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 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 1929 and has been assessed as having a paranoid psychosis described as “schizophrenia type and Dementia” in an assessment by the relevant clinical commissioning group (“CCG”).

4. X lived at Address1B, in CouncilB.

5. On 3 September 2010 X was provided with care at a nursing home at House1B, in CouncilB.

6. On 18 October 2013 X was admitted to Hospital1B, CouncilB.

7. On 1 November 2013 X was discharged from hospital and admitted to Nursing Home1A, CouncilA.

8. On 20 September 2014 X was detained under section 2 of the Mental Health Act 1983 at Hospital1A, CouncilA.

9. On 4 November 2014 X was discharged from hospital and admitted to Nursing Home2A, CouncilA where he remains.

10. All these placements were arranged and funded by CouncilB CCG. X continued to be eligible for continuing healthcare (“CHC”) funding until 21 December 2015. This was confirmed by the CCG in their letter dated 29

December 2015. It appears that funding actually ceased with effect from 28 January 2016.

11. On 22 December 2015 assistant psychiatristY, completed an assessment of X's mental capacity to make decisions in relation to his finances. It appears that she concluded that X did not lack capacity.

12. On 3 November 2016 social workerZ with CouncilA completed an assessment of X's mental capacity to make decisions about his finances, in particular his placement at his nursing home. She concluded that X lacked such capacity.

13. X accrued debts in relation to his care and accommodation costs and notice was served. There is some dispute about whether CouncilB agreed to pay these costs but in any event CouncilB and CouncilA identified that there was a dispute over X's ordinary residence.

14. CouncilB accepts that following the CCG's decision that X was no longer eligible for CHC funding it failed to complete an assessment of his care and support needs and also failed to complete an assessment of X's mental capacity to make decisions about where to live and his funding of his care and accommodation. CouncilA, as lead authority, has agreed it will fund the relevant costs on a without prejudice basis pending resolution of the ordinary residence dispute.

15. Various correspondence was exchanged between CouncilA and CouncilB in relation to X's ordinary residence. Attempts to resolve the dispute between the two authorities have not been successful.

Parties' submissions

16. CouncilA submits that for the purposes of Part 1 of the Care Act 2014 X was ordinarily resident in CouncilB immediately before 28 January 2016 and continues to be ordinarily resident there.

17. CouncilA submits that CouncilB had previously accepted in correspondence that X was not ordinarily resident in CouncilA's area. Reference is made to CouncilB's failure to complete an assessment X's needs under the 2014 Act and the two capacity assessments referred to above.

18. CouncilA refer to various statutory provisions including sections 9, 13 and 39 of the 2014 Act, section 24 of the 1948 Act, section 148 of the Health and Social Care Act 2008, the Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010, the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 and the Care Act 2014 (Transitional Provision) Order 2015. Reference is also made to the cases of *Shah* and *Cornwall* and the Care and Support Guidance.

19. CouncilA submits that there is no dispute with CouncilB that X was ordinarily residence in CouncilB prior to 28 January 2016 when CHC funding ceased. It is submitted that X should be deemed to be ordinarily resident in CouncilB immediately before 28 January 2016 by reference to section 39(5) of the 2014 Act and 24(6) of the 1948 Act because he was ordinarily residence in that area "immediately before" the NHS accommodation (Nursing Home2A) was provided to him on 4 November 2014.

20. In the alternative, CouncilA submits that should I accept that X had capacity to decide where to live as at 4 November 2014 and he should accordingly be treated as someone who voluntarily adopted his place of residence at Nursing Home2A. In the further alternative, it is submitted that if I proceed on the basis that X lacked such capacity the CCG should not be able to export its responsibility for providing accommodation out of area by reference to the decision in *Cornwall*.

21. CouncilB makes reference to the Care and Support (Disputes Between Local Authorities) Regulations 2014, section 39 of the Care Act and the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 in addition to the cases of *Shah* and *Cornwall* and the Care and Support Guidance.

22. CouncilB submits that X should be presumed to have capacity on 22 December 2015 at which point the deeming provisions of section 39 of the 2014 Act do not apply as he had capacity and chose to reside and pay for his own care at Nursing Home2A from that date.

23. CouncilB confirm that they do not dispute that X was ordinarily resident in their area when he was provided with accommodation at House1B on 3 September 2010, from 1 November 2013 when he was provided with accommodation at Nursing Home1A and from 4 November 2014 when he was placed at Nursing Home2A.

24. CouncilB's position is that he remained ordinarily resident in their area until 22 December 2015 when he was deemed to have capacity and from which point he should be treated as becoming ordinarily resident in the area of CouncilA.

Legal framework

25. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 ("the 2014 Act"); the Health and Social Care Act 2008; Part 3 of the National Assistance Act 1948 ("the 1948 Act"); the Mental Capacity Act 2005; the Health and Social Care Act 2008 (Commencement No 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010 ("the 2010 Order"); 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 Transitional Order"); 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")*.

Application of law to facts

26. I have to consider whether the deeming provisions under section 39 of the 2014 Act and section 24 of the 1948 Act apply in this case.

27. Section 39(5)(a) provides that an adult who is being provided with NHS accommodation is to be treated for the purposes of Part 1 of the 2014 Act as being ordinarily resident in the area of in which the adult was ordinarily resident immediately before the accommodation was provided. Section 39(6) provides that NHS accommodation means accommodation under the National Health Service Act 2006.

