SURVIVING
CROSS-EXAMINATION

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Introduction

1. Cross examination strikes fear into the heart of almost every witness in every action, ever. For a witness, surviving cross-examination will be key to a judge or tribunal accepting your evidence as factual and considered.
2. Remember – Courts determine matters on the evidence. Cross-examination is part of your evidence. Your case can often stand, or fall, on cross-examination.
3. As the former president of the Family Division said in Re TG [2013] EWCA Civ 5, at paragraph 72:

*"Most family judges will have had the experience of watching a seemingly solid care case brought by a local authority being demolished, crumbling away, at the hands of skilled and determined counsel."*

What is it, and why do lawyers do it?

1. It is the opportunity of a party in an action (usually, in our case, Care Proceedings) to challenge the evidence of a witness or another party by asking questions of a witness.
2. Why do lawyers cross examine? There are three main objectives:
3. To advance a conflicting case on behalf of another party to the action;
4. To undermine another party’s case;
5. To put their own case on behalf of their client.
6. What are the rules? The Bar Code of Conduct (which is the rules that Barristers must follow when doing their thing) says that counsel must **not make statements or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy either a witness of some other person, must avoid naming in open court third parties whose character would therefore be impugned** and **must not by assertion in a speech impugn a witness whom he has had an opportunity to cross examine unless in cross examination he has given the witness an opportunity to answer the allegation.**
7. **EXPECT A VIGOROUS CHALLENGE!** Remember, you as a witness are asking the Court to make a draconian order that will affect somebody’s right to private and family life. Everyone deserves a fair trial.
8. Don’t take it personally. We are all doing our jobs. Remember that lawyers do not pick their clients, and that they will inevitably have a case to put to you, however lacking in merit that case may be. Cross examination is part of the process of the fair trial.

Common Areas of Cross Examination

1. In your average set of care proceedings, what are the issues that normally arise?
2. The Inchoate Care Plan.

Too many care plans have small but significant holes in. For example, does it stipulate how contact is to be reduced and why?

What if the Court doesn’t agree with you? Does it include acontingency**?**

If there are to be reviews of certain aspects after the proceedings are over, how often, how will they be conducted and who will be involved?

These are commonly matters of detail and clarification. Make sure though that they are discussed and clarified with your legal representative before you are cross examined.

1. The slow burn neglect case.

Usually, these cases have been going on for years. There will be a well documented merry-go-round of referrals, TAF, CP and CIN to various levels over various years. Social worker after social worker will have gone into the home and assessed and supported. Family support worker after family support worker will have done scores of direct work with the parents, usually to no avail in the long term. Schools, GPs and other agencies will have made referrals. The parents – usually supported by social workers and their own families – have just about managed to keep the wheel turning over a number of years.

Make sure you have a chronology that documents the history of the case**.** Make sure you know why it is that the time is right now . There may simply have been years of cumulative neglect, and a tipping point reached, rather than an event which triggers action. You may have been recently appointed to the case and your analysis of significant harm may differ from that of the previous worker. Be prepared to explain why in your professional opinion action is required now.

1. Adherence to contracts

Make sure any contract of expectations/working agreement is in the Court Bundle or attached to your statement, and explain why and how they have been breached. Know the dates and details of breaches, as per your statement.

1. FOSTERING VERSUS ADOPTION and the Re B-S analysis

Your care plan must be sensible. If in your professional opinion, adoption is the only outcome that meets the Child’s welfare needs, you must ask the Court to take this step.

A crucial part of your evidence when asking the Court to make a ‘Placement Order’ (the order allowing the LA to place a child for Adoption) is the **Re BS Analysis.** This is the analysis you have undertaken so **YOU CAN EXPLAIN TO THE COURT WHY NOTHING ELSE, OTHER THAN ADOPTION, WILL DO FOR THE CHILD.**

In this analysis, you need to rule out other placement options – placement with parents, placement with family members or connected carers and long term foster care.

A proper analysis must weigh up the pros and cons of adoption vs. long term foster care for the child.

There is no excuse for this to be done badly. As your guiding star, use the words of Pauffley J in **Re LRP (A Child) (Care Proceedings - Placement Order) [2013] EWHC 3974.**

*“[Somebody irrelevant to this case suggests] that long term foster care would be a "means by which permanency can be achieved"; and that "a long term foster home can offer … commitment, security and stability within a new family…" I profoundly disagree with those contentions. Long term foster care is an extraordinarily precarious legal framework for any child, particularly one as young as LRP. Foster placements, long or short term, do not provide legal security. They can and often do come to an end. Children in long term care may find themselves moved from one home to another sometimes for seemingly inexplicable reasons. Long term foster parents are not expected to be fully committed to a child in the same way as adoptive parents. Most importantly of all in the current context, a long term foster child does not have the same and enduring sense of belonging within a family as does a child who has been adopted. There is no way in which a long term foster child can count on the permanency, predictability and enduring quality of his placement as can a child who has been adopted.*

