The Threshold Criteria In Care Proceedings - The Law And Drafting Tips For Beginners

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clerksroom

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Presenter

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Introduction

- an introduction to the legal concept of ‘threshold’ in care proceedings
- an explanation of why there is a need to satisfy the ‘threshold criteria’

& an overview of the consequence s of the ‘threshold criteria’ not being satisfied

- some guidance regarding drafting and potential pitfalls
- Questions

Detailed agenda

- **Welcome and Introduction**
- **What is threshold?**
- **Threshold – a jurisdictional issue**
- **The relevant date**
- **The burden of proof**
- **The standard of proof**
- **The first component – significant harm/likelihood of significant harm**
- **The second component – attributability to the parent**
- **An alternative basis - beyond parental control**
- **What happens if threshold is not 'crossed'?**
- **Drafting tips – threshold statements**
- **Drafting tips – response documents/ challenging threshold**
- **Questions**

What is ‘threshold’ in care proceedings?

Before the court can make a care order or a supervision order, it has to be satisfied that the subject child or child of the proceedings is suffering significant harm. It must then be satisfied that that harm or likelihood of harm is attributable to either he care being given to the child or likely to be given to the child if an order was not made or the child being beyond parental control (I will return to that later).

This means that the local authority needs to show that the subject child is suffering significant or is likely to be harmed because of something the parents have done that they should not have done or that they have not done something that they should have.

Threshold is a jurisdictional issue

Section 31(2) of the Children Act 1989 makes clear that,

"(2)A court **may only make a care order or supervision order if it is satisfied**—

(a)that 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."

In light of this statutory wording a local authority **must** prove (on the balance of probabilities) to the Court that the case has passed this threshold before it can ask the court to make an order. The local authority will therefore explain how the threshold criteria have been met in its application for a care order (in Form C110A or an attached threshold statement).

Interim threshold criteria – also a jurisdictional issue

The Court may make an interim Care Order or an interim Supervision Order if the Court is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2).

s.38(2)

"(2)A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)."

Therefore, it is easier for the local authority to prove the threshold criteria are met for an interim order than for a final order.

The relevant date for proving “threshold”

Case law has clarified that the Court has a duty to make a finding as to the relevant date on which the threshold criteria are satisfied. This date is the date when protective measures were first initiated if those measures have been continuously in force until the date of the application (if not then it will be the date of the application (**Re M (A Minor) (Care Order: Threshold Conditions) [1994] 3 WLR 558**).

Whether a protective measure was relevant will be considered on a case-by-case basis - **Southwark LBC v B and others [1998] 2 FLR 1095** but the following are likely to be accepted by the Court to be relevant protective measures on which the Court can find to be the relevant date:-

- **The exercise by the police of Police protection powers pursuant to section 46 of the Children Act 1989 in respect of the subject child(ren).**
- **The subject child(ren) being accommodated by the local authority pursuant to section 20 of the CA 1989**
- **an application for an emergency protection order by a local authority in respect of the subject child(ren).**
- **The issuing of an application for a care order by a local authority in respect of the subject child(ren).**

Evidence of events on/ before the relevant date can be relied on to prove suffering or likelihood of suffering significant harm (**Re M above**) as can facts coming to light since the relevant date can be relied on to prove the situation on the relevant date **Re G (Children) [2001] EWCA Civ 968**.

Welfare stage: proportionality evaluation

If the threshold criteria are met, it **does not** mean that an interim care or supervision order or final orders must be made.

The court must consider the welfare checklist in section 1(3) of the Children Act 1989 and carry out a necessity and proportionality analysis of the range of powers available (including the power to make no order – s.1(5) CA 1989). This meets the requirements of Article 8 of the *European Convention on Human Rights*.

Any order must be the least interventionist order to meet the child protection/child welfare needs.

What must be proved as of the relevant date? (1) – Is suffering

The statute requires that the subject child "is suffering" is applicable as at the relevant date

Past events will be used to prove why a child "is suffering significant harm", but whether a child "has suffered significant harm" is not a relevant finding in itself for the purposes of the relevant date/threshold.

