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

1. I have been asked by CouncilA to make a determination under section 32(3) of the National Assistance Act 1948 ("the 1948 Act") of the ordinary residence of X. The dispute is with CouncilB.

2. On 1 April 2015 relevant provisions of the Care Act 2014 ("the 2014 Act") came into force. Article 5 of the Care Act (Transitional Provision) Order 2015/995 requires that any question as to a person's ordinary residence arising under the 1948 Act which is to be determined by me on or after 1 April 2015 is to be determined in accordance with section 40 of the 2014 Act.

3. Section 40 of the 2014 Act provides that any dispute about where an adult is ordinarily resident for the purposes of Part 1 of that Act is to be determined by the Secretary of State (or, where the Secretary of State appoints a person for that purpose, by that person). The Care and Support (Disputes Between Local Authorities) Regulations 2014 were made under section 40(4) of the 2014 Act and apply to this dispute.

Factual background

4. As at May 2013, X resided with her husband in their jointly owned home at Address1B. It is common ground that as at that time she was ordinarily resident in the area of CouncilB.

5. On 29 May 2013, X's husband died. At the prompting of Memory Services (who had been providing support to X, and in agreement with X's daughter and son-in-law, it was determined that X was not able to care for herself at home. CouncilB's on-call social worker, Y1, therefore arranged a respite placement for X at a residential EMI care home known as Care1A. Care1A is in the area of CouncilA. The placement commenced that day and was apparently intended to last for eight weeks (although in the event it lasted until 7 October 2013).

6. This period was funded by CouncilB as an emergency respite placement, although from the contemporaneous care records it appears as though X was required to pay a contribution towards CouncilB for this: £108 per week for the first 8 weeks and £214 per week thereafter. In the event, because the prolongation of the respite placement was due in part to delays on the part of CouncilB, the higher rate was waived through to the time that X became a permanent resident.

7. On 23 June 2013, Care1A entered into a service-user agreement with X. X's daughter, who held an unregistered power of attorney, signed the contract on X's behalf. There is no reference to CouncilB anywhere in the contract and so I take it as read that CouncilB was not a party to it.

8. Between May and September 2013, CouncilB explored together with X's daughter and son-in-law the possibility of X returning to her home with a package of care.

9. There appears to have been an assessment of X's care needs on or about 10th September 2013. I do not have a copy of that assessment.

10. On 7 October 2013, there was a best interests meeting attended by amongst others CouncilB and by X's daughter and son in law. A care record of that date, completed by a Y2 of CouncilB, records that "*I conducted a capacity assessment with X which indicated that she could not retain, weigh up, or adequately communicate her decision regarding returning back home to live. X could not remember the date, month or year and could not answer a series of questions or remember the content only a few minutes later*."

11. It was decided at the best interests meeting that X should remain in residential accommodation at Care1A on a permanent basis.

12. Accordingly, on 8 October 2013, X became a permanent resident at Care1A. I understand that from then until 30 December 2013, CouncilB applied the 12-week property disregard.

13. On 4 November 2013, CouncilB attempted to make a formal referral to Care1A for X's permanent stay. There was a problem with the form, however, and in the event the referral was not properly made until 31 January 2014.

14. On 30 December 2013 the 12-week disregard came to an end. I understand that CouncilB stopped funding the placement on this date, and that from 31 December 2013 X's family took over responsibility for funding it directly.

15. On 6 February 2014, CouncilB carried out a financial assessment and discovered for the first time that X retained a 50% beneficial share in the property at Address1B and was thus potentially eligible to participate in the deferred payment scheme.

16. CouncilB advised X's daughter and son in law as to the Deferred Payment Scheme, under which CouncilB effectively would have remained responsible for meeting X's care needs subject to a legal charge over X's beneficial interest in her property. However, on 14 March 2014 they decided that they would not take it up at that stage. Thereafter, the placement at Care1A appears to have been entirely self-funded. In short: X's relatives/attorneys decided to privately fund the placement rather than allow CouncilB to make the arrangements and recoup a contribution either directly or through a deferred payment agreement.

