Harcourt Chambers

Public Law Team Newsletter

February 2026

February has brought several decisions with direct day to day consequences for local authorities, children's guardians, and advocates in care proceedings and inherent jurisdiction work.

Each judgment carries a clear procedural lesson and rewards close, practical attention.

This edition covers three judgments worth keeping to hand. They address: the limits of inherent jurisdiction where a child is subject to an interim care order, disclosure to the Disclosure and Barring Service following findings of fact, and the modern approach to expert evidence in alienating behaviour litigation.

In this edition

1. Inherent jurisdiction and care planning disputes

Re J [2026] EWFC 26 (Fam), Knowles J (handed down 10 February 2026)

Why this matters

This judgment is a useful reminder that where an interim care order is in force, the court will usually resist separate inherent jurisdiction litigation that is, in substance, an attempt to supervise or restrain day to day care planning decisions within the local authority's section 33 parental responsibility powers.

At the same time, and where required, the Family Court can deploy the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to its substantive decisions, by virtue of section 31E(1)(a) of the Matrimonial and Family Proceedings Act 1984 (see *Re K (Children) (Powers of the Family Court)* [2024] 1 FLR 1261).

Snapshot of the facts

J was 11 years and 9 months old, looked after under an interim care order since June 2024, and living with the same foster carers throughout.

The care proceedings were well advanced, with a final hearing listed for June 2026. The foster carers planned a move to a new home around one and a half hours away during the February half term, making a change of secondary school unavoidable.

The father, acting in person, sought injunctive relief under the inherent jurisdiction to restrain any change of school or location and to preserve the status quo.

The disagreement about the move and schooling had already been raised within the care proceedings before the allocated judge. The children's guardian met J and explored multiple options, including staying with the carers with a school move, boarding, and a change of placement. J was clear that she wished to remain with her current foster carers, even if that meant changing school.

The decision in brief

The injunction was refused. The court held that this was, in substance, a care planning dispute about schooling and placement logistics for a child subject to an interim care order, and it should not generally be re run as separate inherent jurisdiction litigation.

Legal principles the judgment applies

- **Section 33 Children Act 1989 is the starting point**. While an interim care order is in force, the local authority shares parental responsibility and can determine the extent to which others may exercise it, including schooling decisions, provided the **section 33(4)** necessity test is met.
- **Override requires necessity for welfare**. The authority may only limit or override a parent's exercise of parental responsibility if satisfied it is necessary to safeguard or promote the child's welfare.
- **Consultation is required, but only so far as reasonably practicable**. The duty to ascertain wishes and feelings includes parents and child, but what is practicable depends on the timeline and circumstances. The court treated genuine engagement as important, not as a tick box exercise.
- **Inherent jurisdiction is not a routine route for case management of care planning**. The court recognised a small category where the impact is so profound that the court should be asked to sanction the act, but an ordinary change of school tied to a foster carer move will usually sit within section 33 decision making.

How the court evaluated welfare

The judge accepted that J's current school was excellent and that a move risked disruption, including to contact arrangements.

However, the court gave decisive weight to the stability of the existing placement, the impracticality of maintaining the current school with a daily travel burden, and the lack of realistic alternatives that did not create greater instability.

Boarding was considered and rejected as unsuitable because it would remove the day to day emotional support J needed from her carers.

Notably, the court rejected the submission that a schooling change would pre determine the final welfare decision. Schooling was treated as one factor in a holistic welfare evaluation at

final hearing, not a determinative step that fixed the outcome.

What the judgment shows about evidence and decision making

- **Chronology matters**. The judge asked searching questions because the authority's written material did not clearly set out the decision making timeline. The lesson is to evidence consultation, options appraisal, and who decided what, and when.
- **Use education expertise properly**. The authority relied on Virtual School input and comparison of the proposed schools, including pastoral factors, and then recorded formal ratification of the decision.
- **Wishes and feelings were taken seriously**. J's views were consistent to the guardian and social worker and were given weight appropriate for a child approaching 12, while recognising she could not know everything relevant to the litigation.

