



Case No: FD23C40559

Neutral Citation: [2023] EWHC 3416 (Fam)

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

**Before :**

**HHJ MORADIFAR**  
**(SITTING AS A JUDGE OF THE HIGH COURT)**

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**In the matter of;**

**Re X**

**(Child: Deprivation of Liberty: Lack of Placement)**

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**Miss Asma Nizami (Instructed by Clyde & Co) on behalf of the applicant Hospital Trust**  
**Mr Martin Downs (Instructed by Goodman Ray) on behalf of the parents**  
**Miss Gemma Kelly (Instructed by Freemans solicitors...) on behalf of the child through**  
**her guardian**  
**Miss Kerrie Croxford (Instructed by LA Legal Services) on behalf of the local authority**

Hearing dates: 8 December 2023  
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**Judgment**

## HHJ MORADIFAR:

### Introduction

1. At the centre of these proceedings is a fourteen year old girl. To preserve confidentiality of her identity and that of her family, I will identify her as X. Her circumstances make for a sad and tragic reading. I have summarised these below. X is the subject of an application by an NHS Hospital Trust (the ‘Trust’) for permission to invoke the court’s inherent jurisdiction and to seek permission to deprive her of her liberty. Latterly she has become the subject of a similar application by the Local Authority together with an application for public law orders.

### The law

2. The court’s jurisdiction to authorise the deprivation of a child’s liberty has been the subject of long standing jurisprudence and its broad principles may be summarised as follows:
  - a. This jurisdiction is reserved to and inherent to the High Court. It is derived “*from royal Prerogative, as parens patriae, to take care of those who are not able to take care of themselves*” [Re L (An Infant) [1968] 1 All ER 20 See also *A City Council v LS* [2019] 1384 (Fam)].
  - b. It may be used to complement or supplement the existing statutory scheme and is “*capable of filling gaps left by the law, if and in so far as those gaps have to be filled in the interest of society as a whole.*” [per Lord Donaldson of Lynton MR at 13 in *Re F (Mental Patient: sterilisation)* [1990] 2 AC 1, see also *A Mother v. Derby City Council* EWCA Civ [2021]1867, at 82].
  - c. The court’s inherent jurisdiction is not without limits [*Re X (A Minor)(Wardship: Restrictions on publication)* [1975] All ER 697)] and the court’s permission is required to invoke it [see s 100 of the Children Act (1989) and the Family Procedure Rules [2010] PD 12D)].
  - d. Art. 5 of the ECHR confirms a right on every individual not to be deprived of their liberty and such a deprivation is only permissible in certain circumstances.
  - e. There are two distinct parts to the test that the court must consider before it can authorise the State to deprive a person of their liberty.
  - f. The court must first establish if the (proposed) arrangements amount to a deprivation of liberty by establishing if there is;

- i. *An objective element of confinement to a certain limited place for not a negligible period of time;*
- ii. *A subjective element of absence of consent to that confinement;*  
*and*
- iii. *The confinement is imputed to the State.*

*Stork v Germany* [2006] 43 EHHR 6 now commonly referred to as the ‘Stork test’.

These three elements must all be present before the court can conclude that the subject child is or will be deprived of their liberty.

- g. In the domestic jurisprudence, the Court of Appeal in *Cheshire West and Chester v P* [2014] AC 896 stated that the “*acid test*” for assessing if a person who lacks capacity is deprived their liberty is:
  - i. The person is unable to consent to the deprivation of their liberty;
  - ii. The person is subject to continuous supervision and control;  
and
  - iii. The person is not free to leave.
- h. Consent by a parent to the deprivation of their child’s liberty does not satisfy the subjective requirements of valid consent under Art. 5 [*Re D (A Child) (Residence Order: Deprivation of Liberty)* [2019] UKSC 42).
- i. The court need only address the second limb of the test if it is satisfied that the (proposed) arrangements amount to the deprivation of child’s liberty. If so, the court must address the second limb of the test by considering whether the authorisation of the said arrangements is in the child’s best interest. The court’s inherent jurisdiction is protective of children [per Lady Black in *Re T* [2021] UKSC 35 quoting Lord Eldon LC in *Wellesley v Duke of Beauford* [1827] 2 Russ 1], and it is exercised “*by reference to the child’s best interest, which are the court’s paramount concern.*” (*Re L* above).
- j. The court’s authorisation of deprivation of a child’s liberty is subject to an “*imperative considerations of necessity*” and where there has been strict compliance with the matters contained in the Guidance issued by the President of the Family Division on 12 November 2019 in relation to placing a child in an unregistered children’s home (“*the Guidance*”) (see para 147 above) and with

*the addendum dated 1 December 2020 to the Guidance.*’, (Lady Black in *Re T* above at 113).

