PRIVATE LAW UPDATE ON KEY THEMES FROM 2025

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FAMILY Law Week

THE SPEAKER

- Barrister at 7BR Chambers.
- Mixed practice.
- Practising across a wide range of family law matters, including private children, public law, child abduction, financial remedies, forced marriage and the intersection between family law and the Court of Protection.

OVERVIEW

1. Covert recordings in children proceedings – increasing reliance on covert recordings by parties
2. Parental alienation – prominent theme continues but the impact on child arrangements varies
3. Section 91(14) orders – barring orders increasing in frequency
4. Section 37 reports – the intersection of private and public law proceedings

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1. COVERT RECORDINGS

- An increasing issue within family proceedings has been parties' attempts to rely on evidence obtained by covert recording (recordings made without the express knowledge and permission of the people being recorded, whether by video or audio).

- In *Re B (A Child)* [2017] EWCA Civ 1579 the then President of the Family Division, Sir James Munby, called for proper guidance in relation to covert recordings, and invited the Family Justice Council to consider the issue.

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1. COVERT RECORDINGS

- ‘Family Justice Council Guidance on Covert Recordings in Family Law proceedings concerning children’ was released in May 2025.

- In the foreword, the President of the Family Division and Chair of the Family Justice Council, Sir Andrew McFarlane stated:
  - *“This has been a growing area for the courts to consider with little guidance available to judges or other professionals. This guidance from the Family Justice Council (FJC) explores the issues and examines the consequences arising from the use of covert recordings by private individuals and sets out guidance that we hope will lead to greater consistency in approach.*
  - *Whilst some covert recordings have been found to have evidential value, the secret nature of covert recordings can intrude on the privacy of parents, children and professionals, causing harm and often leading to concerns about the accuracy of the recording. It is hoped that this guidance will encourage professional bodies and organisations in the Family Justice System to consider developing their own guidance on the use of covert and overt recordings.”*

1. COVERT RECORDINGS

The Guidance tells us:

- Where an issue of covert recording arises in family law matters concerning children:
  - A party seeking to rely upon a covert recording in proceedings should notify the court, explain what and who is recorded and the relevance of the evidence to the case. Form C2 seeking leave to rely upon the recording may be required.
  - If a professional is provided with a covert recording by a party, enormous care should be taken before it is viewed or listened to and before it is assumed to be genuine.

- If dealing with an issue of covert recording, the court must engage in early stage focused case management to decide admissibility and value. This may require a further hearing. The case management exercise will include:
  - Determining any method of disclosure to parties (e.g. whether transcripts are required).
  - Establishing authenticity, relevance, probative value and the full scope of the recording which is to be admitted into evidence.
  - Consideration of the implications for the welfare of the parties and children.
  - Consideration of costs arising from the application

1. COVERT RECORDINGS

- Covert recordings will often constitute hearsay evidence. To fall within the parameters of the Children (Admissibility of Hearsay Evidence) Order 1993 (such that the rule against hearsay does not apply) the evidence must be "given in connection with the upbringing, maintenance or welfare of a child" (a fact-specific determination for the Family Court). If the rule against hearsay does apply, notice should be provided and an application made for the recordings to be categorised as admissible evidence (see section 2 of the Civil Evidence Act 1995 and FPR 2010, Part 23).

- Where the covert recording is of a child, this will rarely be seen to promote a child's welfare, whatever the reason.

- The very fact of recording can be an example of concerning behaviour (potentially impacting decisions about child arrangements) due to the inherent invasion of privacy.

2. PARENTAL ALIENATION

Findings in relation to emotional harm and parental alienation continue to be a prominent theme across private children cases throughout 2025 and into the new year, however the extent of the bearing of such findings on child arrangements widely varies on a case-by-case basis.

2. PARENTAL ALIENATION DEFINED

Re S (parental alienation: cult) [2020] EWCA Civ 568, Peter Jackson LJ:

"*At the outset, it must be acknowledged that, whether a family is united or divided, it is not uncommon for there to be difficulties in a parent-child relationship that cannot fairly be laid at the door of the other parent. Children have their own feelings and needs and where their parents are polarised, they are bound to feel the effects. Situations of this kind, where the concerned parent is being no more than properly supportive, must obviously be distinguished from those where an emotionally abusive process is taking place. For that reason, the value of early fact-finding has repeatedly been emphasised.*" [7]

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2. PARENTAL ALIENATION DEFINED

Re S [2020] (Peter Jackson LJ at [9]): behaviours may include –

- portraying the other parent in an unduly negative light to the child
- suggesting that the other parent does not love the child
- providing unnecessary reassurance to the child about time with the other parent
- contacting the child excessively when with the other parent
- making unfounded allegations or insinuations, particularly of sexual abuse.