Re S & H-S (Children) [2018] EWCA Civ 1282

What must be proved as of the relevant date? (2) – likely to suffer significant harm

The Supreme Court in **Re B (Care Proceedings: Appeal) [2013] 2 FLR 1075** clarified that a finding that a child is ***"likely to suffer"*** must be based on a finding of ***"a real possibility, a possibility that cannot sensibly be ignored having regard to the gravity of the feared harm in the particular case".***

Past events will be used to prove why a child "is likely to suffer significant harm" – Re: M and **Re S & H-S (Children) [2018] EWCA Civ 1282**

Definition of harm

Section 31(9) CA 1989

(9)In this section—

•…

•“harm” means ill-treatment or the impairment of health or development **[**including, for example, impairment suffered from seeing or hearing the ill-treatment of another**]**

•“development” means physical, intellectual, emotional, social or behavioural development;

•“health” means physical or mental health; and

•“ill-treatment” includes sexual abuse and forms of ill-treatment which are not physical.

•;

When is harm significant?

Please NB there is **no statutory definition** of significant harm. Case law has clarified that significant means "considerable, noteworthy or important" - **Humberside CC v B [1993] 1 FLR 257**

Ward LJ ruled at para 54 in **Re MA (Care Threshold) [2009] EWCA Civ 853** that to satisfy the threshold criteria,

> *"**the harm must … be significant enough to justify the intervention of the State and disturb the autonomy of the parents to bring up their children by themselves in the way they choose**. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it … Although Article 8 has of course more relevance to the disposal stage when the care or supervision orders can be made, it does, nonetheless, inform the meaning of 'significant' and serves to emphasise that there must be a 'relevant and sufficient' reason for crossing the threshold"*

Section 31(10) provides for a comparator **"Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child."**

What must be proved as of the relevant date? (3) – attributability of harm/likely harm to parent

Harm will be attributable to the parent's/parents' care if:-

1 The parent's/parents' actions caused or are likely to cause the child harm.

2 The parent's/parents' re is failure to protect the child from harm

Re A (Children) (Interim Care Order) [2001] 3 FCR 402.

If the significant harm resulted was caused by a genuine accident not due to the parent's/parents' failure to protect the harm will not be attributable to their care - **Re L (A Child) (Care Proceedings: Responsibility for Child's Injury) [2006] EWCA Civ 49**

What must be proved as of the relevant date? (3) – beyond parental control (an alternative basis)

Section 31(2) of the Children Act 1989 makes clear that,

"(2)A court **may only make a care order or supervision order if it is satisfied**—

(a)that 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."

Beyond parental control (continued)

The Court may make an interim Care Order or an interim Supervision Order if the Court is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2).

s.38(2)

"(2)A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)."

Again, it is easier for the local authority to prove the threshold criteria are met for an interim order than for a final order.

Beyond parental control (continued)

Re T (A Child: Care Order: Beyond Parental Control: Deprivation of Liberty: Authority to Administer Medication) [2018] EWFC B1

Care relating to a child with disability

There is acknowledgment and discussion of the conflicting case law regarding whether there is a need to prove a connection between the harm (or likelihood of harm) and the parents' care and the child being beyond parental control and ultimately concludes that no blame of the parents is required.

"90. In my judgment it is immaterial whether a child is beyond parental control due to illness, impairment or for any other reason. The court simply has to consider if, on the facts, the child is beyond the control of the parent or carer. If that condition is satisfied, the court then has to determine if the child is suffering or is likely to suffer significant harm as a result of being beyond the control of the parent. If the answer to that 2nd question is 'yes', then section 31(2)(b)(ii) threshold is, in my judgment satisfied."

The burden of proof – the LA's duty

The burden of proof

It has long been established that the burden of proof is on the applicant local authority - ***Re O and N (children) (non-accidental injury); Re B (children) (non-accidental injury) [2003] 2 All ER 305, [2003] 1 FLR 1169***

The standard of proof (the civil standard)

Whether the s 31(2)(a) is satisfied is an issue to be decided by the court on the basis of the facts either

1. admitted or
2. proved on the balance of probability before it

suspicion is not sufficient - **Re M and R (Child Abuse: Evidence) [1996] 2 FLR 195**

*In **Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35** this was further explained as follows-*

*"If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. **The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened**"*

The standard of proof (continued)

In ***Re T (Abuse: Standard of Proof) [2004] EWCA Civ 558*** *the Court of Appeal ruled that,*

> '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 exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the local authority has been made out to the appropriate standard of proof.'