- k. The court must take into account a wide range of matters that must be considered holistically and realistically together with the consequences of permitting or not permitting the deprivation for the child’s liberty [*Tameside MBC v L* [2021] EWHC 1814 (fam)].
- l. Authorisation or permission to deprive a child of their liberty is not an authorisation for the placement itself and the court retains its jurisdiction even when the placement is prohibited by the terms of the *Care Planning, Placement and Case Review (England) Regulations* 2010 as amended on 9 September 2021 [*Tameside MBC v AM and Ors (DOL Orders for children Under 16)* [2021] EWHC 2472 (Fam)]. See also the important observations of McFarlane P sitting in the Court of Appeal in *A Mother v. Derby City Council* [2021] EWCA Civ 1867.

#### Background

3. X was born to a loving family and until her preteen years, her life was unremarkable. Later, concerns around bullying caused her local CAMHS to support her. When she was twelve years old, she was admitted to the hospital with concerns about self-harm, suicidal ideation and low mood. Later she was assessed to be at a high risk of suicide. She was admitted on three further occasions during that year. Later, the local authority closed her case and sign posted the family to private therapy and support from the school.
4. During this period X was assessed by the Centre of International Paediatric Psychopharmacology and Rare Disease who found her to be suffering with episodes of severe depression with psychotic symptoms, anxiety disorder, ADHD and historical vocal tics. Later in the same year she was observed as having traits associated with ASD.
5. Sadly, her behaviour continued to deteriorate. On one occasion she left her home during the night and was found some distance away walking in her socks, cold and wet. She has expressed a wish to die, reported hearing voices and becoming increasingly violent including direct assault on her parents and self-harming. X also started to place herself at risk by sexual association with older individuals, consuming alcohol and taking a constellation of illicit drugs. There then followed a period of

further significant deterioration in her presentation that has at times necessitated the use of physical restraint and sedation to ensure her safety.

6. On 17 October 2023, X arrived at the Accident and Emergency Department of the hospital in handcuffs and she was admitted under s. 2 of the Mental Health Act 1983 for a period of assessment. The period of assessment ended on 23 November 2023 during which time X's behaviour was a profound cause for concern necessitating her seclusion, restraint and sedation. Her behaviour continued to be violent which was directed at the staff.
7. X's mental health was assessed by doctors from a relevant health body. It was determined that medication has had little positive effect on X. Furthermore, her behavioural difficulties were safeguarding concerns and not rooted in any mental health disorder. Moreover, an inpatient admission was not a solution and likely to be contrary to her therapeutic needs. However, due to a lack of suitable available placements, X continues to reside in a separate room at the hospital where she is supervised by three professionals, prompting the Trust to apply for authorisation by this court to permit the said Trust to deprive X of her liberty.

#### Analysis

8. Since the application by the Trust, the matter has been before the court on four occasions. The application to invoke the court's inherent jurisdiction and permission for the applicant Trust to deprive X of her liberty was approved at the first hearing and subsequently continued at the second hearing. The last two hearings have been listed before me. I am grateful to Mr Downs of counsel and Mr Skinner of Goodman Ray for their pro bono representation of the parents at the early stages of these proceedings.
9. At the hearing on 4 December 2023, there was a significant dispute between the parties about the plans for X. The guardian in particular raised some searching questions and significant concerns about the local authority's decisions. The guardian also questioned why the local authority had not made an application for public law orders. Whilst recognising the limitations placed upon the individual social workers and the local authority, the parents raised significant concerns about their daughter and the failures of the system as whole to provide her with any adequate services. By the time of the next hearing on 8 December 2023, the local authority applied for

public law orders and permission to invoke the court's inherent jurisdiction so that it may be authorised to deprive X of her liberty.

10. I fully recognise the enormous sadness and great courage of the parents who have readily identified the challenges that X presents to any carer. They have each accepted that she is beyond their control and the current demands of caring for her are outwith their capacity to do so safely. It is also important to note that they would like X to return to their care as soon as it is safe to do so.
11. X is living in a hospital room. To ensure her safety, the room contains the most basic and essential items such as a bed and chairs. She is under constant supervision of three professionals. Her daily life is extremely limited and she has no access to any of the opportunities that other teenagers may enjoy, such as socialising with her peer group, forming peer friendships, going out into the community or accessing education.
12. It is common ground among the parties that whilst X is kept safe, her current placement is not suitable for her and it is not meeting her needs. The local authority has conducted an exhaustive search of over two hundred registered placements and it has been unable to identify a single placement that is willing to accept or suited to accommodate X. Consequently, the local authority now plans to place X in an unregistered placement pending an application to Ofsted for the placement to become registered.
13. Once at the new placement, the local authority seeks the court's authorisation to deprive X of her liberty by locking the doors and windows, not allowing her to leave the placement alone, or to be in the community unaccompanied, to be supervised by three adults and to use physical restraint when her safety demands it. I have been provided with a detailed transition plan that requires further authorisation to deprive X of her liberty during her transport to the new proposed placement. These are in line with those that have been authorised during her stay at the hospital but include the additional use of an ambulance to transport her.
14. There can be no doubt that the restrictions that are currently placed on X and if approved, will continue to be placed upon her, constitute a clear deprivation of her liberty. Her circumstances clearly meet the 'acid test' as she is confined to her room and under constant supervision by three adult professionals. The proposed arrangements both in respect of her transfer to and whilst at her new placement all continue to confine her within a limited defined space and by constant supervision. X

does not and cannot give consent to these arrangements as she does not have the capacity to do so and the confinement is clearly imputed to the State in the form of the Trust and the local authority who seek the court's authorisation. Therefore, I must conclude that the current arrangements and the proposed arrangements for X's transfer and residence in her new placement meet the acid test and that she is and will be deprived of her liberty.

