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 ("the 2014 Act") of the ordinary residence of X. The dispute is with CouncilB.

2. The question of ordinary residence arose under Part 3 of the National Assistance Act 1948 ("the 1948 Act") and would, in the first instance, fall to be determined under section 32(3) of that Act. However, as from 1 April 2015, Part 1 of the Care Act 2014 ("the 2014 Act") came into force for material purposes and the 1948 Act ceased to apply in relation to England except in transitional cases. By virtue of article 5 of the Care Act (Transitional Provision) Order 2015 (S.I. 2015/995), 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 (disputes about ordinary residence). 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. I make this determination accordingly.

3. For the reasons set out below I determine that, by operation of the deeming provision of s.24(5) of the 1948 Act, X was ordinarily resident in CouncilB between 28 March 2012 until his death on 5 September 2013. X ought to have been provided with Part 3 Accommodation from 28 March 2012 but as a result of a misunderstanding of his financial position, he was not. Applying the case of *Greenwich,* the deeming provision in s.24(5) of the 1948 Act applied from 28 March 2012. Immediately before this, X was ordinarily resident in the area of CouncilB.

The facts

4. The following information has been ascertained from the agreed statement of facts between CouncilB and CouncilA, and other documents provided.

5. X was born on XX XX 1921. CouncilA first became involved with X in November 2010. At that time he was residing at House1A (housing with care) in CouncilA's area. CouncilA carried out an assessment and the outcome was that no further action would be taken and a referral would be sent to the Sensory Impairment Team.

6. X was admitted to hospital1A in CouncilA on 19 August 2011 following a fall. At some stage between 10 October 2011 and 14 December 2011 he was assessed by a CouncilA social worker at the START Hospital Team and was assessed for NHS Continuing Healthcare. The outcome of the assessment was that X did not meet the criteria for NHS Continuing Healthcare.

7. On 29 October 2011 X was discharged from hospital to Residential Home1B in CouncilB's area following an assessment by the START Team at hospital1A. X was self-funding his care and accommodation at this stage.

8. On 18 January 2012, CouncilA contacted Residential Home1B to arrange a review of X's placement but was informed that X had been admitted to hospital following a suspected stroke. On 26 January 2012 X was assessed by the Mental Health Liaison Nurse at the hospital who stated that: "*he does not appear to be suffering from mental health problems at this point in time*." X was then assessed by the CouncilB social work team. On 21 February 2012, X was assessed for NHS Continuing Healthcare. The outcome was that he was not eligible for NHS Continuing Healthcare but that he required nursing care. CouncilB's notes of the assessment state:

> "X *was unable to contribute directly to the assessment but was able to contribute to extend his wishes. The assessing social worker had been able to engage X who recognised he needed to be cared for in a nursing home but was saddened that he would not be in the same home as his wife.*"

9. Following the assessment, X's brother, Y1, liaised with Z1, Solicitor at Blank Solicitors, who was managing X's finances pending an application to become his Court appointed property and financial affairs deputy. Y1 decided to place X at Manor1A in CouncilA's area. X self-funded this placement because at the time it was thought that his savings were around £30,000. This information was conveyed to CouncilB by Z1 at the time of the assessment. It transpires that this was not the case as the account was in joint names with X's wife.

10. X was discharged from hospital and moved into Manor1A on 28 March 2012. He was assessed again for NHS Continuing Healthcare and it was concluded that he did not have a primary health need but was eligible for NHS funded nursing care from 23 March 2012.

11. Neither Council was involved in moving X to Manor1A. It is not clear whether X had the mental capacity to make this decision. No formal capacity assessment was undertaken by the hospital social work team at the time.

12. In May 2012, Z1 signed a contract with Manor1A subject to the Court of Protection appointing him as X's deputy for property and financial affairs.

13. It is said that on 26 June 2012, Dr C1 at HospitalC confirmed that X had a diagnosis of dementia. This fact was communicated in a letter from X's solicitor dated 12 August 2016.