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2. PARENTAL ALIENATION DEFINED

- In *Re C ('Parental Alienation'; Instruction of Expert)* [2023] EWHC 345 (Fam), Sir Andrew McFarlane adopted the definition proffered by the Association of Clinical Psychologists (ACP-UK) that 'parental alienation' is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetrated by one parent against the other through what are termed as alienating behaviours.

2. ALIENATING BEHAVIOURS – THREE NECESSARY ELEMENTS

In *Re C*, Sir Andrew McFarlane held that a court would need to be satisfied that three elements are established before it could conclude that alienating behaviours had occurred:

1) the child is reluctant, resisting or refusing to engage in, a relationship with a parent or carer; and

2) the reluctance, resistance or refusal is not consequent on the actions of that parent towards the child or the other parent, which may therefore be an appropriate justified rejection by the child, or is not caused by any other factor such as the child's alignment, affinity or attachment; and

3) the other parent has engaged in behaviours that have directly or indirectly impacted on the child, leading to the child's reluctance, resistance or refusal to engage in a relationship with that parent.

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2. THE PREVELANCE OF PARENTAL ALIENATION

The Family Justice Council released guidance on responding to a child's unexplained reluctance, resistance or refusal to spend time with a parent and allegations of alienating behaviour in December 2024.

The guidance tells us that research evidence suggests alienating behaviours which actually impact on the child's relationship with the other parent are relatively rare.

Therefore, despite an increasing number of allegations being made, findings of alienating behaviours will also be relatively rare.

A child's reluctance, resistance or refusal to see a parent is often attributed to "*parental alienation*", in the absence of an alternative explanation. It should be emphasised, however, that reluctance, resistance and refusal cannot in itself amount to evidence of psychological manipulation.

2. PARENTAL ALIENATION CASELAW

CP v M & Ors [2025] EWFC 39

- In this case, Mr Justice Poole considered the Family Justice Council Guidance on allegations of alienating behaviour. Mr Justice Pool made no order on an application by a former civil partner to spend time with four children born during her civil partnership with the biological mother.
- The court determined there was no purpose to be served in holding a finding of fact hearing as "*Whether or not the Court found that M has engaged in alienating behaviour, the boys' positions in relation to spending time with CP would be very unlikely to change*" and the fact-finding process would be likely to cause emotional harm to the children [25].
- The court concluded that the continuation of the proceedings will be [27]:
  - a. highly unlikely to achieve any useful purpose;
  - b. counter-productive to the prospects of a positive relationship between CP and the boys in the future; and
  - c. detrimental to the children's welfare.

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2. PARENTAL ALIENATION CASELAW

Re MK v FJ & XY (Composite Hearing: Alienating Behaviours) [2025] EWFC 326 (B)

- In this case, despite findings of alienating behaviours being made against the mother, the court ordered the child to live with the mother and have contact with the father.
- The judge noted "*F needs to understand that although I have made findings of alienating behaviour, they should not be seen as a continual point of reference going forward. The purpose of findings is to make sense of XY's lived experiences*." [115]
- The judgment further comments on the use of Cafcass' "*alienating behaviour tool*" and noted the following regarding terminology in these cases: "*Cafcass uses the term alienating behaviours to describe circumstances where there is an ongoing pattern of negative attitudes, beliefs and behaviours of one parent (or carer) that have the potential or expressed intent to undermine or obstruct the child's relationship with the other parent.*" [77]

2. PARENTAL ALIENATION CASELAW

X v Y [2026] EWHC 42 (Fam)

- In this case, the court was concerned with a seven-year-old girl. An application was made by the Father seeking a Specific Issue Order providing for the child's return to Dubai. The Mother opposed the application. The matter came before Mr Justice Hayden for a three day fact-finding hearing.
- The Father alleged that the Mother had obstructed the child's relationship with the Father. The Mother made similar opposing allegations.
- The court declined to use the label "*parental alienation*" in its findings. Mr Justice Hayden stated "*For my part, I consider that label generates heat and rarely casts forensic light. It is the actual substance of the allegations that matter, not the name given to them*." [4]
- Mr Justice Hayden's approach demonstrates the ongoing reluctance of the courts to apply the term parental alienation in the court's findings, while also highlighting the frequent use of the term by parties in their schedules of allegations.