28. X was clearly residing in CouncilB immediately before he was provided with accommodation at House1B which, in turn, was NHS accommodation provided under the 2006 Act. Further, and in any event, Nursing Home2A also falls within the definition of NHS accommodation for the purposes of section 39. Article 6(2)(a) of the Transitional Order provides that section 39 of the 2014 Act does not have effect in relation to a person who, immediately before the relevant date in relation to that person, is being provided with non-hospital accommodation as defined by article 12 of the 2010 Order.

29. Article 12 provides that non-hospital accommodation is NHS accommodation that is elsewhere than that at a hospital vested in the Secretary of State, a PCT, Local Health Board, NHS Trust or NHS Foundation Trust. As at the relevant date (1 April 2016) X was residing Nursing Home2A which is accommodation elsewhere than at a hospital so vested and therefore falls within the definition of non-hospital accommodation. Section 39 of the 2014 Act does not apply to assist with the determination of his ordinary residence.

30. I therefore agree with CouncilB that the deeming provisions under section 39 of the 2014 Act do not apply, albeit for different reasons identified by them in their submissions.

31. I will now turn to consider with the deeming provisions under the 1948 Act apply. Section 24(6) of the 1948 Act, as amended by the 2008 Act, states that a patient for whom NHS accommodation is provided shall be deemed to be ordinarily resident in the area, if any, in which P was resident before the NHS accommodation was provided for P, whether or not P in fact continues to be ordinarily resident in that area. NHS accommodation is defined by section 26(6A) as "accommodation at a hospital or elsewhere" provided under the 2006 Act or under section 117 of the 1983 Act.

32. All of the accommodation provided to X by the CCG after his move from Address1B falls within the definition of NHS accommodation provided by section 24(6) and (6A) of the 1948 Act. It is common ground that prior to being provided with the placements, including Nursing Home2A, X was ordinarily resident in CouncilB. In the circumstances, X is deemed to be ordinarily resident in CouncilB for the purposes of section 24(6) and (6A) of the 1948 Act and Article 6(1) of the Transitional Order.

33. CouncilB submits that whilst X should be deemed to be ordinarily resident in CouncilB from the moment he was provided with accommodation at House1B and throughout his other placements, including Nursing Home2A, his ordinary residence changed from 22 December 2015 when an assessment concluded that he had capacity to decide where to live and was responsible for paying for his own care. I reject this submission for the following reasons.

34. At paragraph 1 of CouncilB's submissions it is said that CouncilB was informed by Nursing Home2A on 22 December 2015 that X had mental capacity and that the "legal implication" is that a presumption of capacity is to be made concerning his ability to decide where he wishes to live. At paragraph 3 CouncilB submit that the *Shah* case is relevant in determining

residence of people with capacity and that X should be deemed to have voluntarily adopted to reside at Nursing Home2A applying the approach applied in that case. At paragraph 4 CouncilB submit that the deeming provisions do not apply "when a person gains capacity" by reference to paragraph 21 of Annex H and Example 1 of the Care and Support Guidance. At paragraph 5 CouncilB refer to paragraph 19.50 and submit that this "confirms that the deeming rule does not apply to X as he has chosen his own care in a nursing home in CouncilA".

35. The passages referred to in the Care and Support Guidance do not carry the meaning attached to them by CouncilB. Paragraph 19.50 refers to the deeming provisions not applying "where the person moves to accommodation in a different area of their own volition, without the local authority making the arrangements…". X did not move to Nursing Home2A of his own volition. Whilst the local authority did not make the arrangements the relevant CCG did. In any event, there is no evidence that X made the arrangements. Further, it is clear that X did not fund Nursing Home2A when he moved there. The relevant CCG funded the care until 28 January 2016 after which X's niece agreed to do so but no payments were made by anyone as far as the agreed statement of facts reveals until CouncilA agreed to fund the same, on a without prejudice, pending this determination. It therefore cannot be said that X moved to Nursing Home2A "under private arrangements, and is paying for [his] own care" as referenced in paragraph 21 of Annex H. Further, the circumstances of "Wendy" given in Example 1 of Annex H are clearly very different to those of X who did not move in to Nursing Home2A as a self-funder and did not enter into a contract to pay for the same.

36. Further, I do not accept that X should necessarily be treated as being responsible for paying his own care or that he "voluntarily moved to Nursing Home2A in CouncilA after his CHC funding ceased" as submitted by CouncilB at paragraph 12. The agreed statement of facts states that X moved to Nursing Home2A under arrangements made by the CCG who also paid for the same following his move there on 4 November 2014. The CCG continued to fund Nursing Home2A until 28 January 2016. There is no evidence of any

payments being made by or on behalf of X after that date until CouncilA started to fund the same. It is therefore entirely incorrect to submit that X was responsible for paying his own care from when he voluntarily moved to Nursing Home2A after his CHC funding ceased. Further, CouncilB has not established why X was responsible to pay for his care after his CHC funding ceased. It appears that X requires the care and support provided to him at Nursing Home2A to meet his assessed needs and that one of the authorities is responsible for providing the same. Which local authority that is will be determined by where X is ordinarily resident.

Conclusion

37. For the reasons set out above I conclude that X has been ordinarily resident in CouncilB from 28 January 2016.