14. On 9 November 2012, Z1 called CouncilA to make a referral as X's savings had fallen below the capital limits and he required a financial assessment. A financial assessment was undertaken and it became apparent that some time previously X's finances had fallen below the threshold and that he owed the Manor1A £14,000. A recommendation was made for a further assessment and a financial assessment.

15. Later in November 2012, the Court of Protection appointed Z1 as X's deputy for property and financial affairs.

16. In March 2013, Z1 provided CouncilA with information about X's income and capital for the purposes of completing a financial assessment. The financial assessment was completed by CouncilA based on the information provided by Z1.

17. Around this time, a dispute arose between CouncilA and CouncilB about which authority had responsibility to pay X's outstanding nursing home fees.

18. On 5 September 2013, X passed away.

The Authorities' submissions

19. CouncilA contends that X was ordinarily resident in the area CouncilB. It submits that:

    a. X lacked capacity to make the decision to move to Manor1A. CouncilA relies on a letter from X's solicitor dated 16 August 2016 as well as the fact that it was X's brother who made the decision that X should move to Manor1A. It is submitted that X did not voluntarily adopt Manor1A as his new residence.

    b. At the time X moved to Manor1A he would not have been self-funding as his account was in fact a joint account with his wife. Had this error been apparent at the time of X's move, CouncilB would have had to take responsibility for his placement as he lacked capacity to make the agreement and was not a self-funder.

    c. CouncilA relies on the deeming provision in s.24(5) of the 1948 Act.

20. CouncilB contends that X was ordinarily resident in CouncilA. It submits that:

a. It is not clear whether X lacked capacity at the time he moved to Manor1A and therefore capacity must be presumed pursuant to s.1(2) Mental Capacity Act 2005.

b. The information that was provided to CouncilB at the time was that X had sufficient resources to self-fund his care. CouncilB was not involved in arranging the placement and is of the view that X voluntarily adopted Manor1A as his new residence.

c. CouncilB relies on the decision in *R (Greenwich) v Secretary of State and Bexley* [2006] EWHC 2576, where it was held that where a person moves into residential accommodation as a self-funder, their ordinary residence falls to be determined at the date immediately before the accommodation was provided to him by the local authority and not the date that he moved in to the accommodation.

The Law

21. I have considered all the documents submitted by the two authorities, the provisions of Part 1 of the 2014 Act and the Regulations made under it; the provisions of Part 3 of the National Assistance Act 1948 ("the 1948 Act") and the Directions issued under it; the Care and Support Statutory Guidance and the earlier guidance on ordinary residence issued by the Department ("previous OR guidance"); 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"), *R (Kent County Council) v Secretary of State for Health and others* [2015] 1 W.L.R. 1221 ("*Kent*") and *Mohammed v Hammersmith & Fulham LBC* [2001] UKHL 57 ("Mohammed"). My determination is not affected by provisional acceptance of responsibility by CouncilA.

22. I set out below the law as it stood prior to 1 April 2015 when relevant provisions of the 2014 Act came into force.[1]

The National Assistance Act 1948

23. 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.

24. By virtue of section 26 of the 1948 Act, local authorities can, instead of providing accommodation themselves, make arrangements for the provision of the accommodation with a voluntary organisation or with any other person who is not a local authority. Certain restrictions on those arrangements are included in section 26. First, subsection (1A) requires that where arrangements under section 26 are being made for the provision of accommodation together with personal care, the accommodation must be provided in a registered care home. Second, subsections (2) and (3A) state that arrangements under that section must provide for the making by the local authority to the other party to the arrangements of payments in respect of the accommodation provided at such rates as may be determined by or under the arrangements and that the local authority shall either recover from the person accommodated or shall agree with the person and the establishment that the person accommodated will make payments direct to the establishment with the local authority paying the balance (and covering any unpaid fees).

