CHILD PROTECTION AND STATE INTERVENTION IN 2014

INTRODUCTION

The reforms in thinking in terms of care proceedings amount to a revolution. Central to the revolution has been – and has had to be – a fundamental change to the cultures of the family court. We are truly experiencing a cultural revolution.

STARTING POINTS

S31 Children Act 1989 sets out the threshold for taking care proceedings. The threshold criteria must be crossed in order for a court to make a care order or a supervision order. The threshold criteria is the same in respect of both orders.

I would word a contention for the threshold criteria in the following terms, in a document placed before the court and provided to all parties to either agree with or argue with:

At the time the court took protective measures the child(ren) was suffering, or likely to suffer significant harm if an order were not made and the harm, or likelihood of harm is attributable to the care given to the child(ren) or likely to be given if an order were not made, not being what it would be reasonable to expect a parent to give to a child.

That harm, or likelihood of harm, is evidenced by the following facts:

A number of propositions are then set out, relating to, for example, non accidental injury, non school attendance, neglectful home conditions, non organic failure to thrive, etc.

The word significant with regard to the harm is crucial and there must be reference to the type of harm contended for. For example, physical, emotional, sexual.

The seminal case is re B (A child) 2013 UKSC 33 and this sets out the approach loudly and clearly and is helpful in a number of areas.

i. <u>Threshold: significant harm and likelihood</u>

- The threshold criteria is the gateway to making an order
- The standard of parenting expected by S31 CA 1989 is an objective standard of reasonable parenting. The child's development is dependent upon the subjective level to be expected of a child like him
- A likelihood of significant harm means no more than a real possibility that it will occur but a conclusion to that effect must be based on a fact or facts established on the balance of probabilities – **Re J (Care Proceedings: Possible Perpetrators) 2013 UKSC 9**
- There is no requisite mental element to parental actions. The parents may simply be unable to offer the requisite standard of care
- In **Re L (Care:threshold criteria) 2007 1 FLR 2050 Hedley J** were specifically approved
  "it follows inexorably that 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 very different experiences of parenting and the very unequal consequences flowing from them. It means that some children will experience disadvantage and harm whilst others flourish in atmospheres of loving security and emotional stability. These are the

consequences of our fallible humanity and it is not the province of the state to spare children the consequences of defective parenting."

- The Act does not set limits on when the harm may be likely to occur and the court is entitled to look at the medium and longer term as well as the immediate future whilst bearing in mind the difficulties of making long term predictions.

Article 8 – as discussed in Re B (above)

- There is no interference with Article 8 rights when the court decides whether or not the threshold criteria is crossed. The interference comes when the court considers the making of an order
- Domestic law is consistent with European jurisprudence. The interests of the child must render it necessary to make an adoption order hence the use of the word "requires" in S52 Adoption and Children Act 2002 **NOTE – all care orders do not lead to adoption of children, but adoption is one plan of permanency available to the court if it has been determined that rehabilitation of the child to the parent is not possible**
- It is not enough that it would be better for a child to be adopted than to live with the natural family **– the concept of social engineering is deprecated**
- The more significant the harm the less the required level of likelihood and vice versa

Making an order

A care order which would result in the adoption of a child is “a very extreme thing, a last resort and should only be made where nothing else will do”

- Before making an order for adoption the court must be satisfied that there is no practical way of the LA or others providing the requisite assistance and support to allow the parents to discharge their responsibilities towards a child
- The court’s task is not to improve on nature or even to secure that every child has a happy and fulfilled life but to be satisfied as to whether the statutory criteria is satisfied and to determine the child’s welfare needs.

Appellate review of determinations made in care proceedings

- The determination of whether or not the threshold criteria is crossed does involve an exercise of judicial discretion. It can be categorised as a “value judgment” or an appraisal or evaluation (Lord Neuberger)
- The test to be applied is whether or not the decision is wrong
- The role of the trial judge in deciding whether to make a care order involves not only the exercise of discretion but also an obligation not to determine the matter in a way which would constitute a disproportionate interference with a party’s Article 8 rights. The review on appeal must therefore focus not only on the judge’s exercise of discretion but on his compliance or otherwise with an obligation. There is no obligation on the appellate court to undertake its own review as to whether an order is a proportionate response.

