

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

### ***Introduction***

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 1927 making him 91 years of age. He used to reside in his own rented accommodation in the CouncilB's area. Whilst living at home he was not in receipt of adult social care even though there is evidence from his family that he had been "struggling" for some time.
4. In November 2016 X suffered a fall which led to him being admitted to the Hospital1B, CouncilB's area. He was treated for his injuries and then offered rehabilitation on the ward. The social work team based at the hospital expressed concerns about X's safety were he to return home. He was observed to be unable to bear his own weight without the support of 2 carers and was considered to be at high risk of falls.
5. CouncilB discussed the options with X and his family. Those options included a return home with four "double-up" visits a day by carers or a move to Extra Care housing. The records show that X's family said that he wanted to move to a care home in the CouncilA area so as to be near his family. There is no evidence that X lacked mental capacity to make decisions about his residence at this time and he made it clear that he wanted to move to be nearer his family. As X had capital exceeding £23,250 he would be deemed to be a "self-funder" but when his capital fell below that amount he would be able to approach the relevant local authority for assistance.

6. The records show that the family made the arrangements for X to move to a care home in the CouncilA area and notified CouncilB of the same. On 15 December 2016 X was discharged from hospital to Care home1A in CouncilA area. This appears to have been done on a “short-stay” basis. On 22 December 2016 X’s niece requested CouncilB to complete a care and financial assessment. CouncilB notified her that CouncilA were the responsible local authority. X’s niece contacted CouncilA but due to staff leave no response was received at that time.
7. On 3 January 2017 X’s niece contacted CouncilB again and was again told that CouncilA were the relevant responsible local authority. She was provided with information about care choices in CouncilB in the event that X decided to return to that area.
8. On 5 January 2017 Care home1A contacted CouncilA to request a financial assessment on the basis that X’s capital had fallen below the upper threshold limit. This was in circumstances where CouncilB had stated that they were not the responsible local authority. On 6 January 2017 X’s niece contacted CouncilB to say that CouncilA had also refused to carry out any assessment by reference to the fact that he still had a tenancy of a property in CouncilB’s area.
9. On 25 January 2017 X’s niece notified CouncilB that he had decided to stay at Care home1A permanently and that he was terminating his tenancy of his previous property in CouncilB’s area. The records indicate that X terminated the tenancy, or at least intended to do so, on 13 February 2017.
10. On 24 May 2017 CouncilA completed a care and support assessment in respect of X pursuant to the Care Act 2014. This concluded that X was eligible to receive care and support. Between 6 – 9 June 2017 CouncilA attempted to “source” alternative Extra Care or “residential provision” for X in the CouncilA area. On 14 June 2017 CouncilA undertook a financial assessment in respect of X and concluded that he became eligible for local authority funding from 3 March 2017.

11. Between May and November 2017 both authorities sought to reach agreement as to X's ordinary residence for the relevant period but were unable to do so. On 15 April 2018 X died. By 3 May 2018 both authorities had agreed and signed a statement of facts. On 22 June 2018 both authorities provided written legal submissions in support of their positions in respect of X's ordinary residence.

### ***Parties' submissions***

12. In summary, CouncilA submit that X should be deemed to be ordinarily resident in the area of CouncilB following his move to Care home1A on 15 December 2016 until his death. Reference is made to section 39 of the Care Act 2014. CouncilA confirm that X should be treated as having mental capacity to make decisions about where to live at the relevant times. It is submitted that X did not voluntarily adopt his residence at Care home1A because he had no choice where to go and that his lack of choice was caused by CouncilB failing to complete an assessment under the Care Act 2014. CouncilA submit that CouncilB also failed to undertake a financial assessment and that in the circumstances CouncilB failed to discharge X safely from hospital. In the alternative, it is submitted that X should be deemed to ordinarily resident by reference to the decision in *R (Greenwich) v Secretary of State for Health [2006] EWHC 2576 (Admin)*.

13. In summary, CouncilB submit that X had mental capacity to decide where to live and decided, together with his family, to move to Care home1A in the CouncilA area so as to be nearer his family. It is submitted that X arranged the care at Care home1A with the assistance of his family and that because his capital was above the upper financial limit at the time of his move he would be treated as a self-funder. CouncilA accepts that it "probably" should have completed a care and support assessment and a financial assessment in respect of X pursuant to the Care Act 2014 but submit that after speaking to X and his family it was "legitimate" to provide information as to care homes in the area of CouncilA. Reference is made to paragraphs 21 to 23 inclusive and a case example contained in Annex H to the Care and Support statutory guidance. CouncilB submit that in *Greenwich* it was common ground that a duty arose against the first local authority to provide care and support which is not

the case here. In any event, in *Greenwich* the court found that the host authority where the adult had lived for 4 weeks as a self-funder was ultimately held to be responsible.