[1] The provision of care and support for adults and of support for carers is governed by the Care Act 2014 as from 1 April 2015 and the relevant provisions of the National Assistance Act 1948 have been disapplied in relation to England by the Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015 (S.I. 2015/914). However, under article 3(3) of that Order, despite the amendments made by the Order, any provision that operates in relation to, or by reference to, support or services provided, or payments towards the cost of support or services made, before or on or after 1 April 2015 and anything done under such provision, continue to have effect for the purposes of that support or those services or payments.
Paragraph 19.87 of the Care and Support Statutory Guidance says: Regardless of when the Secretary of State is asked to make a determination, it will be made in accordance with the law that was in force at the relevant date, in respect of which ordinary residence falls to be determined. Therefore, where ordinary residence is to be determined in respect of a period which falls before 1st April 2015, then the determination will be made in accordance with Part 3 of the National Assistance Act 1948 (the 1948 Act). If, in respect of a period on or after 1st April 2015, then the determination will be made in accordance with the Care Act.

25. Section 26(1A) of the 1948 Act consequently prohibits arrangements being made by a local authority to provide residential accommodation together with personal care under section 21 of that Act with any organisation other than a registered care home.

The relevant local authority

26. 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

27. 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 ordinarily resident immediately before the residential accommodation was provided.

28. In *Greenwich* Charles J held that the deeming provision in s24(5) of the 1948 Act only applies from the date on which Part 3 accommodation either was (or should have been) provided:

> "*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*.
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> *In the arguments advanced in this context on behalf of the Secretary of State it was accepted that (a) a failure to comply with that statutory duty would be the subject of judicial review, and (b) if and when the court found that a local authority had acted unlawfully in not entering into the arrangements, the effect would be that the arrangements would be put in place retrospectively, not in the sense of contract, but in the sense that the result would be that the local authority would have to make the appropriate payments from the relevant date. That, it seems to me, supports the conclusion I have reached*."
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> (see paragraph 55-56)

Previous OR Guidance

29. The previous OR Guidance provides:

> *"58. It should be noted that local authorities cannot escape the effect of the deeming provision in circumstances where they are under a duty to provide Part III accommodation but they fail to make the necessary arrangements. In such a case, the person's ordinary residence would fall to be assessed at the date immediately before the accommodation should have been provided. This was made clear in the Greenwich case."*
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> And
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> *"72. When a person moves into permanent residential accommodation in a new area under private arrangements, and is funding their own care, they usually acquire an ordinary residence in this new area, in line with the "settled purpose" test in Shah. If so, and if they subsequently become in need of community care services, they should approach the local authority in which their residential accommodation is situated.*
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> *73. In the Greenwich case, the courts considered the ordinary residence of an older person who had moved into residential accommodation in another area under private arrangements and subsequently needed to be provided with that accommodation by a local authority due to a lack of funds. The court found the person to be ordinarily resident in her new area. The person's ordinary residence fell to be determined at the date immediately before the accommodation was provided for her by a local authority and not immediately before she entered the residential accommodation as a self-funder. This was the case even though it was known at the time of her move that her funds would shortly fall below the upper capital limit in the National Assistance (Assessment of Resources) Regulations 199235. It was argued in the Greenwich case that this meant that she was in imminent need of Part 3 accommodation at the time of her move and therefore remained ordinarily resident in her former local authority area. The judge rejected this argument.*
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> *74. The situation would be different if the reason the person made private arrangements was because of a failure by the local authority to provide the accommodation in circumstances where it was under a duty to do so. In that case, the deeming provision in section 24(5) of the 1948 Act (see paragraphs 55-59) would apply, and the person's ordinary residence would fall to be assessed at the date immediately before the accommodation should have been provided.*
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> *75. Sometimes, a person with sufficient means to pay for their care may not be able to enter into a private agreement with their care home for the*

provision of their care. This may be because they do not have the mental capacity to do so and have no attorney or deputy to act on their behalf, or it may be that, even though they have the capacity to decide where to live, they are not able to manage the making of the arrangements and have no friends or relatives to assist them. In such cases, the local authority would be responsible for making arrangements for the provision of their accommodation under Part 3 of the 1948 Act, with reimbursement from the person as necessary36. As such, the deeming provision in section 24(5) of the 1948 Act would apply and the person would remain ordinarily resident in their placing local authority, even where they enter the accommodation in another local authority area."