*The realistic, as opposed to the fanciful, options are (i) a return to her parents or (ii) a placement for adoption. So whilst I am sympathetic to [somebody] as I would be to any practitioner who is endeavouring to fulfil the requirements of the law in the way assessments are conducted and reports written, it is worth reiterating that the focus should be upon the sensible and practical possibilities rather than every potential outcome, however far-fetched*

*The disadvantage of making a placement order is that [the child] will be deprived of an upbringing within her natural family. She will not be brought up by a mother who is obviously able to demonstrate pleasing emotional warmth and affection for her child or by a father who, similarly, can be appropriately tender when minded to show that side of himself. It may be, as [somebody] suggests, that in future LRP will need some professional assistance so as to deal with issues of loss and identity if she is not to be brought up within her natural family. But experience suggests that so long as the adoptive family deals openly and sensitively with those matters – and age appropriately as the child grows – the potential for problems is markedly reduced, even eliminated.*

*[Somebody] comments that "in the event a culturally matched placement is not found, LRP's diversity needs will not be met." She continues, "There is a risk of placement breakdown." Those fears, it seems to me, are misplaced. They fail to recognise the realities, well known to all professionals who practice in the field. I mention the most obvious. First that the younger a child is placed within his / her permanent alternative family, the better the chance of a very successful outcome. Second that LRP is an infant child born to "White British" parents of average to good intelligence so that 'family finding' for her should be entirely straightforward. Third, that there should be no difficulty at all in identifying a culturally appropriate placement. Fourth, that I may safely ignore the absurd suggestion that LRP's "diversity needs will not be met."*

*The advantages of a placement order are many and obvious. Prospective adopters are required to submit themselves to a rigorous and very thorough assessment process over many months. Those who satisfy the selection criteria are ordinarily of the highest calibre. They may be confidently expected to provide extremely good parenting to any child who is matched with them in all areas of his / her development. They will protect LRP from harm of whatever kind. The overwhelming probability is that they will be able to provide her with the priceless gift of a happy, secure and stable childhood from which she will derive life-long advantages.*

The appeal courts have been very critical of meaningless statements about children’s long term needs being repeated in social work evidence. Bland statements that children “require” permanence will not do.

1. Frequency of contact

Contact is something unique to every child, and so every plan should be considered.

Avoid the lazy mantras (3 x weekly for a new born, 6 x yearly for a parent once a care order has been made and the child placed in foster care). Be prepared to justify why you consider a level of contact as appropriate (and in line with your statutory duties to promote contact). Be clear about the structure for reviewing contact. Will there be an initial review following the making of a final order, with further reviews thereafter ? It would be helpful to be able to state the date of the first review. What will the review look at and who will attend it ? What might change at that review ? What would need to have happened for things to change ?

1. GOOD ENOUGH PARENTING

The Law says that parenting should be ‘good enough’.

See Hedley J in *Re L (Care: Threshold Criteria) [2007] 1 FLR 2050:*

*“The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.'*

*There are those who may regard that last sentence as controversial but undoubtedly it represents the present state of the law in determining the starting point. It follows inexorably from that, 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 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.”*

Don’t leave yourselves open to the accusation of social engineering. Explain clearly and in a measured way why P’s parenting is not ‘good enough**’.** Be prepared to measure the parenting you have assessed the parent to be able to give against the needs of the particular subject child. Avoid stating that a child “ needs better than good enough parenting “.

How will you be cross-examined?

1. So how is it done? The truth is that everybody has a different style of cross-examination. Some will go in all guns blazing, some will be gentle and measured, some will put their case and sit down. But, as a rough idea…
2. Attacking your level of experience – you may be asked questions about how many cases of a similar nature you have worked on. Be prepared to detail the working and decision making you have done with other colleagues.
3. Use of closed questions – good cross-examination will use questions that are by and large leading you to an answer – yes or no.
4. The hypothetical question. “Isn’t it right that in general terms, if P were to abstain from using heroin on a daily basis…”
5. The false extrapolation. “And if this is the case, then isn’t it also the case that x will follow” – Listen carefully to these.
6. The balance. Most CP decisions are very difficult and therefore your task is to balance all of the factors and make recommendations. Naturally if another party disagrees with your assessment, the ‘balance’ will be the subject of challenge.
7. Highlighting alternative professional views. Be aware of what the other evidence says before it is put to you. Know why you disagree.

*And now some of the naughtier techniques…*

1. Interrupting. A good judge will stop a barrister interrupting a witness. If you are being interrupted, just be polite.
2. Piggy backed questions. “You said X in your report when Y told you Z, didn’t you? But Dr K said Y when he looked at the same thing, didn’t he? So why did you not report that properly?” (The correct response to this is “…eh?”)
3. The speech. A long rambling question that doesn’t end with a question. (The wrong response to this is “are you going to ask me a question?” – let the Judge say that!)
4. Badgering a witness – asking the same thing over and over again. (See h)

How do I deal with all of this ?