3. SECTION 91(14) ORDERS

The court has continued a trajectory of increasing the prevalence of Section 91(14) barring orders, including for the duration of children's minority.

3. SECTION 91(14) ORDERS DEFINED

Section 91(14) of the Children Act 1989 states: 'On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court'.

Section 91(14) orders explained:

- They occur when within private law children cases, applications to the Court are consistently made by one or multiple parties in relation to a child or children.
- Section 91 (14) of the Children Act 1989 allows the Court to make an Order preventing an individual from making future applications under the Children Act 1989 without the Court's express permission.
- Such an Order may appear similar to those which can be made under the inherent jurisdiction of the High Court.
- A Section 91 (14) Order is generally made with a limited time and has clear restrictions.

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3. SECTION 91(14) ORDERS DEFINED

The central case is *Re P (Section 91 (14)) Guidelines (Residence and Religious Heritage)* [1999] 3 WLR 1164.

In this case, Lord Justice Butler-Sloss drew up a number of guidelines from the reported cases, while indicating that the court always has to carry out a balancing exercise between the welfare of the child and the right of unrestricted access of the litigant to the court.

The guidelines are as follows:

(1) Section 91(14) should be read in conjunction with Section 1(1) of the Children Act 1989 which makes the welfare of the child the paramount consideration.

(2) The power to restrict applications to the court is discretionary and in the exercise of its discretion the court must weigh in the balance all the relevant circumstances.

(3) An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.

(4) The power is therefore to be used with great care and sparingly, the exception and not the rule.

(5) It is generally to be seen as a weapon of last resort in cases of repeated and unreasonable applications.

3. *RE P* GUIDANCE CONTINUED

(6) In suitable circumstances (and on clear evidence), a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications.

(7) In cases under para 6 above, the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family; and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain.

(8) A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, to the rules of natural justice such as an opportunity for the parties to be heard on the point. In particular it is wrong in principle, except in exceptional circumstances, to put a litigant in person in the position, at short notice, of having to contest a Section 91(14) order.

(9) A restriction may be imposed with or without limitation of time.

(10) The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of order.

(11) It would be undesirable in other than the most exceptional cases to make the order ex parte.

3. SECTION 91(14) CASELAW

MZA v FHB (No 4) [2025] EWFC 277 (B)

- In this case, Judge Vincent delivered a supplementary welfare judgment in long-running private law proceedings concerning two children, which involved relocation and contact issues following findings of domestic abuse against the father.
- The mother, now seeking reduced and supervised contact for the father, presented concerns about the father's coercive behaviour and the children's emotional safety. The father opposed such restrictions.
- The judge found the father's past abuse and insufficient remorse rendered frequent unsupervised contact inappropriate and ordered reduced, supervised contact instead.
- An order was made under Section 91(14) to prevent the father from making further applications, as he had been using the litigation process as a controlling and coercive measure. The judge thereby restricted the father's ability to bring future applications without permission, to safeguard the family from the stress of ongoing litigation. The court ordered the Section 91(14) order would be in place until each of the children's sixteenth birthday. That represented nearly six years for J and nearly nine years for K.

3. SECTION 91(14) CASELAW

AB v CD [2025] EWFC 398

- In this case, the court dismissed an application for child arrangements and ordered no contact between a father and his seven-year-old daughter following findings of ongoing domestic abuse including threats of honour-based killing, coercive control and harassment.
- The Cafcass court adviser in their first report had recommended a Section 91(14) order for a duration of 2 years. However, in the addendum report, the Cafcass officer stated they had reflected on this recommendation and now took the view that the Section 91(14) order should be for a duration of 3 years, given the lengthy proceedings.
- The court imposed extensive restrictions on the father's parental responsibility, and a Section 91(14) order was made preventing him from making further applications without the court's permission until the child's sixteenth birthday, which meant the order would last a duration of 8 years.
- This case demonstrates the court's willingness to use its discretion and make Section 91(14) orders as the court sees fit. The duration of the barring order made was far longer than the Cafcass court adviser had recommended, even on second reflection.

