A*, the Court of Appeal in *Re J (A Child)* [2015] EWCA Civ 222 picked up on a number of themes articulated by the President in *Re A*.
- At [56]:
 - i) In an adoption case, it is for the local authority to prove, on a balance of probabilities, the facts on which it relies and, if adoption is to be ordered, to demonstrate that “nothing else will do”, when having regards to the overriding requirements of the child’s welfare.
 - ii) If the local authority’s case on a factual issue is challenged, the local authority must adduce proper evidence to establish the fact it seeks to prove.



The Law on Threshold

- iii) Hearsay evidence about issues that appear in reports produced on behalf of the local authority, although admissible, has strict limitations if a parent challenges that hearsay evidence by giving contrary oral evidence at a hearing.
- iv) The formulation of “threshold” issues and proposed findings of fact must be done with the utmost care and precision. The document must identify the relevant facts which are sought to be proved. It can be cross-referenced to evidence relied on to prove the facts asserted but should not contain mere allegations (“he appears to have lied” etc.)
- iv) It is for the local authority to prove that there is the necessary link between the facts upon which it relies and its case on threshold.
- iv) It is vital that local authorities, and, even more importantly, judges, bear in mind that nearly all parents will be imperfect in some way or other.



The Law on Threshold

- vii) When a Judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvas overall.

- viii) In considering a local authority's application for a care order for adoption the judge must have regard to the "welfare checklist" in section 1(3) of the Children Act 1989 and that in section 1(4) of the Adoption and Children Act 2002. The judge must also treat, as a paramount consideration, the child's welfare "throughout his life" in accordance with section 1(2) of the 2002 Act. In dispensing with the parents' consent, the judge must apply section 52(1)(b) as explained in *Re P (Placement Orders, parental consent)* [2008] 2 FLR 625.



The Law on Threshold

- Key Lessons from the judgement:
 - The Threshold document should be in short form. It does not need to be your entire case.
 - It must clearly demonstrate:
 - i) What the nature of the local authority's case is
 - ii) What the essential factual basis of the case is
 - iii) What the evidence is upon which the local authority relies to establish its case.
 - iv) What the local authority is asking the court, and why.
 - The local authority must justify the conclusion that the child has suffered or is at risk of suffering significant harm of the type asserted
 - The local authority must show in its evidence why the alleged conduct is significant, not simply that it occurred



The Law on Threshold

- In the case of *Re J*, the original threshold document approved by the Judge stated as follows:
 - *The LA relies upon the following facts:*
 - a) (Mother) and (Father) have lacked positive role models.*
 - b) (Mother and (Father) have not always been honest with professionals. For example:*
 - i) During the course of the parenting assessment the first respondent was not initially honest about how she came to sustain a black eye; and*
 - ii) The second respondent, initially, failed to disclose the extent of his cannabis use.*
 - c) (Mother) and (Father) have failed to consistently engage with professionals and accept the support provided.*
 - d) ...*
 - e) (Mother) and (Father) have shown a lack of understanding with respect to domestic abuse and the impact this has on a child. Prior to the birth of (J) there was an incident whereby both parents injured each other. (Mother) hit (Father) with a shoe and (Father) bit (Mother). On 1 March 2014 the police were contacted by a member of the public with regards to an incident of domestic abuse between (Mother and (Father)).*
 - f) (Mother) and (Father) lack appropriate positive support networks.*
 - g) (Father) has a history of cannabis misuse. On 27 January 2013 he received a caution for possession of cannabis.*
 - h) Throughout the assessment process (Mother) and (Father) have displayed emotional immaturity.*
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The Law on Threshold

- The Court of Appeal was troubled by three points in particular:
 - 1) Failure to make findings of fact;
 - 2) Generalised drafting;
 - 3) Lack of linkage.



Updating case law

- *Re ABC (Children: Overlaying Child)* [2020] EWFC 57
- Keehan J outlined the relevant law in full regarding fact finding hearings:
 - The burden of proof lies with the local authority, the standard is the balance of probabilities and findings of fact must be based on evidence.
 - The burden of disproving a reasonable explanation put forward by the parents falls on the local authority (see para 10 *Re S (Children)* [2014] EWCA Civ 1447)
 - The inability of a parent or carer to explain an event cannot be relied upon to find an event proved (see *Re M (A Child)* [2012] EWCA Civ 1580)



Updating case law

Findings of fact

- In *Re BR (Proof of Facts)* [2015] EWFC 41, Peter Jackson J, as he then was, sets out a list of risk factors and protective factors that might assist the court in assessing the evidence it hears in cases of alleged inflicted injury.
- The Judge must decide if the facts in issue have happened or not. There is no room for finding that it might have happened. The law operates a binary system in which the values are 0 or 1, per Lord Hoffman in *Re B* at paragraph 2.