In ***Re: A (Children) (Care Proceedings: Burden and Standard of Proof) [2018] EWCA Civ 1718*** *the Court's approach was explained further as follows:-*

1. the court must look at each possibility, both individually and together, factoring in all the evidence available including the medical evidence before deciding whether the 'fact in issue more probably occurred than not'
2. judges will decide a case on the burden of proof alone only when driven to it, and where no other course is open to them, ie the evidence is unsatisfactory—consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances
3. the court arrives at its conclusion by considering whether, on an overall assessment of the evidence (ie on a preponderance of the evidence) the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities

The standard of proof (continued)

It should be noted that it is not permissible for a Court to find that the threshold criteria has been crossed on the basis of likelihood of future harm in relation to a younger child on the basis that there is a real possibility the parent has injured the older child

Re S-B (Children) [2010] 1 FLR 1161 and

Re J (Care Proceedings: Possible Perpetrators) [2013] 1 FLR 1373

Therefore a prediction of future harm has to be based on findings of **actual fact** made on the civil standard (i.e. more likely than not that another child was injured by the parent and therefore it is likely to happen again).

What happens if threshold is not 'crossed'?

The statute provides in s31(2) regarding final care & supervision orders, the Court,

"may only make a care order or supervision order if it is satisfied" that the criteria are satisfied.

Similarly in relation to interim care and supervision orders, section 38(2) provides, "***(2) A court shall not make an interim care order or interim supervision order "***.

Threshold really is a **jurisdictional issue** and the Court cannot make a care or supervision order if the threshold criteria are not made out.

It is therefore important before advising a client regarding whether or not a local authority has grounds to make an application for a public law order (i.e. a care or supervision order (or an interim care or supervision order) that we have a clear understanding of the threshold criteria so we an advise how the case might progress.

What happens if threshold is not 'crossed'? (continued)

The general position is that the the LA should not seek to maintain public law proceedings in circumstances where it has been established that the threshold criteria obviously cannot be satisfied and that, if the proceedings were not withdrawn, the Court would have little choice but to dismiss the proceedings, as per Hedley J in **Redbridge London Borough Council v B C & A [2011] 2 FLR 117** in which he said (at paragraph 9 of the judgment in relation to withdrawal applications and dismissals where threshold test is not met) that:

"***If the local authority could not prove the threshold criteria, then of course, their application would succeed without more as otherwise I would have no alternative but to dismiss the proceedings.***

Munby P (as he then was) at paragraphs 120-126 of **Re X (Children) (No 3) [2015] EWHC 3651** (Fam) (application dismissed the care application when he found that the threshold test was not satisfied.

There are exceptions, an example of which I will discuss further.

Threshold not met - examples

FM (A Child: fractures: bone density) [2015] EWFC B26

This was a Leicester Family Court case.

The subject child had sustained some serious fractures. The LA alleged that these were non-accidental injuries.

Medical experts were instructed to advise the Court. There was some disagreement between the medical experts as to whether the child was susceptible to fractures. After hearing the evidence of the medical experts, the judge could not be satisfied on the balance of probabilities that the child's injuries were non-accidental injuries (it could have been a combination of natural pre-disposition and overuse of a steroid cream that could weaken the bones). The application was dismissed.

Threshold not met - examples

Leicester City Council v AB and others [2018] EWHC 1960 (Fam)

A mother who was sadly terminally-ill with cancer, anticipating her death, requested that the local authority provide accommodation to her children pursuant to s.20 of the Children Act 1989.

The LA made an application for care orders in respect of the children.