Welfare services

30. Section 29 of the 1948 Act empowers local authorities to provide welfare services to those ordinarily resident in the area of the local authority.

The Cornwall case

31. In *Cornwall*, it was held that where the question of ordinary residence arises in respect of an adult who lacks capacity, the decision maker should take a common sense approach to the test in *Shah*. The "*essential criterion*" for establishing ordinary residence is the residence of the subject and the nature of that residence. Further, it was held that the underlying purpose behind the deeming provisions in the legislation under consideration (namely the Children Act 1989 and the 1948 Act) was that "*an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it"* (at paragraph 54).

Ordinary Residence

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

33. 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."

34. Where the person lacks capacity to decide where to live, direct application of the test in *Shah* will not be appropriate. In such cases, all of the facts must be considered, including physical presence in a particular place and the nature and purpose of that presence, but without requiring the person to have voluntarily adopted the place of residence.

35. 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.*"

Application of the law to the facts

Capacity

36. 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. It is not clear whether X lacked capacity at the time he moved to Manor1A. No capacity

assessment was carried out in hospital. There is some evidence to suggest that X lacked capacity at the time to make decisions about his property and financial affairs as his solicitor was acting as his property and financial affairs deputy pending appointment from the Court of Protection.

37. Capacity is decision-specific. There is no direct evidence that at the time he was discharged from hospital to Manor1A, X lacked capacity to make decisions about his residence. CouncilA relies on the fact that X's brother made the decision about where X should live. There is also a reference to the CHC funding assessment which stated that X was "*unable to contribute directly to the assessment but was able to contribute to extend his wishes*."

38. There is insufficient evidence before me concerning X's mental capacity at the relevant time. However, for the reasons set out below, it is not necessary for me to determine whether or not X had capacity as it does not affect the outcome in this case.

Ordinary Residence

39. The initial question is to determine where X was ordinarily resident before residential accommodation was provided to him under Part 3 of the 1948 Act (see *Greenwich* and *Kent*). X was not placed in Manor1A by CouncilB and he was initially self-funding. If X had capacity to decide where to live, he had voluntarily adopted Manor1A as his home for settled purposes.

40. If X did not have capacity, the outcome would be the same. Although there would be no suggestion of X having adopted CouncilA voluntarily, the guidance in *Cornwall* is that I should look at the residence of the subject and the nature of that residence. X was physically present in CouncilA. The purpose of his move to CouncilA was that long-term arrangements could be made for his care. His wishes were that he accepted a need to be cared for but was saddened this would not be in the same care home as his wife.

The Deeming Provision

41. The next question is whether the fact that the parties were mistaken as to X's finances means that the deeming provision in s.24(5) was engaged at the time X moved to Manor1A.

42. I do not have any detailed information about the state of X's finances at the time he moved to Manor1A. In the bundle of papers there is a CouncilA document titled "Financial Circumstances Form A66/D". It is not dated but appears to relate to the time when X was resident at Residential Home1B. It names the person dealing with X's finances as an advocate from Age UK, not Z1. The assessment notes X's income but not his capital.

43. It is said that X's savings were believed to be £30,000 but that this was in a joint account with his wife. X was entitled to half of this amount, £15,000, which is below the upper capital limit meaning that at the time he moved to Manor1A X was eligible to be provided with Part 3 accommodation under the 1948 Act.[2]

Conclusion

44. If the correct information had been provided to CouncilB, X would have been provided with Part 3 Accommodation from the date he moved to Manor1A. While it is unfortunate that inaccurate information was given to CouncilB, objectively CouncilB had a duty to provide X with Part 3 Accommodation which it failed to do. I therefore find that the deeming provision in s.24(5) of the 1948 applied from 28 March 2012. Immediately before this, X was ordinarily resident in the area of CouncilB.

[2] See Regulation 20 National Assistance (Assessment of Resources) Regulations 1992/2977