General approach in every case where threshold criteria is in dispute

1. The court's task is not to improve on nature or even to ensure that a child has a happy and fulfilled life but to be satisfied that the statutory threshold has been crossed.
2. When deciding whether the threshold criteria has been crossed the court should identify as precisely as possible the nature of the harm which the child is suffering or likely to suffer. This is particularly important where he child has not yet suffered any harm and where the harm which is feared is impairment of intellectual, emotional, social or behavioural development
3. Significant harm is harm which is "considerable, noteworthy or important". The court should identify why and in what respects the harm is significant. Again this may be particularly important where the harm in question is that set out above but which has not yet happened
4. The harm has to be attributable to a lack or likely lack of reasonable parental care, not simply to the characters and personalities of both the child and her parents. So once again, the court should identify the respects in which parental care is falling or likely to fall short of what it would be reasonable to expect
5. Finally, where harm has not yet been suffered the court must consider the degree of likelihood that it will be suffered in the future. This will entail considering the degree of likelihood that the parents' future behaviour will amount to a lack of reasonable parental care. It will also entail considering the relationship between the significance of the harm feared and the likelihood that it will occur. Simply to state that there is a "risk" is not enough. The court has to be satisfied by relevant

and sufficient evidence that the harm is likely – Re J 2013 2 WLR 649

Stage one – examination of the facts

Split hearings have become rarer since Re S (A child) 2014 EWCA Civ 25.

Split hearings became popular for more simple cases as a means of expediting the most simple cases where there was only one issue to be decided and where the threshold criteria would not be satisfied unless a finding were not made. Over time they began to be used for the more complex medical causation hearings where death or serious medical conditions had arisen and an accurate medical diagnosis was integral to the future care of the child concerned. The oft repeated but erroneous suggested that a split hearing enables a social care assessment to be undertaken is simply poor social work and forensic practice.

Valuable guidance is set out in Lancashire County Council and R and W 2013 EWCA 3064 should that detail be required.

Importantly, that case reiterates that:

- The Local Authority must prove its allegations on the balance of probabilities, no more no less
- 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 court is left in doubt that doubt is resolved by a rule that one party or the other carries the burden of proof. If a party fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge the burden a value of 1 is returned and the fact is treated as having happened.

- The more serious or improbable the allegation the greater the need for evidential cogency.
- There is no obligation upon the respondents to come up with alternative explanations
- The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research will throw light into corners that are at present dark.
- Evidence of propensity or a psychiatric or psychological assessment of one of the parties is unlikely to be of any assistance in resolving a purely factual issue
- The assessment of credibility generally involves wider problems than mere demeanour, which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes more active. The human capacity for believing that something which bears no relation to what actually happened is unlimited. Therefore, contemporary documents are always of the utmost importance.

<u>Stage 2 – Threshold</u>

In re J (Children) (Care Proceedings) 2013 UKSC the Supreme Court grappled with another difficult issue: can a Local Authority rely upon a previous finding which left a parent within a pool of perpetrators to establish threshold in future proceedings?

Baroness Hale took the following view at paragraph 49

"care courts are often told that the best predictor of the future is the past. But prediction is only possible where the past facts are proved. A real possibility that something has happened in the past is not

enough to predict that it will happen in the future. It may be the fact that a judge has found that there is a real possibility that something has happened. But that is not sufficient for this purpose. A finding of a real possibility that a child has suffered harm does not establish that he has. A finding of a real possibility that the harm that a child has suffered in 2non accidental" does not establish that it was. A finding of a real possibility that this parent harmed a child does not establish that she did. Only a finding that it was, or she did, or he has, as the case may be, can be sufficient to found a prediction that, because it has happened in the past the same is likely to happen in the future. Care courts need to have this message loud and clear."

In this case, the Supreme Court was critical of the stance taken by the local authority that this was a single issue case. Single issue, or "whodunit" cases are a vanishing rarity. Care cases usually come with a multitude of relevant facts. Even in uncertain perpetrator cases, it is a fact that a child was injured in the same household as this parent and that cannot be ignored. The fact will usually come with a multitude of other facts which may be relevant to the prediction of future harm to another child. Was there a failure to protect; a failure to seek medical attention; an attempt to conceal injuries? What were the circumstances in the household at the time that the child was injured? Were the parents engaged in the use of drugs or alcohol; was there domestic violence; was there neglect?

Stage 3 – Orders and Proportionality

There is an uncompromising message from the President in Re B-S (Children) 2013 EWCA Civ 1146 in relation to proportionality. Re B-S represents a seismic shift in the way that practitioners and the courts are to approach cases involving adoption.

The Children and Families Act 2014

This new act enshrines into law the concept that care cases should conclude within 26 weeks.

However, in Re S 2014 EWCC B44 (Fam) the President specifically approved the words of Pauffley J in Re NL 2014 EWCH 270 “Justice should never be sacrificed on the alter of speed” and the President was clear that there would be exceptions to the 26 week deadline (cases of exceptional complexity, or split hearings, or certain international cases, cases where something unexpected happens and cases where litigation failure by a party makes it unjust to conclude.

In all matters, there must be an element of judicial discretion and there has been no interference which I can discern in the principle found at S1 Children Act 1989, somewhat elderly legislation now, but not yet improved upon – the welfare of the child is the paramount consideration of the court.

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