Practice checklist

- **Keep it in the care proceedings**. If the dispute is really about care planning under an interim care order, list it before the allocated judge and seek directions rather than launching separate inherent jurisdiction proceedings.
- **Anchor the decision in section 33 and the section 33(4) necessity test**. State explicitly why overriding parental opposition is necessary to safeguard or promote welfare, and record the reasoning contemporaneously.
- **Prove consultation was real and reasonably practicable**. Keep an auditable timeline: when parents were told, what was shared, what alternatives were considered, what input was sought, and how objections were evaluated.
- **Prepare a short options analysis**. Address practicalities (travel time, homework and activities, placement stability, contact logistics, availability of alternative placements) and explain why less disruptive options are not feasible.
- **Deal with the pre determination argument head on**. Make clear that schooling is one feature of welfare analysis at final hearing and does not of itself fix the outcome.
- **Put the child's stability at the centre**. The judgment shows the court may prefer a school move over a placement move where stability and emotional support depend on the existing carers.

> **Takeaway**
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> When an interim care order is in force, routine care planning decisions such as schooling will ordinarily be governed by section 33, subject to the section 33(4) necessity safeguard and proper consultation so far as reasonably practicable. If challenged, the authority's best protection is a clear decision making record, a practical options analysis, and evidence that welfare and stability drove the outcome.

2. Disclosure to DBS after findings of fact

A Local Authority v Mrs O and Ors [2026] EWFC 27, Judd J (11 February 2026)

Why this decision deserves attention

Applications about disclosure to DBS can arise unexpectedly, usually at moments of acute concern about reputational harm, employment consequences, or perceived unfairness. This judgment highlights that DBS operates within a statutory safeguarding framework, and that the family court will usually be slow to interfere with that scheme.

This decision sits neatly alongside Arbuthnot J's judgment discussed in our January edition, which addressed the proper approach to DBS requests for disclosure from family proceedings.

Procedural note (useful in practice)

The local authority initially applied for permission to disclose findings to DBS. Once it became clear that disclosure did not require permission under FPR 12.73, the focus shifted: the parents sought orders restraining disclosure. DBS was served, provided a position statement and argument, and intervened.

Rule gateway often relied on in practice

Family Procedure Rules 12.73 provides that, for the purposes of the law relating to contempt of court, information relating to proceedings held in private may be communicated without permission where the communication falls within one of the specified gateways.

For safeguarding purposes, the gateway commonly relied on is rule 12.73(1)(viii), which permits communication to:

> viii) a professional acting in furtherance of the protection of children.

As emphasised by Judd J, the rule does not itself confer a general discretion to disclose. It identifies circumstances in which a communication is not a contempt of court. The court retains a power to direct otherwise where necessary.

Context and background

The application followed grave findings made after a lengthy fact finding hearing concerning the death of a child who had been cared for by the respondents.

The court found that the child died from inflicted injuries caused by one or other of the parents, although the precise perpetrator could not be identified. Both parents were found to have lied and to have concealed what had occurred. Earlier inflicted injury findings were also made.

Against that background, the issue became whether disclosure should be prevented, rather than whether it required permission. The court dealt with the matter on the footing that disclosure fell within the applicable statutory and rule based gateways, subject to the court's power to direct otherwise.

The DBS scheme (what the judgment underlines)

- **DBS is a statutory safeguarding body**, tasked with maintaining barred lists and assessing risk in a forward looking way under the Safeguarding Vulnerable Groups Act 2006.

- **Checks vary by role**, including basic, standard, and enhanced checks, with enhanced checks used for regulated activity and potentially including barred list status.
- **Safeguards exist within the DBS process**, including the opportunity to make representations and appeal rights.
- **Local authorities may be permitted, and sometimes required, to provide information** to DBS through statutory gateways.

