IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the child and members of her family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Case No: CJ16C00319

IN THE HIGH COURT FAMILY DIVISION
CAERNARFON DISTRICT REGISTRY

IN THE MATTER OF THE CHILDREN ACT 1989
AND THE SOCIAL SERVICES AND WELL-BEING (WALES) ACT 2014

AND IN THE MATTER OF K (A CHILD)

Date: 27th September 2016

Before:

HIS HONOUR JUDGE GARETH JONES
(Sitting as a Deputy Judge of the High Court)

- -

Between:

X COUNCIL	**Applicant**
- and -	
Mother (1)	
Father (2)	
and (a child)	
by her Guardian (3)	**Respondents**

- -

- -

Miss Mihangel of Counsel for the Applicant Local Authority
The First and Second Respondents did not appear and were not represented
Mr Abberton of Counsel for the Children's Guardian

Hearing dates: 27th September 2016

- -

APPROVED JUDGMENT

Transcript provided by:
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JUDGMENT **27th September 2016**

HIS HONOUR JUDGE GARETH JONES
(Sitting as a Deputy District Judge of the High Court):

1. I have before me an unusual application made by the Local Authority (X Council) in relation to a child, K, who is fifteen years-old.

2. The parties to the application and their representation are as follows:

   (i) the Local Authority are represented by Miss Mihangel of counsel;

   (ii) K is represented by her Guardian, Miss Wilson, and by her counsel, Mr Abberton;

   (iii) K's parents (who are both parties to the application) are not represented today, nor are they present, but they are aware of the application, having been informed thereof orally by the Guardian, and they have indicated their consent to the application and the Orders sought.

3. This application will be relisted before me on Tuesday 4th October 2016, when there will be an opportunity to review the application and the case more generally.

4. The Local Authority's application as issued is for an Order under section 25 Children Act 1989 (but it is recognised at the outset that procedurally the application itself is invalid, and ought to have been an application made by the Local Authority under the inherent jurisdiction of the High Court). The reason for that will become apparent in a moment.

5. So far as the background generally is concerned, K is subject to a Final Care Order made on 23rd March 2016, by Her Honour Judge Lloyd. K had been the subject of a number of applications for a Secure Accommodation Order since the end of 2015, and several such Orders have been made on various occasions.

6. So far as the more recent permission is concerned, an Order was made on 18th August 2016, by District Judge Jones-Evans, giving the Local Authority authority under section 25 Children Act 1989, to place K in a secure accommodation facility, that permission to expire on 29th September 2016. That was expressed to be a Final Order rather than an Interim Order under section 25 Children Act 1989.

7. I should indicate that this permission had been preceded by a permission given by Her Honour Judge Lloyd in April 2016, under what correctly should be section 124 Social Services and Well-being (Wales) Act 2014, and not schedule 2 paragraph 19 Children Act 1989, to place K outside the jurisdiction of England and Wales (more particularly in Scotland).

8. The difficulty with regard to the Orders previously made has arisen since 12th September 2016, and in particular the decision of the President of the Family Division in the case of *Re X and Y [2016] EWHC 2271 (Fam)*. The decision involved two children (X being a girl of sixteen years-old, Y being a boy of fifteen years-old) who were subject to Secure Accommodation Orders (applications made respectively by C County Council and B City Council) the Orders having been made by Her Honour Judge Forrester and His Honour Judge Duggan at the Carlisle and the Blackpool Family Courts respectively.

9. These Orders permitted those children to be placed in a secure accommodation facility in Scotland. It is that authorisation and the power to make Orders of that kind which has been held to be invalid by the President in the decision to which I have referred.

10. These difficulties are partly statutory in origin, and partly administrative. They are partly statutory in origin because Part 1 of the Family Law Act 1986, whereas it makes fairly extensive provision for the enforcement and recognition of Private Law Family Orders within the separate jurisdictions of the United Kingdom, does not make adequate provision for the enforcement and recognition of Public Law Orders within the jurisdictions concerned. There is, therefore, as the President indicated, a "serious lacunae" with regard to that statutory provision which should be addressed as speedily as possible (in his view) by a joint report of the Law Commission.

11. The other difficulty is entirely administrative. As the President indicated in paragraph 2 of his judgment:

> *"These particular issues arise because of the shortage of places in secure accommodation units in England, so that local authorities and Courts in England, particularly in the north of England, whether on the Northern Circuit or the North-Eastern Circuit, look to making use of available places in secure accommodation units in Scotland."*

12. That difficulty is by no means exclusive to the North of England, it applies also to applications within Wales, and in particular to North Wales, and I have myself experience of several such applications in the past.

13. This is a situation which is well-known to the National Assembly, and to the other administrative and governmental institutions who are responsible for secure accommodation places within Wales. It is within my knowledge that the local Family Justice Board in North Wales has in the recent past, pressed upon the National Assembly in Cardiff the need to increase the secure accommodation capacity within Wales, and in North Wales in particular, and to press for the institution of such a facility within this locality. So far, those pleas by many in North Wales have fallen on deaf ears.

14. The President decided in paragraph 8 of *Re X and Y*:

    (i) section 25 of the Children Act 1989, does not enable the Family Court in England and Wales to make a Secure Accommodation Order in respect to a placement in Scotland. That is because section 25 in its amended form relates solely to a placement in England;

    (ii) such a placement can now only be authorised under the Court's inherent jurisdiction; and

    (iii) there is no mechanism for the recognition or enforcement of such an Order under the inherent jurisdiction in Scotland, apart from an Order of nobile officium before the Scottish Court of session.

