

DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 40 OF THE CARE ACT 2014

Introduction

1. I have been asked by Council A to make a determination under section 40 of the Care Act 2014 of the ordinary residence of X. The dispute is with CouncilB.

Facts

2. I have taken the following facts from the agreed statement of facts and other documents provided by the parties.
3. X was born on XX XX 1924. She has a diagnosis of dementia and both parties agree that since the date of the agreed statement of facts (September 2017) X has lacked capacity to make decisions as to where to reside and as to her care needs due to her dementia.
4. In or around 2009 X moved to a ground floor flat in CouncilA's area which she bought and continues to own.
5. On 19 July 2016 X first came to the attention of CouncilB. At that time X was receiving care at home in the form of 3 visits a day which she paid for privately. X's god daughter, X1, contacted CouncilB to tell them that she had concerns about X's welfare. CouncilB conducted a welfare check which indicated that a face-to-face assessment was required.
6. On 17 August 2016 (and before CouncilB could complete its assessment) X was admitted to hospital. It appears that X had a number of hospital admissions prior to this one.
7. On 12 September 2016 X was discharged from hospital and admitted to a care home in CouncilA's area called House1.

8. CouncilB did not make the arrangements for X to move to House1 and were not aware of her admission there until 25 September 2016. I assume that CouncilA was also unaware of X's move until after her arrival.
9. It appears that there was another care home in the CouncilB's area but that was considered unsuitable and that X was supported to move to House1 by Y2 and X's friend, Y3, who lives in the CouncilA's area.
10. X has privately funded her accommodation and care costs throughout. X has appointed two deputies – Y4 and Y5.
11. There is a dispute concerning X's best interests currently before the Court of Protection. Within those proceedings it appears to be accepted that X now lacks capacity to make decisions in relation to her residence and care.
12. There is a further hearing listed in the Court of Protection on 15 December 2017.
13. Attempts to resolve the dispute between the two authorities have not been successful.

Parties' submissions

14. CouncilA submits that there is insufficient evidence to show that X had capacity to make the decision to move to CouncilA's area and that if CouncilB had complied with their duties and responsibilities under the Care Act 2014 and/or the Mental Capacity Act 2005 there would be sufficient evidence to demonstrate that she lacked capacity.
15. CouncilA state that there is evidence from Y3 that X was in a highly confused state when she moved to CouncilA's area and that her behaviour was severely disturbed. It is also said that Y3 was only looking at House1 as a short-term option to meet her 24-hour care needs and to facilitate a discharge from hospital.

16. Council A make reference to the evidence of Y6, social worker, and go on to submit that X did not adopt her residence at House 1 voluntarily and has indicated her wish to return to Council B's area.
17. Council B submit that there is no or no sufficient evidence to rebut the presumption that X had capacity to make decisions about where to live at the time of her move to House 1. It is Council B's position that X should be treated as having voluntarily moved there.
18. Council B go on to submit that as X should be treated as having capacity to make the decision to move consideration must be given to the extent to which X is sufficiently settled at House 1.
19. Council B set out a number of factors in support of their submission that X is sufficiently settled and otherwise ordinarily resident in Council A's area.
20. Finally, Council B submit that the deeming provisions do not apply in this case.

Legal framework

21. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 ("the 2014 Act"); the Mental Capacity Act 2005; the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care Act 2014 (Transitional Provision) Order 2015; the Care and Support Statutory Guidance; and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("Shah") and *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 ("Cornwall").
22. Any question as to a person's ordinary residence arising under the 1948 Act which is to be determined on or after 1 April 2015 ('the relevant date') is to be determined in accordance with s.40 of the Care Act 2014 pursuant to article 5 of the Care Act (Transitional Provision) Order 2015/995.

23. Section 40(1) provides that any dispute about where an adult is ordinarily resident for the purposes of this Part, or any dispute between local authorities under section 37 about the application of that section, is to be determined by the Secretary of State, or where the Secretary of State appoints a person for that purpose (the “appointed person”), that person. Section 40(1) also provides that regulations may make further provision about the resolution of disputes of the type mentioned in subsection (1).