The respondents' central argument

The parents argued that a "pool finding", that one or other of them caused the fatal injuries, could not properly found a risk assessment by DBS. Reliance was placed on authority establishing that a finding of a "real possibility" does not equate to a definitive finding of culpability against a particular individual.

It was submitted that disclosure would therefore be unfair, disproportionate, and an unjustified interference with Article 8 rights, particularly given the potential employment consequences.

Legal framework applied by the court

The court approached the application on the basis that disclosure was permitted under the rules unless the court directed otherwise, and treated the Re C (Disclosure) factors as continuing good guidance in the balancing exercise.

- Welfare interests of the children in the proceedings
- Welfare of other children generally and vulnerable adults
- Confidentiality and frankness in children proceedings
- Public interest in administration of justice
- Public interest in cooperation between safeguarding agencies

How the court approached the issue

- **The DBS statutory role was given primacy**. Parliament has created a specialist safeguarding body tasked with forward looking risk assessment. The family court's role is not to anticipate or second guess how DBS will evaluate disclosed material.
- **Disclosure was grounded in clear legal gateways**. The judgment explains the interaction between the Safeguarding Vulnerable Groups Act 2006 and the rule based gateways for communication of information from private proceedings to professionals acting in furtherance of child protection.
- **Article 8 was engaged but outweighed**. The court accepted that disclosure interfered with private and family life rights, but held the interference to be necessary and proportionate given the gravity of the findings and the protective purpose of the DBS scheme.
- **Pool findings were not treated as irrelevant**. The court rejected the submission that the absence of a single identified perpetrator made the material incapable of assisting DBS. The findings remained of obvious safeguarding significance.

Notable aspects of the reasoning

The judge drew a clear distinction between the family court's fact finding role and the DBS's evaluative safeguarding function.

The court emphasised that its task was not to decide whether DBS would ultimately bar either respondent, but whether disclosure should be prevented. That framing shaped the proportionality analysis.

The court also placed weight on the wider safeguarding landscape: the welfare of other children and vulnerable adults, the public interest in inter agency cooperation, and the procedural safeguards within the DBS regime, including representations and appeal rights.

Pool findings (what the judgment actually does with them)

The court simply could not accept that the absence of an identified perpetrator meant there was no factual basis for DBS to assess risk. The point was treated as one for DBS, not the family court, and the judgment emphasised that there were also significant and serious findings against each respondent beyond the pool finding itself.

Practical guidance for practitioners

- **Start with the statutory framework**. Before issuing applications for permission or restraint, identify whether disclosure is already authorised or required under the Safeguarding Vulnerable Groups Act 2006.
- **Avoid litigating DBS merits in the family court**. Arguments about whether findings will justify barring are usually premature and misdirected. The DBS assessment process is separate and specialist.
- **Expect Article 8 challenges, but frame responses carefully**. Emphasise necessity, proportionality, gravity of findings, and the protective purpose of DBS rather than debating employment speculation.
- **Pool findings are not disclosure proof**. The judgment confirms that inability to identify a sole perpetrator does not strip findings of safeguarding relevance.
- **Document reasoning for disclosure decisions**. Authorities should record why statutory criteria are met and why disclosure serves a legitimate safeguarding aim.

> **Takeaway**
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> **The court refused to restrain disclosure.** Disclosure disputes involving DBS should be analysed through the lens of statutory purpose and public protection, not as collateral litigation about the underlying findings. Where Parliament has created a structured safeguarding regime, the family court will usually require compelling justification before restraining information sharing that falls within that scheme.

3. Experts and alienating behaviour: the modern approach (and what not to do)

Re Y (Experts and Alienating Behaviour: The Modern Approach) [2026] EWFC 38, Sir Andrew McFarlane P (handed down 20 February 2026)

Why this judgment matters

This is more than a warning about case management. It is a judgment about welfare harm caused by getting the sequence wrong, letting expert opinion drive findings, and failing to determine domestic abuse allegations before moving to an alienating behaviour narrative. The President set aside the earlier findings and directed that future welfare decisions for Y must be evaluated without any reference to the expert report or those findings.