3. SECTION 91(14) CASELAW

A & T (Children), Re (Appeal: Duration of Section 91(14) Order) [2025] EWHC 3052

- In this case, Mr Justice Harrison allowed the father permission to appeal the duration of the Section 91(14) order, but not the making of the order itself. The father sought to appeal against the making of a Section 91(14) order on 4 February 2025 preventing both parents from making further Section 8 applications for three years. The appeal in relation to duration was allowed in this case because [46-60]:
  - Although the duration of such orders is always a critical issue, the judge had not given an explanation for the three year term;
  - Although the judge was entitled to make the order, this was not an obvious case for doing so. The length of proceedings was caused by court delays, the errors made by the magistrates, the change of guardian, M obstructing the guardian's access to the children, the potential risks in M's care and consequent need for LA enquiries, LA delays and repeated changes of social worker;
  - F had not abused the court process by making repeated applications or engaging in "lawfare";
  - The judge alluded to the clogged nature of the court lists but this should not be routinely used to justify a Section 91(14) order in cases where inappropriate applications have not been made;
  - The family had been let down by the system; a Section 91(14) order was needed because of the harm caused by protracted litigation but a 3-year order was disproportionate;
  - The break from litigation was beneficial and would make the children more secure about their living arrangements but the blanket 3-year restriction was unjustified.
- Furthermore, Mr Justice Harrison considered Section 91A (inserted by the Domestic Abuse Act 2021) and PD12Q – the need to address duration and proportionality of such an order, neither of which were adequately considered at first instance. Nonetheless, in his final remarks at [61] Mr Jusice Harrison cautioned the parents to think carefully before making any further applications, stating mediation is generally a better way than litigation to resolve disputes.

4. SECTION 37 REPORTS

There have been several recent cases where the court has directed Local Authority involvement in private children cases, demonstrating the court's continued willingness to invoke Section 37 the Children Act 1989, including on its own volition, where the court deems it necessary.

4. SECTION 37 REPORTS DEFINED

Section 37(1) of the Children Act 1989 states:

- ‘Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child’s circumstances.’

Section 37(2) states:

- ‘Where the court gives a direction under this section the local authority concerned shall, when undertaking the investigation, consider whether they should—
  - (a) apply for a care order or for a supervision order with respect to the child;
  - (b) provide services or assistance for the child or his family; or
  - (c)take any other action with respect to the child.’

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4. SECTION 37 REPORTS DEFINED

When are Section 37 reports invoked in private law proceedings?

- A report pursuant to Section 37 of the Children Act 1989 is ordered within private law children proceedings when the Court becomes concerned regarding the welfare of the child and there are concerns that the child has suffered or is at risk of suffering **significant harm.**
- The Court may make a direction for a Section 37 report of its own motion or following the recommendation or request of another party.
- The court must carefully explain its reasons for ordering a Section 37 report.
- Ultimately, it is for the local authority to decide whether to start public law proceedings (*Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam)).

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4. SECTION 37 REPORTS DEFINED

Significant harm includes but is not limited to:

- Physical harm as a result of:
    - A. The young person's own actions for example taking part in risky behaviour, criminality or self harm which the parents are unable to control.
    - B. A parent or third party's behaviour towards the child such as from domestic abuse or which the child is exposed to and which the parent fails to protect the child from. This can also include inappropriate physical chastisement.
    - C. Exposure to parental criminality
    - D. Exposure to alcohol/drug abuse
- Sexual harm or risk of sexual harm
- Emotional harm including exposure to:
    - A. Domestic abuse
    - B. Parental acrimony and/or alienating behaviours
    - C. Exposure to poor parental mental health
- Neglect (poor home conditions, not meeting developmental or emotional needs, lack of food etc)

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4. SECTION 37 REPORTS DEFINED

Per *Re W (Care Proceedings: Functions of Court and Local Authority)* [2013] EWCA Civ 1227, a case considering the powers and duties of local authorities and the Court in the context of final orders, it was held that the Court could only 'force upon' a local authority a more draconian order than was asked for if:

1. instant removal of the children or long-term placement outside the family is required;

2. it is necessary to share parental responsibility with the parents; and

3. it was necessary to place duties on the local authority towards the children.