17. On 7 January 2015, CouncilB reviewed X's long-term care needs and decided that Care1A was meeting those needs.

18. From around April 2016, X's son-in-law contacted CouncilB to say that he was running out of funds to pay privately for X's placement. There were some discussions with CouncilB for the next few months, until on 10 October 2016 CouncilB informed X's son-in-law that CouncilA rather than CouncilB was the responsible authority.

Capacity

19. CouncilB suggests in its submissions that the issue of X's capacity was not clear cut and that, as at the time of the best interests meeting, she had fluctuating capacity. It bases this on a note of the best interests meeting dated 7 October

2013. The note does not purport to be a full capacity assessment of X – it is simply a note of a meeting. Moreover, the same note immediately goes on to say that X "does not have the insight to realise the risks posed to living alone", which usually means that the individual in question does lack the capacity to make decisions about where they live. In a similar vein, the same note also says that X "would not be able to manage if she was to return home, due to dementia and confusion".

20. A note in CouncilB's care records dated 13 June 2013 states that X "lacks insight into her difficulties and if questioned on a topic, e.g. have you had breakfast, might say yes when in fact she has not."

21. A note in CouncilB's care records dated 7 October 2013, the date of the best interests meeting, states that "I conducted a capacity assessment with X which indicated that she could not retain, weigh up or adequately communicate her decision regarding returning back home to live. X could not remember the date, month or year and could not answer a series of questions or remember the content only a few minutes later." There is reference to a capacity assessment on file, but I have not been provided with a copy of this.

22. CouncilA suggests that X lacked capacity altogether.

23. I agree with CouncilA that the evidence appears to be that X lacked capacity to make decisions about where she should live, as at 7 October 2013.

The parties' arguments

24. CouncilB's contends that X is ordinarily resident in CouncilA:
    a. It is asserted that CouncilB's did not make the arrangement (on 7/8 October 2013) for X to stay permanently at Care1A. Although it attended the relevant best interests meeting, the arrangement was made by her attorneys for health and welfare and for property and affairs. Decisions made by X's attorneys are to be treated, for ordinary residence purposes, as decisions made by X through her agent;

b. Even if CouncilB is to be regarded as having made this permanent arrangement, it did so within the 12-week property disregard. Funding provided during the 12-week property disregard should be discounted for the purposes of determining someone's ordinary residence: see the Guidance applicable at the relevant time (*Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England* (October 2013) at paragraphs 85 and 90);
c. Beyond this time, i.e. from 31 December 2013 onwards, the placement was self-funded;
d. As such, X's placement after 31 December 2013 was not one that was made by CouncilB under Part 3 of the National Assistance Act 1948 or otherwise. Such arrangements are only made where care is not otherwise available to the individual in question: *R v Gloucestershire County Council ex parte Barry* [1997] AC 584 *per* Lord Lloyd at 598-599. Here, care and attention was otherwise available to her through the decision made by her attorneys on 8 October 2017 and through the private funding from 31 December 2013 onwards;
e. There were no contractual arrangements requiring payment by the local authority for the care home fees, again meaning that this was not an arrangement under Part 3 of the 1948 Act: *Chief Adjudication Officer v Quinn Gibbon* [1996] 4 All ER 72 *per* Lord Steyn, cited at paragraph 78 of the 2013 Guidance;
f. As the deeming provision does not apply, the relevant test is that set out in *R(Cornwall Council) v Secretary of State for Health* [2015] UKSC 46. Applying that test, X is ordinarily resident (in the everyday meaning of that phrase) in CouncilA;
g. In *Barking and Dagenham v Secretary of State for Health* [2017] EWHC 2449, Justine Thornton QC (sitting as a deputy judge of the Administrative Court) held – *obiter* – that the deeming provision in s.24(5) applies only for so long as a person remains in residential accommodation provided pursuant to section 21, and can fall away if arrangements change thereafter.