### **Relevant law**

14. I have considered all of the relevant statutory provisions including those referred to by the parties in their written submissions. The relevant law includes the following: sections 9, 18 and 39 of the Care Act 2014; the Care and Support (Disputes Between Local Authorities) Regulations 2014; the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014; and the Care Act 2014 (Transitional Provision) Order 2015. I have also considered the relevant passages from the Care and Support statutory guidance and the relevant case law including *R v Barnet LBC ex p Nilish Shah* [1983] 2 AC 309, *Mohammed v LB of Hammersmith and Fulham* [2002] 1 AC 547, *Al-Ameri – Kensington and Chelsea Royal London Borough Council* [2003] 1 WLR 1289, *R (Royal Borough of Greenwich v Secretary of State for Health and Bexley Council)* [2006] EWHC 2576 (Admin) and *R (Cornwall) v Secretary of State for Health* [2015] UKSC 46.

15. Section 9 of the Care Act 2014 provides (so far as is relevant):

(1) *Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—*

- (a) whether the adult does have needs for care and support, and*
- (b) if the adult does, what those needs are.*

(2) *An assessment under subsection 1 is referred to in this Part as a “needs assessment”.*

(3) *The duty to carry out a needs assessment applies regardless of the authority’s view of—*

- (a) the level of the adult’s needs for care and support, or*
- (b) the level of the adult’s financial resources.*

(4) *A needs assessment must include an assessment of—*

- (a) the impact of the adult’s needs for care and support on the matters specified in section 1,*
- (b) the outcomes that the adult wishes to achieve in day-to-day life, and*
- (c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.*

16. Section 18(1)(a) of the Care Act 2014, provides:

*(1) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—*

*(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, ...*

17. Section 39 (1) & (2) of the Care Act 2014, provide:

*(1) Where an adult has needs for care and support which can be met only if the adult is living in accommodation of a type specified in regulations, and the adult is living in accommodation in England of a type so specified, the adult is to be treated for the purposes of this Part as ordinarily resident—*

*(a) in the area in which the adult was ordinarily resident immediately before the adult began to live in accommodation of a type specified in the regulations, or*

*(b) if the adult was of no settled residence immediately before the adult began to live in accommodation of a type so specified, in the area in which the adult was present at that time.*

*(2) Where, before beginning to live in his or her current accommodation, the adult was living in accommodation of a type so specified (whether or not the same type as the current accommodation), the reference in subsection (1)(a) to when the adult began to live in accommodation of a type so specified is a reference to the beginning of the period during which the adult has been living in accommodation of one or more of the specified types for consecutive periods.”*

18. The Care and Support statutory guidance provides as follows:

***“Ordinary residence when arranging care and support in another area***

*19.47 There may be some cases where the local authority considers that the person's care and support needs can only be met if they are living in a specified type of accommodation. This could be in a care home, or other kinds of premises that are specified in the legislation (see para. 19.28 for the types of accommodation specified). If the specified accommodation in which the care is*

*provided is located in the area of another authority, it is important that there is no question as to which local authority is responsible for meeting the person's needs.*

*19.48 Section 39 of the Care Act, and the specified accommodation regulations made under it set out what should happen in these cases, and specify which local authority is responsible for the person's care and support. Together, these create the principle that the person placed 'out of area' is deemed to continue to be ordinarily resident in the area of the first authority, and does not acquire an ordinary residence in the 'host' or second authority. The local authority which arranges the care in the specified accommodation, therefore, retains responsibility for meeting the person's needs.*

*19.49 The specified accommodation regulations specify the types of accommodation to which this provision applies. The specified accommodation regulations explicitly set out 3 types of accommodation:*

- ***nursing homes/care homes:*** *accommodation which includes either nursing care or personal care*
- ***supported living/extra care housing this is either:***
  - *specialist or adapted accommodation: this means accommodation which includes features that have been built in or changed to in order to meet the needs of adults with care and support needs. This may include safety systems and features which enable accessibility and navigation around the accommodation and minimise the risk of harm, as appropriate to the individual*
  - *accommodation which is intended for occupation by adults with care and support needs, in which personal care is also available, usually from a different provider*
- ***shared lives schemes:*** *accommodation which is provided together with care and support for an adult by a shared lives carer, approved by the scheme, in the shared lives carer's home under the terms of an agreement between the adult, the carer and any local authority responsible for making the arrangement. The shared lives carer will normally be providing personal care but they will not need to provide it in every case.*