What happened (in short)

In October 2019 the court heard evidence from a psychologist. At the conclusion of that evidence, and without hearing any other witness, the judge found that the children had been alienated from their father.

In December 2019, before the mother's appeal permission application had been determined, the court ordered that both children move immediately to live with the father. There was then no contact with the mother from the end of 2019 until 2025.

The matter returned via a Part 18 application to set aside the findings, which the President heard in January 2026 and determined by setting the key findings aside.

A core point the President makes early

The judgment is not framed as a critique of one individual expert. It is framed as a systemic failure across the case, including the court and the wider professional network, to prioritise welfare and apply basic forensic discipline.

What went wrong: the errors identified by the President

- **Domestic abuse allegations were not determined first**. Where the court accepted that extremely serious cross allegations required fact finding, expert instruction and any final welfare report should have been postponed until the conclusion of that process.
- **The expert was unregulated**. The President strongly endorsed the modern expectation that psychological experts instructed in children proceedings should be appropriately regulated, and criticised the instruction of an unregulated expert in this case.
- **Sequencing and method at the hearing were fundamentally unsafe**. Hearing the expert first and then making findings without hearing any other evidence was described as a fundamental error.

The point about regulation is made in the context of suitability and safeguards in children proceedings, rather than as a general comment on professional competence outside that setting.

The modern approach (structured, and deliberately sequenced)

The President sets out a staged analysis that starts with the child's position, tests alternative explanations (including domestic abuse), and only then examines whether alienating behaviours are established.

1. **Start with the child**: focus on the child's reluctance, resistance, or refusal to spend time with a parent.
2. **Test the estranged parent explanation**: consider whether the child's response is a consequence of the actions of the estranged parent, including abusive behaviour.
3. **Exclude justified reactions and ordinary dynamics**: consider whether the child's reaction is an appropriate justified reaction, or explained by ordinary alignment, affinity, or attachment to the primary carer.
4. **Only then consider alienating behaviours**: focus on whether the caring parent has engaged in behaviours that directly or indirectly impacted on the child, leading to the reluctance, resistance, or refusal.

Practice checklist (how to use Re Y in live cases)

- **Pin down the sequence early**: if domestic abuse is alleged and fact finding is required, determine that factual matrix before any expert driven evaluation of alienating behaviour.
- **Draft Part 25 questions to match the stage reached**: avoid asking an expert to answer questions that depend on facts the court has not found.
- **Regulation is not optional**: if psychological evidence is sought, treat regulated status as the default expectation and be ready to justify any departure.
- **Resist label based shortcuts**: frame the issue as behaviours and impact, not diagnosis, syndrome, or a single narrative that crowds out competing explanations.
- **Keep welfare consequences in view**: the judgment is explicit about the long tail of harm when flawed findings drive residence and contact outcomes.

> **Takeaway**
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> Re Y is a reminder that flawed sequencing and overreliance on expert opinion can produce unsafe findings with long lasting welfare consequences. The judgment reinforces the need for regulated experts, disciplined case management, and a clear separation between expert evaluation and judicial determination.

A note on this month's selection

This edition does not attempt to draw out a single doctrinal theme. The cases are linked instead by their practical significance. Each illustrates how everyday procedural choices, whether about jurisdiction, disclosure, or expert evidence, can materially shape welfare outcomes and litigation risk.

Want to discuss any of the cases featured?

For advice on a live matter, training, or discussion of any issue raised in this edition, please contact our clerks to arrange a discussion with a member of Harcourt Chambers' Public Law Team.

Written by James Dove

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Neutral citations in this edition: *Re J* [2026] EWFC 26 (Fam); *A Local Authority v Mrs O and Ors* [2026] EWFC 27; *Re Y* [2026] EWFC 38.