25. CouncilA contends that X is ordinarily resident in the area of CouncilB:
    a. CouncilA contends that the relevant date for making the assessment of ordinary residence is 29 May 2013, when X moved to Care1A. It was CouncilB that arranged X's move to that placement, and it paid for it until 30 December 2013;
    b. At the time of this move, X lacked the capacity to make decisions about where she should live;
    c. CouncilB should not be entitled to shift responsibility to CouncilA simply by placing X out of area;
    d. It is said that the deeming provisions in s.39 of the Care Act 2014, together with associated guidance at paragraphs 19.50 to 19.51 of the Care and Support Statutory Guidance, apply. Applying these provisions means that, because it was CouncilB that placed (and for a while funded) X in Care1A, it remains responsible for meeting X's care needs, as the authority in which X was ordinarily resident immediately before she began to live at the care home.

The Law

26. I have considered all the documents submitted by the two authorities, the provisions of Part 3 of the 1948 Act and the Directions issued under it, the guidance on ordinary residence issued by the Department, and the cases of *R (Cornwall Council) v Secretary of State for Health [2015] UKSC 46 ("Cornwall"); R (Shah) v London Borough of Barnet* (1983) 2 AC 309 ("*Shah*"), *R (Greenwich) v Secretary of State for Health and LBC Bexley* [2006] EWHC 2576 ("*Greenwich*"), Chief Adjudication Officer v Quinn and Gibbon [1996] 1 WLR 1184 ("Quinn Gibbon"), and Mohammed v Hammersmith & Fulham LBC [2001] UKHL 57 ("Mohammed").

27. I set out below the law as it stood prior to 1 April 2015 when relevant provisions of the 2014 Act came into force. Article 6(1) of the Care Act (Transitional Provision) Order 2015/995 states that any person who, immediately before the relevant date, is deemed to be ordinarily resident in a local authority's area by virtue of section 24(5) or (6) of the 1948 Act is, on that date, to be treated as ordinarily resident in that area for the purposes of Part 1 of the 2014 Act.

Accommodation

28. Section 21 of the 1948 Act empowers local authorities to make arrangements for providing residential accommodation for persons aged 18 or over who by reason of age, illness or disability or any other circumstances are in need of care or attention which is not otherwise available to them**.**

The relevant local authority

29. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 of the 1948 Act is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. The Secretary of State's Directions provide that the local authority is under a duty to make arrangements under that section "in relation to persons who are ordinarily resident in their area and other persons who are in urgent need thereof".

The deeming provision

30. Under section 24(5) of the 1948 Act, a person who is provided with residential accommodation under Part 3 of the Act is deemed to continue to be ordinarily resident in the area in which he was residing immediately before the residential accommodation was provided.

31. At paragraph 55 of *Greenwich*, Charles J held that "It seems to me that if the position is that the arrangements should have been made — and here it is common ground that on 29th June a local authority should have made those arrangements with the relevant care home — that the deeming provision should be applied and interpreted on the basis that they had actually been put in place by the appropriate local authority."

32. In *Barking and Dagenham v Secretary of State for Health* [2017] EWHC 2449, the Deputy High Court Judge made the following *obiter* observations:

> "50…I express the view that the deeming provision in section 24(5) applies for so long as a person remains in residential accommodation

> provided pursuant to section 21 . I base my view on the use of the present tense in "Where a person is provided with residential accommodation under this Part of the Act". The wording of Section 21(5) appears to support this interpretation by construing references to 'accommodation provided under this part' of the Act so as to exclude section 29.
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> 51 It follows that even if the section 21 duty, and deeming provision in section 24(5) had been triggered in August 2012, the deeming provision would have fallen away by April 2013 when Redbridge lawfully formalised the supported living placement for HR under section 29 of the Act. Accordingly the Secretary of State's decision that HR was ordinarily resident in Barking from June or July 2013, if not April 2013, remains the same."