The Court found that the threshold criteria in *section 31(2) of the Children Act 1989* were not satisfied because the mother had fully cooperated with professionals and accepted the advice given to her. Because her actions were reasonable and the threshold criteria require that the suffering or likelihood of suffering is attributable to the care given by the parents not being what a reasonable parent would give, a threshold finding could not be made: She had acted as ***"a perfectly reasonable, loving, caring mother".*** The children were made wards of court.

Threshold not met - examples

Re AC (unaccompanied asylum-seeking child - threshold criteria) [2021] EWFC B89

The child came to the UK from Bangladesh unaccompanied and claimed asylum and was accommodated by the LA. Due to his age, the LA applied for a care order. A

The child gave different accounts about his past to different people. The Judge made findings that it was more likely that the child's parents had placed him in an orphanage and he had not seen them since he was five years old. He was trafficked to the UK by two people who were unrelated to he child AC, using false identities.

Although the Judge agreed that the child had suffered significant harm she could not find that there had been any act attributable to the child's parents which had caused the significant harm he had suffered such as arranging the trafficking and it was acknowledged that placing the child in an orphanage could have been the action of a reasonable parent.

The threshold criteria were not satisfied because the significant harm suffered by the child could not be attributed to his parents. The care proceedings were dismissed.

Drafting threshold – key case law

Re A (A Child) [2015] EWFC 11

This contains a warning in that Local Authorities must take care in preparing and presenting a public law Children Act 1989 application, lest they be found to have (in the President's immortal words) constructed a ***"a tottering edifice built on inadequate foundations"***.

Munby P gave detailed guidance in relation to the establishment of the threshold criteria and the need to specify in the case of each allegation how and why it would, if true, give rise to a risk of significant harm to the child. The full judgment can be found at http://www.bailii.org/ew/cases/EWCA/Civ/2015/222.html

Drafting threshold – key case law (cont)

Re J (A Child) [2015] EWCA Civ 222 Aikens LJ

The Court of Appeal expressly approved the guidance in **Re: A** suggested that the Re A principles, which were ***"not new but based on statute, the highest authority or both"***, could be summarised as follows:

Drafting threshold – key case law (cont)

‘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 regard 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. If a local authority asserts that a parent “does not admit, recognise or acknowledge” that a matter of concern to the authority is the case, then if that matter of concern is put in issue, it is for the local authority to prove it is the case and, furthermore, that the matter of concern has the significance attributed to it by the local authority.

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. If the local authority is unwilling or unable to produce a witness who can speak to the relevant matter by first hand evidence, it may find itself in “great, or indeed 2 insuperable” difficulties in proving the fact or matter alleged by the local authority but which is challenged.

iv) The formulation of “Threshold” issues and proposed findings of fact must be done with the utmost care and precision. The distinction between a fact and evidence alleged to prove a fact is fundamental and must be recognised. The document must identify the relevant facts which are sought to be proved. It can be crossreferenced to evidence relied on to prove the facts asserted but should not contain mere allegations (“he appears to have lied” etc.)

Drafting threshold – key case law (cont)

v) 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. The local authority must demonstrate why certain facts, if proved, "justify the conclusion that the child has suffered or is at the risk of suffering significant harm" of the type asserted by the local authority. "The local authority's evidence and submissions must set out the arguments and explain explicitly why it is said that, in the particular case, the conclusion [that the child has suffered or is at the risk of suffering significant harm] indeed follows from the facts [proved]".

vi) 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 State will not take away the children of "those who commit crimes, abuse alcohol or drugs or suffer from physical or mental illness or disability, or who espouse antisocial, political or religious beliefs" simply because those facts are established. It must be demonstrated by the local authority, in the first place, that by reason of one or more of those facts, the child has suffered or is at risk of suffering significant harm. Even if that is demonstrated, adoption will not be ordered unless it is demonstrated by the local authority that "nothing else will do" when having regard to the overriding requirements of the child's welfare. The court must guard against "social engineering"

Drafting tips – case theory/taking stock

Case theory

As we all learned at law school developing a case theory is the very first step in any case preparation, whether for the preparation of written ‘pleadings’ or for oral advocacy, to focus the mind as to:-

1. What the legal test is.

2. What the available evidence says

3. Why the Court can properly draw the conclusions we would like it to (i.e. in our client’s favour).

Drafting tips – case theory/taking stock

The key question in this matter is whether the s.31(2) criteria are satisfied (or on an interim basis whether they are).