Updating case law

Assessment of evidence

- When carrying out the assessment of evidence regard must be had to the observations of Butler-Sloss P, as she was in *Re T* [2004] EWCA (Civ) 558:
“[33] *Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.*”
- When considering the ‘wide canvas’ of evidence part of the speech of Lord Nicholls in *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80 remains relevant.
- The evidence of the parents and of any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them (See *Re W and another (Non-accidental injury)* [2003] FCR 346.



Updating case law

- The process by which the facts are judicially determined is further complicated for the potent reason Leggatt J, as he then was, set out in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) (15 November 2013), [paragraph 15 – 21] in relation to testimony based on memory.

“An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people’s memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.”



Updating case law

- The observations as to demeanour in *R (on the application of SS) (Sri Lanka) v The Secretary of State for the Home Department* [2018] EWCA Civ 1391 made by Leggatt J: “36. Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge.”
- The findings made by the Judge must be based on all the available material, not just the scientific or medical evidence; and all that evidence must be considered in the wider social and emotional context: *A County Council v X, Y and Z (by their Guardian)* [2005] 2 FLR 129.



Updating case law

Expert Evidence

- In *A Local Authority v K, D and L* [2005] EWHC 144 (Fam), [2005] 1 FLR 851 Charles J referred to the important distinction between the role of the Judge and the role of the expert.
- The court is not precluded from making a finding that the cause of harm is unknown: *Re R (Care Proceedings: Causation)* [2011] EWHC 1715 (Fam).
- The court must resist the temptation identified by the Court of Appeal in *R v Henderson and Others* [2010] EWCA Crim 1219 to believe that it is always possible to identify the cause of injury to the child.



Updating case law

Identification of perpetrators

- As to the identification of perpetrators is concerned the standard of proof with respect to any such identification is the balance of probabilities. Where a perpetrator cannot be identified, the Court should seek to identify the pool of possible perpetrators on the basis of the “real possibility” test. In *B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575, Peter Jackson LJ drew the threads together:

“49. I would suggest that a change of language may be helpful. The court should first consider whether there is a ‘list’ of people who had the opportunity to cause the injury. It should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so: Re D (Children) [2009] EWCA Civ 472 at [12]. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: “Is there a likelihood or real possibility that A or B or C was the perpetrator of the inflicted injuries?” Only if there is should A or B or C be placed into the ‘pool’.



Updating case law

- Where there are multiple injuries sustained at different times the court must consider separately the question of who is the perpetrator of each injury. If the court is able to identify the perpetrator of one injury, the question would then arise as to the extent to which the court is entitled to rely upon that finding in order to identify the perpetrator of other injuries. That issue was considered by the Court of Appeal in *Re M (A Child)* [2010] EWCA Civ 1467.



Updating case law

‘Failure to protect’ as a finding

- The evidential basis for making a finding of a failure to protect was considered by the Court of Appeal in the case of *L-W Children* [2019] EWCA Civ 159. At paragraph 40, King LJ emphasised that it is for the local authority to prove the necessary link between its case on the facts and its threshold allegations. King LJ said:

“62. Failure to protect comes in innumerable guises. It often relates to a mother who has covered up for a partner who has physically or sexually abused her child or, one who has failed to get medical help for her child in order to protect a partner, sometimes with tragic results. It is also a finding made in cases where continuing to live with a person (often in a toxic atmosphere, frequently marked with domestic violence) is having a serious and obvious deleterious effect on the children in the household. The harm, emotional rather than physical, can be equally significant and damaging to a child.”



Updating case law

63. Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.

64. Any court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable. As Aikens LJ observed in Re J, "nearly all parents will be imperfect in some way or another". Many households operate under considerable stress and men go to prison for serious crimes, including crimes of violence, and are allowed to return home by their long-suffering partners upon their release. That does not mean that for that reason alone, that parent has failed to protect her children in allowing her errant partner home, unless, by reason of one of the facts connected with his offending, or some other relevant behaviour on his part, those children are put at risk of suffering significant harm."