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. The relevant parts of Annex H to the statutory guidance provide:

**People who have sufficient funds to pay for their own care and accommodation**

21) When a person moves into permanent accommodation in a new local authority area under private arrangements, and is paying for their own care, they usually acquire an ordinary residence in this new area. If so, and if their needs subsequently change, meaning that they require other types of care and support, (or if their financial circumstances change so that they would not have to pay for all of the costs of their care and support, if their needs were met by a local authority) they may approach the local authority in which their accommodation is situated. That local authority will be responsible for assessing whether it should meet their needs. The person will be ordinarily resident in the local authority area where the person's care home is situated.

22) Sometimes, a person with sufficient means to pay for their accommodation in a care home, who was intending to arrange their own care, may not be able to enter into a private agreement with a care home. If this is because they do

*not have the mental capacity to do so and they either have no attorney or deputy to act on their behalf, or another person in a position to do so, the local authority must meet their needs. Therefore if their assessed needs are required to be met by the provision of accommodation in a care home, the local authority must provide that accommodation (and it will do so by arranging for an independent care home provider to provide it) for which the authority may charge the adult.<sup>83</sup>*

*23) In other cases, the person may have capacity, but is not able to manage the making of the arrangements without assistance. In these circumstances the authority may provide information, advice and guidance, or refer the person to an independent broker (someone who can help them find and negotiate terms with a care home). Alternatively, under section 19 of the Care Act, it may decide to meet the person's needs by arranging the accommodation (which it will normally do by arranging for an independent care home provider to provide the accommodation). The local authority should consider doing so where the person's wellbeing would otherwise be adversely affected, in particular where there is no one else able to act on their behalf. In either case, if the person's needs which the local authority is meeting can only be met in a type of specified accommodation, the person would remain ordinarily resident in their placing local authority, even if the accommodation arranged by it is in another local authority area. In such circumstances, if the person's needs change, or their financial resources change so that they may not have to pay the local authority all of the costs for meeting their needs, they should approach the local authority which has arranged the placement and is currently meeting their needs.*

### **Application of law to facts**

20. In order for the deeming provisions under section 39 to apply it is necessary to establish that the adult's care and support needs can only be met in one of the specified types of accommodation and that the move to the specified accommodation in the area of the receiving authority was arranged by the first authority. This is clear from paragraphs 47 to 50 (inclusive) of the statutory guidance.



21. The evidence that has been provided to me is that Council B did not arrange X's move to Care home 1A. The move was arranged by X's family at his request. I note that at the relevant time it is agreed that X had mental capacity to make his own decisions as to where to reside. Paragraph 19.48 of the statutory guidance refers to the first local authority "placing" the person in the area of the host authority and "arranging the care" in the specified accommodation. I find as a fact that Council B did not make the arrangements for X to move to Care home 1A in the area of Council A. For this reason alone, I conclude that the deeming provisions under section 39 do not apply so as to allow me to conclude that X should be deemed to be ordinarily resident in the area of Council B.
22. Council A argue in the alternative that X should be deemed or otherwise found to be ordinarily resident in the area of Council B by reference to the decision in the *Greenwich* case. In essence it is submitted that Council B failed to complete a care needs assessment or financial assessment of X resulting him not being given any choice as to placement.
23. It is important when considering the decision in the case of *Greenwich* to note that the comments of Charles J apparently relied upon by Council A were obiter. Further, those comments were based on the premise that the first authority owed the adult a duty to provide care and support services under the community care legislation that existed at the time. In the instant case, I am unable to conclude that Council B would have found X eligible for care and support services had they completed a needs assessment under section 9. A significant factor is that X had capital above the upper financial limit at the time it is said that Council B ought to have completed their assessment. In such circumstances, it is not possible to conclude that Council B would have been under a duty to provide care and support to X. In the circumstances, I cannot accept that the effect of the decision in *Greenwich* is that X should be deemed to be ordinarily resident in the area of Council B.
24. In the absence of any deeming provision I must now move on to consider whether X acquired ordinary residence when he moved to Care home 1A. On

the information provided to me I am in no doubt that he did. He moved there in line with his own stated wishes and feelings to be nearer his family with whom he clearly had a close relationship. He voluntarily adopted his residence at Care home1A from 15 December 2016 as part of the regular order of his life until his death on 15 April 2018.

### ***Conclusion***

25. For the reasons set out above X was ordinarily resident in the area of CouncilA between 15 December 2016 and 15 April 2018.