1. So – you’re in the box. What do you do?
2. Keep calm. Or at least appear to be calm. You may feel stressed, as your professional judgment is being questioned. However retaining your composure is vital to making a good impression as a witness, and shows that you are respectful to the court and to the parents.
3. Be polite. Make eye contact with the questioner and give your answers to the judge. Know how to address the judge and do so.
4. Own your care plan. You should be prepared to explain your professional analysis of the evidence and where that leaves you. What is your analysis of the evidence that you have, and where does that leave you ? Know your plan and the evidence upon which it is formulated. Double check documents to avoid obvious cutting and pasting, incorrect names, dates of birth, detail etc.
5. Acknowledge the positives. Nothing fills a cross examining advocate with greater joy than a social worker who can’t bear to say anything good at all about a parent. It is very easy to make such a witness look both biased and unreasonable.
6. Make concessions where appropriate. Again this emphasises your balance and fairness.
7. If there is an aspect of your evidence that concerns you, be reflective. (But don’t do a 180 degree turn in the box without discussing it with your own barrister first – this can lead to all sorts of issues!)
8. Engage with the hypothetical questions. Explain to the judge why the hypothetical question isn’t relevant to the instant case.
9. Know the evidence. Be aware of the primary material and where to find it. Read the statements of the GP, the health visitor, the community worker. Ask for the bundle, ask for time. If you are asked about the opinion of another witness in cross examination, take the time to reflect upon it and to refer to it in the bundle if appropriate.
10. Think carefully about fact versus opinion.
11. If you think you’ve said all you can say, say so.
12. Answer the question . Do not strain to return to matters which are not related to the question. You maybe anxious to make your point, but your point will be in your written evidence which you will have confirmed at the outset of your evidence. It’s all there, in short, and the judge will have read it before your evidence began. Your advocate will return to it at the submissions stage of the case.
13. Use of language - avoid telling the court what you think or feel. Your professional evidence is not about feelings. It is about your careful analysis of the evidence you have , the basis upon which you formulate your professional assessment.
14. Know the legal test relating to the outcome that you are seeking, eg. interim removal of a child to foster care.

Challenging the Guardian

1. A Children’s Guardian – *the guardian ad litem* – has a very important role in care proceedings . They advise the Court, represent the interests of the child and make recommendations with reference to the child’s welfare. They must also scrutinise the work of the Local Authority, which includes the work of individual social workers.
2. Sometimes a social worker will disagree with a guardian. If this is the case, and the divergence of opinion cannot be reconciled, your differing views will need to be heard and evaluated by the judge.
3. In such a situation you may be able to refer when cross examined to points including :
4. Confidence – you have worked with the family for longer than the Guardian has. You’ve spent more time with them and have an intimate knowledge of the case. When asked, tell the court about this, and where your knowledge leads you in terms of your planning.
5. Attempts to discuss the disputed area(s) in a professionals meeting.
6. Reasoning. The Court must give cogent reasons as to why it should depart from the recommendation of a Guardian. Your considered view and evidence on this point will be vital in paving the way for the Judge to take an alternative view. This is done carefullyand with a solid evidence base. Know precisely why and how you disagree**.** Make surethat you are prepared to set this out, having reflected on the Guardian’s stance and considered it with your legal team**.**

Placement

1. Some of the most fertile ground for cross-examination is provided when decisions in respect of a child is handed over from one team to another. For example, assigning a social worker from the adoption team to attend Court for the final hearing of your care/placement application **does not look good.** It leaves the Local Authority open to criticism that they have pre-judged the issue.
2. Remember: if you are the author of a care plan, you are the one who must justify the decisions upon which that care plan is based.

**SO, IN CONCLUSION…**

1. Know **the** evidence in the case, and know **your** evidence**.** Try and read all of the important documents Be sure of the reasons why you are asking the Court to follow the path you have laid down – this will involve trying to weave together the evidence.
2. Don’t get caught out by the common problems (above).
3. Be reflective if there are issues with your evidence. Don’t be afraid to temper your opinions if you find an aspect of your evidence is troubling you.
4. Think about the questions you are being asked and engage with them. If the premise of the question is flawed (the hypothetical…), then say so.
5. Remember you are not giving your evidence to the barristers, **you are giving it to the judge.**
6. A calm demeanour goes a long way. A professional who is calm, polite and reflective is an impressive witness.
7. Don’t be scared of being cross-examined.

**AND IF IT IS ALL GOING WRONG, REMEMBER... IT WILL ALL BE OVER AT HALF PAST FOUR!**