24. Section 78(1) provides that a local authority must act under the general guidance of the Secretary of State in the exercise of functions given to it under the Care Act 2014.

25. Section 1(2) of the Mental Capacity Act 2005 provides that a person must be assumed to have capacity unless it is established that he lacks capacity.

26. In the Shah case, Lord Scarman said as follows:

“...unless ... it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning I unhesitatingly subscribe to the view that “ordinarily resident” refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.”

27. The statutory Care and Support guidance (revised 2017) provides-

“19.26 Where a person lacks the capacity to decide where to live and uncertainties arise about their place of ordinary residence, direct application of the test in Shah will not assist since the Shah test requires the voluntary adoption of a place.

19.27 The Supreme Court judgment in Cornwall made clear that the essential criterion in the language of the statute ‘is the residence of the subject and the nature of that residence’.

19.28 At paragraph 51, the judgment says in relation to the Secretary of State’s argument that the adult’s OR must be taken to be that of his parents as follows:

‘There might be force in these approaches from a policy point of view, since they would reflect the importance of the link between the responsible authority and those in practice representing the interests of the individual concerned. They are however impossible to reconcile with the language of the statute, under

which it is the residence of the subject, and the nature of that residence, which provide the essential criterion.....'

19.29 *At paragraph 47, the judgment refers to the attributes of the residence objectively viewed.*

19.30 *At paragraph 49, the judgment refers to an: assessment of the duration and quality of actual residence.*

19.31 *At paragraphs 47 and 52, the judgment refers to residence being 'sufficiently settled'.*

19.32 *Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration."*

28. The following passages from the statutory guidance dealing with the deeming provisions are of particular relevance to this determination:

"19.50 Where an adult's care and support needs can only be met if they are living in one of the specified types of accommodation and the accommodation arranged is in another area, then the principle of 'deeming' ordinary residence applies. This means that the adult is treated as remaining ordinarily resident in the area where they were resident immediately before the local authority began to provide or arrange care and support in any type of specified accommodation. The consequence of this is that the local authority which first provided that care and support will remain responsible for meeting the person's eligible needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. However, in circumstances where the person moves to accommodation in a different area of their own volition, without the local authority making the arrangements, they would be likely to acquire ordinary residence in the area of the authority where the new accommodation is situated. The deeming rule does not apply where a person has chosen to arrange their own care in a type of specified accommodation in another area, and then later asks for local authority support.

19.51 *Need should be judged to be 'able to be met' or of a kind that 'can be met only' through a specified type of accommodation where the local authority has made this decision following an assessment and a*

care and support planning process involving the person. Decisions on how needs are to be met, made in the latter process and recorded in the care and support plan, should evidence that needs can only be met in that manner. Where the outcome of the care planning process is a decision to meet needs in one of the specified types of accommodation and it is the local authority's view it should be assumed that needs can only be met in that type of accommodation for the purposes of 'deeming' ordinary residence. This should be clearly recorded in the care and support plan. The local authority is not required to demonstrate that needs cannot be met by any other type of support. The local authority must have assessed those needs in order to make such a decision - the 'deeming' principle therefore does not apply to cases where a person arranges their own accommodation and the local authority does not meet their needs. (underlining added)

Application of law to facts

29. The issue of whether X had capacity at the time she left hospital and moved to House1 is crucial. It is not my role to determine X's capacity but I do have to decide whether to accept the submission made by CouncilA that she lacked capacity at the relevant time. This is because of the presumption that a person has capacity to make decisions unless it is established that she lacks capacity pursuant to section 1 of the Mental Capacity Act 2005.
30. For the reasons set out below I cannot accept CouncilA's submission that X lacked capacity at the time she moved from hospital to House1. The 2005 Act not only enshrines the common law assumption of capacity in section 1(2) but it goes on to set out the test which must be applied when considering whether a person does not have capacity. That test must be applied using all relevant information at the relevant time the decision falls to be made. That immediately creates a difficulty for CouncilA because its submission effectively invites me to accept an assertion that X lacked capacity over a year ago.
31. The capacity test requires consideration of what has been referred to as a 'diagnostic' and 'functional' criteria pursuant to sections 2 and 3. A person can only be treated as lacking capacity if, on the balance of probabilities, they cannot make the relevant decision because of the relevant disturbance or

impairment. Further, capacity is still to be assumed until all practical steps to assist in decision making have been taken without success: section 1(3) of the Act and *Ali v Caton & Anor [2014] EWCA Civ 1313*.