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4. SECTION 37 IN PRIVATE CHILDREN CASELAW

E, Re (Children: S.37 Direction) [2025] EWHC 2464 (Fam)

- This case was part of long-running private law proceedings concerning 4 children, in which there had been findings of abuse by the father and alienating behaviour from the mother. The Court made a Section 37 direction and interim care orders under Section 38 for all 4 children.
- The court gave the following reasons for making the Section 37 direction:
  - The local authority did not properly explain why it stopped involvement and why proceedings should cease.
  - The local authority's work was inadequate, especially in light of serious evidence of emotional harm. It failed to address key concerns identified by previous professionals, including the mother's alienating behaviour, issues of enmeshment, B's controlling and manipulative behaviour, and overall dysfunctional parenting.
  - There was a failed attempt to manage a session for one child and the father. This was attempted by the parents alone without any social work support.
  - There is no clear plan for restoring the children's relationship with the father, nor for addressing the children's false beliefs about the father or the mother's alienating behaviour.
  - A new investigation was thus needed to allow the local authority to re-evaluate the situation and reconsider whether public law proceedings should be initiated.
- The judgment provides a recent example whereby findings of abuse and alienating behaviours have triggered Section 37 investigations, of the court's own volition.

4. SECTION 37 CASELAW

Re E (Section 37 Direction) [2025] EWCA Civ 470

- The question arising on this appeal was whether Section 37(1) allowed courts to direct investigations and make interim orders only for children involved in proceedings or for any other children known during the case.
- The appeal concerned care proceedings for baby girl E. At the case management hearing, the learned judge ordered a Section 37 investigation into the welfare of three cousins where the mother and E were living. The cousins were not the subject of the proceedings. The judge also imposed interim supervision orders for the cousins and appointed E's guardian as guardian for them.
- The local authority appealed against the direction for the Section 37 report and the interim supervision order.
- The key issues were:
  - 1. Whether the court's power under section 37(1) to direct a local authority to investigate a child's circumstances extends to children who are not the subject of the proceedings.
  - 2. Whether the judge erred in making orders under sections 37 and 38 without notice to the parents of the three children.
- The Court of Appeal allowed the appeal and set aside the section 37 direction and interim supervision orders. Lord Justice Baker delivered the leading judgment, with Lady Justice Elisabeth Laing and Lord Justice Underhill concurring.

4. *RE E (SECTION 37 DIRECTION)* CONTINUED

- The Court of Appeal shared the learned judge's concerns about the three non-subject children, however held that the judge's interpretation of section 37 was legally incorrect and that the procedural defects rendered the orders unfair for the following reasons:
  - 1. The judge misunderstood the scope of section 37, which applies only to children who are the subject of the proceedings. The phrase "*any family proceedings in which a question arises with respect to the welfare of any child*" means proceedings in which a question arises for determination about the welfare of a child, not proceedings in which the court becomes aware of a concern about the welfare of a child [68]
  - 2. Section 37 is intended to assist the court in assessing options for dealing with the child who is the subject of the proceedings. It provides a "*jurisdictional bridge*" between private law proceedings and public law provisions, enabling the court to obtain a report about the subject child's circumstances [69]
  - 3. The underlying principles of the 1989 Act delineates the boundaries between the court's powers and the local authority's responsibilities, emphasising the least interventionist approach consistent with the child's welfare. Section 37 and section 38 powers are exceptions to the general principles and should be interpreted narrowly. [71-72]
  - 4. The Family Procedure Rules and the earlier 1991 Rules do not provide for service of Section 37 directions or Section 38 interim orders on persons who are not parties to the proceedings. The absence of procedural safeguards for non-subject children indicates that section 37 does not extend to children who are not the subject of the proceedings. [79-80]

4. *RE E (SECTION 37 DIRECTION)* CONTINUED

- 5. No notice was given to A and B about the court's intention to make a section 37 direction or section 38 interim order. [84-85]
- 6. Procedural Unfairness and/or incorrect basis:
  - a. The judge failed to list the matter for an early hearing after making the order without notice, depriving A and B of an opportunity to respond promptly [86]. Further, the judge did not consider the requirement under section 38(10) to assess whether any party opposed to the order was in a position to argue their case fully [§87].
  - b. The judge relied on oral submissions based on instructing solicitor had read from the computerised social services records and insufficient evidence, rather than proper written evidence, to make the interim supervision order [89].
  - c. The judgment lacked analysis of the welfare checklist under section 1(3) and proportionality considerations, essential when making public law orders [90, 92].
  - d. Even though the judge made ISOs rather than ICOs, the orders still constituted an interference with parental responsibility. The broader interpretation of section 37 proposed by the guardian would have allowed for even more intrusive orders, such as interim care orders or directions under section 38(6) [§92].
  - f. The appointment of the guardian to represent the three children was outside the scope of the law because the proceedings were not "specified proceedings" under section 41(6)(b) of the Act. The children had not been joined as parties to the proceedings, and the appointment was not made under FPR rule 16.4 [91].

THANK YOU

Thank you for your time.

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