15. Even that latter provision is uncertain, because as the President indicated, there is some dispute as to whether an Order of that kind can be made. Scotland, for its part, has much better provisions for the recognition and enforcement in England and Wales of its own Orders than does England and Wales in Scotland, as the President indicates in paragraph 62 of his judgment.

16. I should indicate that these difficulties are part of a wider series of difficulties encountered by Courts in Wales presently with regard to these provisions. In Wales, since 6th April 2014, under the Social Services and Well-being (Wales) Act 2014, where Welsh or English local authorities place children, or seek to place children in secure accommodation **in Wales** the provisions of section 119 of the Social Services and Well-being (Wales) Act 2014 applies. However, where Welsh or English local authorities seek to place children in secure accommodation facilities in England, section 25 of the Children Act 1989, applies.

17. That, the lay person may think is a relatively straightforward position. It is not the case. Because of the acute shortage of secure accommodation places, a Welsh Family Court dealing with these provisions often does not know, when the application is before it, where the location of the placement at which the child will be placed is situated. The reason for that is because the Home Office organises placements on a "queue" system, and children have to wait their turn before a facility is made available to them. In a recent case with which I had dealings (in the last few days) the child concerned was tenth in the queue awaiting placement at some unknown and unspecified location.

18. This is a national scandal, it is a national scandal in Wales and it is a national scandal within England and Wales also. It needs to be addressed as a matter of urgency.

19. The position is compounded by the statutory difference in the authorisation provisions to place children outside the jurisdiction of England and Wales. Whereas in England the provisions under schedule 2, paragraph 19 Children Act 1989, apply, in Wales the provisions of section 124 Social Services and Well-being (Wales) Act 2014, apply, and the criteria in some respects are very different. Where a local authority in Wales arranges for a child in Care to live outside England and Wales, Court approval is required under section 124(1) Social Services and Well-being (Wales) Act 2014. Approval can only be given if section 124(3) and section 124(4) is satisfied.

20. The expression "live in" under schedule 2 paragraph 19 Children Act 1989, seems to refer to a home or residence with a parent, guardian, special guardian or other suitable person, and not a corporate organisation or a non-natural person; for instance a facility providing detention and secure accommodation. That is the President's indication at paragraph 29 of the judgment in *Re X and Y* (to which I have referred). Whether a placement in secure accommodation either amounts to or does not amount to a "live in" placement was left undecided by paragraph 30 of the President's judgment.

21. In this case I should indicate the Local Authority does not propose a continuation of K's detention beyond 29th September 2016. Thereafter, K will remain in Scotland, but she will not be accommodated in a secure facility providing for her continued detention. Her continued residence, however, in Scotland outside the jurisdiction of England and Wales will require authorisation now under the inherent jurisdiction, and will of itself be subject to further judicial review and oversight by this Court.

22. In order to regularise the position as the Local Authority now seeks to do, the Local Authority must satisfy the Court that section 100 Children Act 1989, is established. I am satisfied that this is the position. The inherent jurisdiction has to be invoked because section 119 of the Social Services and Well-being (Wales) Act 2014, or section 25 Children Act 1989, do not apply in these circumstances, and the Order sought by the Local Authority simply could not be made, save under the High Court's inherent jurisdiction. I accept and am bound by the reasoning of the President in paragraph 36 of his judgment in *Re X and Y*.

23. Furthermore, I have to be satisfied that if the inherent jurisdiction **is** being utilised, is that inherent jurisdiction (which is an aspect of the Royal Prerogative) in effect ousting a relevant statutory scheme or provision? However, if the gateways for secure accommodation are not met, then the inherent jurisdiction is permissible and has to be invoked. Again for the reasons indicated by the President, I am satisfied that the inherent jurisdiction in this case does not oust a relevant statutory scheme, because there is **no** relevant statutory scheme actually operative in this situation.

24. It seems to me that the President's reasoning with regard to that (insofar as it applies to section 119 Social Services and Well-being (Wales) Act 2014, and section 25 Children Act 1989 respectively) applies also to the permission to place a child outside the jurisdiction of England and Wales under schedule 2 paragraph 19 Children Act 1989, or section 124 Social Services and Well-being (Wales) Act 2014, and I accept entirely what is said by the President in that regard at paragraph 46 of his judgment:

> *"A similar analysis, in my judgment, applies and leads to the same conclusion in relation to paragraph 19 of Schedule 2 to the 1989 Act".*

25. It is for these reasons, therefore, that I have given the Local Authority permission to invoke the inherent jurisdiction. I have sought to regularise at present, K's placement within a secure accommodation facility in Scotland, that authorisation lasting at least until Thursday of this week, as originally envisaged. Furthermore, I give the Local Authority permission for K's continued placement in Scotland after Thursday, subject to a further review hearing which I have listed on Tuesday of next week before me.

26. I have made other ancillary Orders which involve the appointment of a Guardian for K, and the provision of further information, and very importantly I have made provision for K's parents to have regular access with K, the expense thereof being met by the Local Authority, again following the decision of the President in the case of *Re X and Y*.

27. I propose to direct that a transcript of my judgment today is provided (the cost of that will be met by the Local Authority and by the Guardian). I propose in due course to make a copy of that available on the Bailli website, suitably anonymised, and I will hear representations as to whether that transcript should be disclosed more generally. These matters raise matters of legitimate public concern within Wales, and it is high time, it seems to me, that those in authority realise the difficulties which are created by the statutory and administrative "lacunae" to which I have referred. In any event, I will consider that matter again on Tuesday of next week, and I will not make any decision until I have a transcript available to me.

28. However, in the same way as I have drawn attention previously to the shortcomings of certain local authorities, it seems to me that the spotlight now needs to be directed towards those in authority in Cardiff to do something about the situation we find ourselves in.

End of judgment