32. CouncilA's submissions misstate the relevant capacity test. CouncilA submits that there is insufficient evidence to show that X had capacity to move to CouncilA's area. As is plain from the statutory scheme set out in the 2005 Act the starting point is that a person has capacity. In other words, it is for a person asserting lack of capacity that must establish the same, rather than the other way around. Any failure to assess under the Care Act 2014 or the 2005 Act does not alter this fundamental principle.

33. The evidence CouncilA relies upon to make good the submission that X lacked capacity at the relevant time is limited to information provided by Y3 that X was "in a highly confused state in hospital and her behaviour severely disturbed". There is no evidence of any formal assessment of X's capacity at the time of her move by a medical practitioner or social worker or anyone else applying the diagnostic and functional test required by the 2005 Act. That X has subsequently been assessed as lacking capacity does not answer the question as to whether she lacked capacity at the time of the move. To assume that she did is to breach the fundamental principle that we must all be presumed to have capacity until established that we do not. On the evidence available I cannot accept the submission by CouncilA that X lacked capacity to make decisions about where to live and her care needs when she moved to CouncilA's area on 12 September 2016.

34. It follows that if X is to be treated that she had capacity to decide where to live on 12 September 2016 she must be taken to have moved of her own volition. CouncilA does not address the issue of the deeming provisions but I agree with CouncilB's submissions that those provisions do not apply in this case. To that extent paragraph 19.50 of the statutory guidance provides the answer. It has been set out above but for the avoidance of doubt the relevant passage states as follows:

“...However, in circumstances where the person moves to accommodation in a different area of their own volition, without the local authority making the arrangements, they would be likely to acquire ordinary residence in the area of the authority where the new accommodation is situated. The deeming rule does not apply where a person has chosen to arrange their own care in a type of specified accommodation in another area, and then later asks for local authority support.”

35. For the reasons identified above, X must be treated as moving under her own volition. Further, CouncilB clearly did not make the arrangements for X to move to House1. Those arrangements were made privately. In the circumstances, I conclude that X had capacity to decide whether to move to CouncilA's area and she did so of her own volition through arrangements made privately and not by CouncilB (or CouncilA).
36. The next question is whether X is sufficiently settled in CouncilA's area so as to allow me to conclude that she is ordinarily resident there. I have no doubt that there is sufficient evidence to allow me to reach that conclusion. She has been living at House1 in CouncilA's area for over a year now. She is, of course, physically present there. She has a close friend, Y3, who lives in CouncilA's area and visits her very regularly. She was admitted to House1 as a permanent resident and has remained there for over a year despite the initial concerns raised by Y3 that it may only be temporary. It is noted that Y3 has not taken any steps to move X back to CouncilB's area or anywhere else for that matter.
37. There is evidence that X has indicated a wish to return to CouncilB's area but this may be explained as a wish to move back to her own home. It is accepted that X now lacks capacity and the issue of whether it would be in X's best interests to return to live in her own home in CouncilB's area has yet to be decided by the Court of Protection.

38. X's assessed needs appear to be met at House1. In addition, I assume that any social activities, including community access, are arranged by the staff at the care home. It is reasonable to make this assumption because as a registered care provider, House1, are duty bound to do so. In contrast, X appears to have very little ongoing contact with or presence in CouncilB's area despite owning a property there.

Conclusion

39. For the reasons set out above I conclude that X is ordinarily resident in CouncilA's area.