The evidence available should be reflected on prior to drafting and the following key questions should be answered:-

a. **<u>Harm</u>**

i. What type of harm is the child suffering or likely to suffer?

ii. Is the harm significant harm?

b. What specific incidents/facts or pieces of evidence illustrate/evidence the harm?

c. What specific facts or pieces of evidence illustrate/evidence the effect of any harm suffered upon the child?

d. How is the harm attributable to the care given (or likely to be given, if the order is not made) by the parents?

b. **<u>Likely harm</u>**

i. what specific facts /incidents means that the child is likely to suffer harm in the future?

ii. . How is the harm attributable to the care given (or likely to be given, if the order is not made) by the parents?

c. **<u>The overall picture</u>** – do the facts taken together amount to a picture of significant harm/likely harm, given the need to make allowances for differences in society?

Guidance

FPR Practice Direction 12A – Care, Supervision and Other Part 4 Proceedings: Guide to Case Management

Para 7.1 “Interpretation”:

“**Threshold Statement” means a written outline by the legal representative of the Local Authority** in the application form of the facts which the Local Authority will seek to establish by evidence or concession to satisfy the threshold criteria under s.31(2) of the 1989 Act **limited to no more than 2 pages**

Guidance

Make Every Hearing Count – Case Management Guidance in Public Law Children Cases: March 2022

"When issuing proceedings the LA must have a clear and properly considered threshold, to which the parents can then respond. Thresholds must be short and focused on what the LA seeks to prove. In the great majority of cases threshold will be crossed and long discursive threshold documents neither help the court nor the parties."

Paragraph 12(b))

Guidance

View from the President's Chambers (2)

"The threshold statement can usually be little more than a page, if that. We need to remember what it is for. It is not necessary for the court to find a mass of specific facts in order to arrive at a proper threshold finding. Take a typical case of chronic 4 neglect.

Does the central core of the statement of threshold need to be any more detailed than this?

"The parents have neglected the children. They have

- Not fed them properly
- Dressed them in torn and dirty clothes
- Not supervised them properly
- Not got them to school or to the doctor or hospital when needed
- Not played with them or talked to them enough
- Not listened to the advice of social workers, health visitors and others about how to make things better: and now will not let the social worker visit the children the home [the evidence to support the case being identified by reference to the relevant page numbers in the bundle]."

I think not [**Page 4**]

Practical tips

1. **Take time to prepare** - We are all busy professionals but time taken saves time later
2. Try to **use plain English**
3. **Set out facts, not opinions**, suspicions or concerns.
4. **Cross-reference the facts to the evidence** (and page and para number)
5. **Explain how each fact is connected to significant harm** suffered (or likely to suffered)
6. **If you cannot prove it, do not plead it**

Response documents

FPR Practice Direction 12A – Care, Supervision and Other Part 4 Proceedings: Guide to Case Management

Para 7.1 "Interpretation":

"'**Parents' Response' means a document from either or both of the parents containing (a) in no more than two pages, the parents' response to the Threshold Statement,** and (b) the parents' placement proposals including the identity and whereabouts of all relatives and friends they propose be considered by the court; (c) Information which may be relevant to a person's capacity to litigate including information

Response documents

1. **Take time to prepare** - We are all busy professionals but time taken saves time later. Enough time is needed to properly take instructions on each allegation in the threshold so a comprehensive response can be submitted.
2. **Ask for the threshold statement in Word form** or convert it, so the client's response can be inserted below /next to each allegation., starting with either "Agreed" or "denied" It is helpful to start each response with either **"Agreed"**, **"Agreed in part"** or **"Denied"**, followed by an explanation
3. Be prepared to **advise on any defects in the threshold** – is there actually any evidence of neglect such as medical evidence of weight loss or is this just an unsupported opinion? If matters are unevidenced they can be challenged and the Court asked to rule if needed.
4. **Cross-reference to any evidence** is relied on in the response.
5. Seek and **obtain the client's approval** before submitting /serving the response document.

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