15. I entirely agree that X cannot continue to reside in the hospital. The options for X are limited. The local authority has now identified a placement that as consequence of considerable effort by the local authority and the professionals involved can be tailored to meet X's needs. The placement is not registered with Ofsted, but urgent appropriate applications are being made to address this in accordance with the President of the Family Division's Guidance of 2019 and its 2020 addendum.
16. It is unsurprising that the parties agree that subject to the approval of the detailed transition plan, that X should move to the placement as matter of urgency. Given the limited available options, the condition of "*imperative considerations of necessity*" is entirely satisfied. Furthermore, in my judgment, X's welfare demands that she moves to the proposed placement as a matter of urgency. X's wishes and feeling are important but must be considered in the context of her maturity and inability to make informed safe decisions about her own welfare. The change of placement is a significant change for X but it is a necessary change that is demanded by her welfare interest. Subject to a settling in period and the staff being able to build a trusting relationship with X, her move is intended to be a prelude to her accessing appropriate services, including those that will best meet her emotional and educational needs. X's relationship with her parents will be maintained through direct contact with her parents which will be promoted by the local authority.

#### Conclusion

17. Therefore, in my judgment, X's welfare demands that she moves and is placed in the proposed placement. For the duration of her stay in the hospital, there is no option but to approve the continuation of the existing restrictive regime that has already been approved by the court to ensure her safety. Once at the new placement, X will require a high degree of restriction and support to keep her safe and the permissive measures that are sought by the local authority are entirely proportionate which currently present the least restrictive measures that would keep X safe.

18. Given the parent's agreement that she is beyond parental control, I find that the interim threshold criteria pursuant to s 38(2) of the Children Act 1989 is crossed. Furthermore, having regard to the welfare checklist as set out in s. 1(3) of the Act, I am satisfied that she must be placed in the interim care of the local authority and in doing so, for reasons that I have set out earlier, I approve the local authority's interim care plan. The transition plan is well thought out, necessary and entirely proportionate for meeting X's needs. The success of the local authority's care plan is predicated on a successful transition and in my judgment this must be supported by the restrictive measures that the Trust has sought permission to put in place. Therefore, I permit the restrictions that the Trust has applied for to support and implement the transition plan. Given that X will now be the subject of an interim care order, I accept the parties' invitation to allocate the case to a court that is local to the parties where the matter can benefit from judicial continuity.
19. I am most grateful to the Trust for its efforts to keep X safe despite the significant challenges that this has presented to the Trust. I am also grateful to the local authority that through a significant concerted effort of the social work team and other professionals, has identified a placement that is far more suitable for X. I note the significant number of hours and resources that have been employed to achieve this in a very short time which stands as testament to the commitment of the professionals involved who have worked tirelessly above and beyond that which may be normally expected of them.
20. Regrettably, X is not alone in her experiences of a system that is not equipped to meet her needs. She is one of many children who are the subject of similar applications before this court. There is a common thread that binds these children. They do not easily fit the criteria of established services. These children and the adults supporting them face a gargantuan and at times an insurmountable challenge to finding a safe placement that can cater for their needs. A suitable and stable placement is key to meeting their therapeutic, educational, emotional and educational needs. Without a suitable placement, they are usually lost in the ever increasing gaps between services that are provided through different public bodies.
21. Invariably, these children are in their teens with professionals being presented with the last opportunity to assess, identify and address their profound needs so that they have a reasonable prospect of entering adulthood with a glimmer of hope and optimism. Sadly, the significant challenges in providing these children with



appropriate placements and services, will contribute to making their future prospects ever more uncertain and raising the likelihood that they will require continuing professional support as adults.

22. The impact of these concerns is not limited to the children themselves but permeates through their immediate family that can include their siblings and other close family members. Furthermore, there is a significant impact on the front line professionals who are often not trained to deal with these children's specific needs and presentation. In the instant case, the nurses involved have been fearful for their safety. They have become anxious, emotional and suffered with stress. Such has been the impact on them that through its in-house psychologist team, the Trust has provided them with break out and debriefing sessions.
  23. X's behaviour has also impacted other patients, including her encouragement of an eleven year old girl to abscond from hospital and disruption to the treatment of another child receiving end of life care. She has been residing in a room that is usually used for treating acute conditions and during the more recent busy periods, this has added to the waiting time for other patients, with some patients having to be transferred to other hospitals. None of this is X's fault. She and many children like her require access to suitable placements. The time to address this silent crisis is long overdue and requires urgent attention.
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