Ordinary Residence

33. "Ordinary residence" is not defined in the 1948 Act. The Department of Health has issued guidance to local authorities (and certain other bodies) on the question of identifying the ordinary residence of people in need of community care services.

34. In *Shah v London Borough of Barnet* (1983) 1 All ER 226, Lord Scarman stated that:

> *"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 "ordinary residence" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purpose as part of the regular order of his life for the time being, whether of short or long duration"*

35. The courts have considered cases of temporary residence on a number of occasions, including in *Levene, Fox, Mohamed and Greenwich*. In *Fox*, the Court of Appeal considered *Levene* and Lord Denning MR derived three principles: "*The first principle is that a man can have two residences. … The second principle is that temporary presence at an address does not make a man resident there. A guest who comes for the weekend is not resident. A short-stay visitor is not resident. The third principle is that temporary absence does not deprive a person of his residence..*" Lord Justice Widgery commented that "*Some assumption of permanence, some degree of continuity, some expectation of*

continuity, is a vital factor which turns simple occupation into residence". The Court of Appeal found that the students were resident at their university address.

36. In *Mohamed,* Lord Slynn said "*the 'prima facie' meaning of normal residence is a place where at the relevant time the person in fact resides. That therefore is the question to be asked and it is not appropriate to consider whether in a general or abstract sense such a place would be considered an ordinary or normal residence. So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few belongings and moves to a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is 'shelter' but it is also where he resides.*"

Guidance

37. The current Care and Support Statutory Guidance says nothing about the interaction of ordinary residence with either the 12-week property disregard or with deferred payment schemes.

38. The old (superseded) guidance on ordinary residence (*Ordinary residence: Guidance on the identification of the ordinary residence of people in need of community care services, England* (October 2013)) provided that:

> "85. During the 12 week disregard period the person's residential accommodation is provided under Part 3 of the 1948 Act and funded by the local authority in which they are ordinarily resident. The local authority may place the person in residential accommodation in the area of another local authority, for example because they have expressed a desire to be near family members, but remains the responsible authority during this period. However, at the end of the 12 week period, the value of the person's home is taken into account (unless it remains the home of the person's spouse, civil partner, partner or certain other relatives). This may result in the person becoming a self-funder and entering into a private contract with the care home for the provision of their care on a

permanent basis, rather than continuing to be provided with Part 3 accommodation by their placing authority. In such a case, the person would be likely to acquire an ordinary residence in the new area, in line with the settled purpose test in Shah. If the person subsequently requires local authority funded community care services, including Part 3 accommodation, they should approach the local authority for the area of their care home. However, if they enter into a deferred payment agreement with the original authority or there is another reason, such as lack of mental capacity, as to why they were unable to enter into a private contract with the care home (see paragraph 73), they remain the responsibility of the original authority.

(…)

89. It is the local authority in which the person is ordinarily resident that has responsibility for offering and funding a deferred payment. Where a person who is ordinarily resident in the area of local authority A has been placed in residential accommodation in the area of local authority B, and the value of that person's home is being disregarded for 12 weeks, local authority A should offer the person the option of having a deferred payment at the end of the 12 week period. If the person accepts the offer and enters into a deferred payment agreement, local authority A remains responsible for funding their care (minus any contributions from means-tested income and assets) and maintaining a contract with the care home on their behalf. These actions constitute the making of arrangements under section 21 of the 1948 Act and the deeming provisions apply*:* the person remains ordinarily resident in the area of local authority A and does not acquire an ordinary residence in the area of local authority B.

90. However, if the person decides against having a deferred payment, they revert to self-funding status at the end of the 12 week property disregard period. At this point, they would be likely to acquire an ordinary residence in the area of local authority B, in line with the principles set out in the Shah test. If they later require local authority funded community care services, including the option to enter into a deferred payment agreement, they should approach local authority B. The situation would be different, however, if local authority A had failed to offer the person information about deferred payment agreements during the 12 week property disregard period. It was established in the Greenwich case that if arrangements should have been made under section 21 of the 1948 Act but were not, then the deeming provision in section 24(5) should be applied as if the arrangements had been made. Therefore, if information about deferred payment agreements had not given at the time the person entered residential accommodation, local authority A would remain responsible for the provision of a deferred payment agreement should the person require one in the future."

