



LexisNexis®

This article was first published on Lexis®PSL IP & IT on 21 February 2014. Click [here](#) for a free 24h trial of Lexis®PSL.

Evidence and interim care orders

21/02/2014

Family analysis: Discussing the judgment in *Re NL*, Katherine Dunseath, a barrister at 3 Paper Buildings, predicts that the increasing push for transparency within the family justice system will result in the evidence of local authorities being subject to ever-increasing scrutiny by the court.

Original news

Re NL (a child) (appeal: interim care order: facts and reasons) [2014] EWHC 270 (Fam), [2014] All ER (D) 135 (Feb)

NL was the eighth child of the mother who had a history of substance abuse and involvement of social services with her previous seven children. On the evidence of a hastily instructed independent expert, the justices made a decision to separate the mother and NL and an interim care order was made. The mother appealed and the Family Division held that due to procedural unfairness the decision could not stand and that NL was to be returned to his mother forthwith.

What key issues did this case raise?

The main issue raised from this case is that immense trouble should be taken by the court to ensure that decisions made at interim hearings are based upon good evidence and are fully justified.

In *Re NL* the expert report was not based on a fair and just assessment process. The expert report relied upon by the local authority to support their case for an interim care order with removal of baby from the mother was completed:

- o without the expert ever having met the mother
- o without speaking with her rehabilitation facility
- o within one day based upon documentation sent by the local authority and after a discussion with a member of the local authority team who also had never met the mother

The other evidence before the court from the hospital after birth was very positive of the mother, as were the reports from her rehabilitation unit about her engagement and progress.

Another concerning issue in this case was that draft facts and reasons were provided to the court in advance of the hearing by the local authority's representative in circumstances where the mother's solicitors were not a party to the correspondence. These were ultimately what the court relied upon as the facts and reasons and this was a potential infringement of the mother's art 6 rights.

The final issue was the delay in the hearing of this interim appeal was unacceptable where it was caused by the unavailability of representatives and the guardian.

What are common issues that arise in relation to practice and procedure during the earliest stages of care proceedings?

At the earliest stages of care proceedings there are regularly issues with a lack of proper evidence being relied upon by the local authority in order to support their case for interim removal. In these cases it is even more vital that the court actively scrutinises the evidence presented before making the decision to remove at the interim phase which ultimately will prejudice the parent's case.

The requirement that cases be concluded within 26 weeks is being strictly adhered to by courts even where the effect is to prejudice the parent's case. This case gives clear guidance on this point which will be beneficial to other practitioners where the speedy conclusion of proceedings is taking precedence over that of justice.

Did the judgment clarify the law in this area?

The judgment is of importance in that it illustrates that a local authority in support of their case for removal at an interim stage are required to provide the court with good proper evidence and to fully justify their case. Of particular concern to the judge in this case was the expert opinion relied upon which had been obtained at speed without a fair and just assessment process.

This case also highlights the importance of the court actively scrutinising and evaluating this evidence before making the significant decision for placement at the outset of public law proceedings. The court should not be relying upon draft facts and reasons produced by the local authority without the knowledge and input of the other parties as it is a breach of the basic requirement of openness and transparency. It also casts into doubt the court as impartial and independent if it merely adopts the analysis of the local authority as to what the facts and reasons should be.

This case makes it plain that appeals from interim care orders where separation is sanctioned are among the most urgent of all public law hearings and the court must do its utmost to list such appeals as a matter of urgency within days or at the most a very few weeks. The convenience of counsel should not be a reason to delay the hearing date and the guardian's availability is of minor significance when weighed against the issue of delay.

What are the implications for lawyers?

A thorough analysis of all evidence relied upon by the local authority--especially expert reports and how they were obtained--is of vital importance for practitioners before advising their clients. If the evidence is not properly obtained, as occurred in *Re NL*, then the evidence should not be relied upon and the court should be informed as to the irregularities and gaps in the evidence before these important decisions are made.

Practitioners should also now be alert to the concern that draft facts and reasons are being provided to the court behind closed doors by the local authority which is unacceptable and enquiries will need to be made into this at the hearing to ensure that it is not being done.

Are there any patterns or trends emerging in the law in this area? And what are your predictions for future developments?

Many practitioners were concerned about the Family Justice Reforms and the requirement that cases conclude within 26 weeks and its prejudicial effect upon justice. Recent case law such as this case and that of *Re B-S (Children) (Adoption: Application of Threshold Criteria)* [2013] EWCA Civ 1146, [2013] All ER (D) 145 (Sep) make it clear that justice should not be jeopardised on this basis.

Looking forward, my prediction is that the increasing push for transparency within the family justice system will result in the evidence of local authorities being subject to ever-increasing scrutiny by the court, which hopefully will result in more just outcomes.

PSL practical point: In relation to the requirement to conclude public law cases within 26 weeks Pauffley J quoted from Munby P, the President of the Family Division in his 'View from the Presidents Chambers (7)' in which he said 'We must always remember that the PLO is a means of achieving justice and the best out-

comes for children and, wherever possible, their families. It is not, and must never be allowed to become, a straightjacket, least of all if rigorous adherence to an inflexible timetable risks putting justice in jeopardy.' In the President's 'View from the Presidents Chambers (10)' he highlighted *Re NL* as an important recent decision of significance in relation to practice in public law cases and he recommended careful consideration of the judgment by all public law practitioners.

Katherine Dunseath is a family law and personal injury specialist. She regularly appears in the county courts on a range of matters and in the High Court and Court of Appeal on international cases concerning leave to remove from the jurisdiction and child abduction cases subject to the Hague Convention. Katherine represented the appellant mother in Re NL.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.