Updating case law

Physical Abuse

- *R (Children)* [2018] EWCA Civ 198
- In the care proceedings, the local authority sought a finding in the threshold document that, “*the father killed the mother and in doing so used unreasonable force, or alternatively, was reckless.*”
- This led to the parties and Mrs Justice Theis considering the criminal law in relation to self-defence and the Judge ultimately making a finding that the father, “*used unreasonable force and unlawfully killed the mother...*”
- The Court of Appeal confirmed that criminal law concepts have neither relevance nor function within a process of fact finding in the Family Court, especially given the very different functions that the Criminal Court and Family Court perform; the latter considering the future welfare of children rather than guilt or innocence.



Updating case law

Sexual Abuse

- *A Local Authority v C* [2001] EWHC 231 Theis J sets out the ‘lessons learnt’.
- It is essential that the practitioner is familiar with the guidance for best practice in cases involving physical signs of sexual abuse. The Royal College of Paediatrics and Child Health has produced the definitive guide “**The Physical Signs of Sexual Abuse**” Handbook sets out all the key features to look out for.



Updating case law

- The observations made by Baker J in *A London Borough Council v K* [2009] EWHC 850 (Fam) at para 161 are relevant:
 - Examining a pre-pubertal child should be conducted by doctors who have relevant experience;
 - The examination should be recorded wherever possible on DVD
 - The clinicians conducting the examination should inspect the DVD recording before completing their written record of the examination. They should note what the DVD demonstrates and in particular whether it conforms or contradicts what they saw with the naked eye.
 - The written record should include a note of the anatomical configuration of the hymen.
- In addition, Theis J added two more:
 - Precise terminology is essential
 - Detailed written recording of the examination, including the use of line drawings is essential.



Practical guidance and evidence gathering

Practical points for proving threshold

- As much evidence as possible to support the facts relied upon by the local authority in threshold should be sought at the first CMH.
- Where the local authority seek to prove a physical or sexual assault, direct, first hand evidence will be necessary:
 - a) Who witnessed the assault?
 - b) Who do you need to get a witness statement from to prove a fact in threshold?
 - c) Anonymous police referrals will hold very little weight, if any.
 - d) Is the witness a child and has she had an ABE interview?
 - e) Can the witness provide photographs/videos of the incident/location to be exhibited to their statement.
- Other hearsay evidence may be helpful but will carry much less weight.



Practical guidance and evidence gathering

Obtaining witness statements

- Example: A social worker was tasked with asking 2 lay witnesses (a parent's family members) to provide statements of domestic violence between the parents. The family members lived together and were not advised to write their statements separately and in their own words. They produced a joint document to the social worker. The local authority solicitor produced two statements, one for each witness, where the majority of the statements were copied and pasted.
- How does this impact on a parent's right to a fair trial (Article 6 ECHR)?



Practical guidance and evidence gathering

Police evidence

- Disclosure that may be needed from the police:
 - a) Any witness statements
 - b) All interview recordings and transcripts including ABEs and defendant interviews.
 - c) All CRIS reports (rather than just the referrals and merlins)
 - d) All photographs/body worn footage/video evidence
 - e) Telephone records
 - f) Device downloads, such as iPads, tablets and laptops.
 - g) In sexual assault cases – SOIT log – sex offenders investigation log – this could include e.g. first disclosures, body maps



Practical guidance and evidence gathering

- Other evidence:
 - a) Medical records, including GP notes, hospital notes, body maps, health visitor's notes
 - b) CP medical reports
 - c) School/nursery records
 - d) Foster carer logs
 - e) Relevant social worker case notes
 - f) MASH records
 - g) Section 47 reports

- Other considerations:

Do you need a *Re W* hearing?

- What are the implications for your case if the judge refuses the application? Can you still prove the facts on which you seek to rely?



Practical guidance and evidence gathering

- School records – examples of disclosure
- Referrals
- Safeguarding logs
- Safeguarding Lead statement



Practical guidance and evidence gathering

Drafting threshold documents

- It should be a short concise document.
- What happened?
- What is the result – i.e. What is the harm?
- Has the event caused significant harm or a risk of significant harm?
- A fact that can be proven but cannot be linked to significant harm is of no relevance.



Practical guidance and evidence gathering

- The fact must be attributable to a parent's care or the child being beyond parental control.
- Clear headings and sub headings are helpful.
- Threshold should not contain minor issues or elements that do not advance the question of the presence or risk of significant harm.
- For the final threshold document each fact should be cross referenced to the paginated direct evidence in the bundle, not just the social worker's statement.
- For a schedule of findings, it is best to set out as detailed a schedule as possible. Put in all allegations you seek to prove. A schedule can be reduced later on.



Thank you

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