Applying the law to the facts

39. There is no dispute that X was ordinarily resident in CouncilB immediately prior to moving to Care1A.

40. There also does not appear to be any dispute that, if matters were to be determined only according to s.24(1) of the 1948 Act that, applying *Shah* and *Cornwall*, X would be regarded as being ordinarily resident in CouncilA. She has resided at Care1A for four and a half years and there is no prospect of her moving anywhere else.

41. The question is therefore whether the deeming provision in s.24(5) of the NAA 1948 applies to the facts of this case, so as to modify the position that would otherwise have been the case under s.24(1).

42. That, in turn, is a question about whether at each point Care1A was (or, applying paragraph 55 of *Greenwich*, ought to have been) provided to X by CouncilB under Part III of the NAA 1948, or not. That is purely a question of fact. The best evidence I have is CouncilB's contemporaneous care notes.

43. From the contemporaneous care notes, the following appear to be the critical dates:

    a. CouncilB made the initial arrangements to place X at Care1A. They also paid for that placement, subject to a contribution from X. The arrangements were made on an emergency respite basis and were intended to last for 8 weeks, but in the event they went on for longer;
    b. On 8 October 2013, X's placement at Care1A became permanent. This was following a best interests meeting in which both CouncilB and X's attorneys participated;
    c. Between 8 October 2013 and 30 December 2013, the placement was funded by CouncilB under the 12-week property disregard. The placement was funded privately thereafter;

d. In around April 2016, X's family members returned to CouncilB asking for additional help with funding.

44. I do not agree with CouncilA that s.39 of the Care Act 2014 is applicable here. The events in question took place prior to the coming into the force of that statute. The relevant statutory framework at the material time was Part III of the National Assistance Act 1948. This has been set out above.

45. I conclude that X was ordinarily resident in CouncilB as at 29 May 2013.

46. I conclude that X remained ordinarily resident in CouncilB until 30 December 2013. CouncilB was undoubtedly making arrangements for her pursuant to Part III of the NAA 1948 up until that date, first on an emergency respite basis and then on a permanent basis. Either way, the deeming provision in s.24(5) of the NAA 1948 applied during this time.

47. As from 31 December 2013, it does not appear that the arrangements for X were being made by CouncilB any longer, whether pursuant to Part 3 of the NAA 1948 or otherwise. The arrangements were now being made privately by X's family. Accordingly, s.24(5) of the NAA 1948 ceased to apply: see the *Barking and Dagenham* case. See also the old statutory guidance which, although it has been superseded, represents a helpful analysis of the law that applied at that time.

48. I further conclude that by the date of the best interests meeting on 7 October 2013, it was clear that X was to settle permanently at Care1A. There is a note on CouncilB's care records from around that date stating that X had visited her old property but wanted to return to Care1A. It is also clear that, from the date of that meeting, X was to remain at Care1A on a permanent basis without any realistic prospect of moving elsewhere. Accordingly, by the time arrangements ceased to be made by CouncilB pursuant to Part III of the NAA 1948, X was residing at Care1A for settled purpose.

49. I do not find the case of *Cornwall* to be of much assistance in this context, other than in relation to clarifying the "*settled purpose*" test. Apart from that, it is concerned with a case where a person's care needs have been met by a local authority continuously. It does not address the question of what happens where local authority A places a person in local authority B but where that placement is then funded and supported through alternative means. As observed above, that question is answered instead by the *Barking and Dagenham* case already cited.

Conclusion

50. As such I conclude that from 31 December 2013 onwards X has been ordinarily resident in CouncilA.