DETERMINATION BY THE SECRETARY OF STATE UNDER SECTION 32(3) OF THE NATIONAL ASSISTANCE ACT 1948 AND SECTION 8 OF THE COMMUNITY CARE (DELAYED DISCHARGES ETC.) ACT 2003 OF THE ORDINARY RESIDENCE OF MRS X (OR 9 2013)

1. I am asked by CouncilA to make a determination for the purposes of section 8 of the Community Care (Delayed Discharges etc.) Act 2003 ("the 2003 Act") and section 32(3) of the National Assistance Act 1948 ("the 1948 Act") of the ordinary residence of Mrs X. CouncilB is the other local authority to this dispute.

2. A determination as to X's ordinary residence is necessary as she requires services under section 21 of the 1948 Act. The local authority that has a duty to provide these services is the one in which X is ordinarily resident.

The facts of the case

3. The following information has been ascertained from the statement of facts completed by CouncilA but not agreed by CouncilB and the copy documents provided by CouncilA.

4. X was born on x date 1930 and was living in a council flat for several years in CouncilB prior to the events the subject of this dispute. The flat was located on the second floor and was accessed via a lift. X was supported by her SonU, who visited her twice weekly and helped with shopping.

5. X’s DaughterV, who lives in CouncilA, was becoming increasingly concerned for X’s health and safety in the two years prior to the Spring of 2012. She had visited her mother at Easter 2012 and was aware that her mother was no longer tending to her personal care and was becoming agitated and wandersome, particularly trying to go out into the night and enter other people’s flats. X’s food and drink intake was not sufficient and she had suffered marked weight loss. X had been supported in the past by a neighbourhood care officer who had visited regularly but this had ceased 18 months previously when the care officer had left to have a baby.

6. DaughterV asked CouncilB to assess her mother and this resulted in a package being agreed for twice daily care to start upon X’s return from a three week holiday to CouncilA to visit her daughter.

7. On 21 May 2012, during the holiday to CouncilA, X was found by a neighbour of DaughterV wandering in a frightened and agitated state. X was admitted to HospitalA, on an emergency basis. She was in an acute confusional state, possibly secondary to heart failure and/or an infected cellulitic left hand. Despite treatment for this, she remained confused and wandersome.

8. A CT scan showed severe cerebral and cerebella atrophy, with some small vessel changes to the brain. DoctorA, consultant in psychiatry, diagnosed acute confusion on top of a mixed dementia, both vascular, indicated by her

history of vascular disease, atrial fibrillation, angina and pacemaker, plus probable Alzheimer's type dementia, as evidenced by her wandersome, agitated behaviour (day and night) and self-neglect. He felt that this type of dementia was unlikely to respond to medication and usually indicated the need for special needs placement in a residential facility with 24 hour support.

9. It is understood that a notice pursuant to section 2 of the 2003 Act was served upon CouncilB by HospitalA indicating that X was likely to need community services. It is further understood that an NHS Continuing Healthcare ("NHSCHC") Needs Checklist was completed on 28 May 2012 which concluded that X was not eligible for NHSCHC and a notice under section 5 of the 2003 Act was served upon CouncilB which gave a planned discharge date of 31 May 2012. The Statement of Facts provides that in a telephone call which took place on 30 May 2012, by DutyManagerB at CouncilB, asked CouncilA to conduct the community care assessment.

10. CouncilA conducted this assessment on 31 May 2012 and faxed a copy to CouncilB that same day. The assessment, a copy of which appears in the bundle of copy documents provided to me, provides the assessor's view that:

"Mrs X needs help with prompts with every aspect of personal care, including help to get washed, dressed, prompts to go to the toilet and manage her continence, prompts with medication, including warfarin, all meals provided and prompts to eat and drink and help to manage her diet controlled diabetes.

In addition, she needs a caring environment, where her agitation and wandersome behaviour can be managed and she can be kept safe.

In my view she needs to be placed in special needs residential care in her best interests. She has been check-listed but not deemed eligible for continuing care.

She meets the FACS criteria of critical in that she cannot self-protect, nor can she perform self-care tasks essential for survival".

11. A telephone call from DutyManagerB of CouncilB on 6 June 2012 indicated that responsibility for funding was disputed since it was considered that CouncilA was the responsible authority. The "progress notes" for this date held by CouncilA provide as follows:

"T/c to daughter. She confirmed that her mother came here on holiday and has not given up her flat as yet".

12. Between 6 and 11 June 2012 CouncilA and CouncilB exchanged telephone correspondence during which CouncilB stated that they considered paragraphs 47-49 of the guidance on ordinary residence to apply ("ORG")[1] and asked CouncilA, as local authority of the moment, to provide care and funding to enable the authorities' two legal departments to communicate.

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[1] Ordinary Residence: Guidance on the identification of the ordinary residence of people in need of community care services, England, published on the Department of Health's website at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/152009/dh_131705.pdf.pdf

13. A formal assessment of X under the Mental Capacity Act 2005 was conducted by EmployeeA on behalf of CouncilA on 13 June 2012 and concluded that X “lacks the capacity to make a decision about where she is to live and where her needs can best be met on discharge from hospital”. The document states that CouncilA contacted both SonU and DaughterV in the course of undertaking the assessment who shared the view that X “now needs to be placed in her best interests in a special needs residential home”. The last comment on the document provides: “Family working in Mrs X’s best interests, they are requesting for Mrs X to be placed in CouncilA”. The statement of facts at paragraph 19 states that EmployeeA held a best interests meeting, attended by DaughterV and that she telephoned SonU afterwards to gain his views.

14. The care assessment was updated on the same date to read:

“Both her DaughterV, and her SonU, think she would be best placed in CouncilA near her daughter who is in a position to visit regularly and where she has a family who can support her. Her son says she only has him in CouncilC, as her brothers have lost contact with her”.

15. On 14 June 2012, CouncilA faxed CouncilB, attaching both the community care and Mental Capacity Act assessments, to ascertain their opinion and position. It seems that CouncilB did not reply to this letter and so CouncilA finalised the Best Interests decision for X and agreed with the family that X

should be placed at ResidentialHomeA in CouncilA. X was placed by CouncilA in ResidentialHomeA under section 21 of the 1948 Act on 19 June 2012, funded on a provisional basis by CouncilA, pending this determination. The parties have been unable to resolve the issue of delayed hospital charges and funding for care services.

The relevant law

16. In addition to the documentation referred to above and the submissions from CouncilA, I have considered the provisions of Part 3 of the 1948 Act, the provisions of the 2003 Act, the Delayed Discharges(England) Regulations 2003[2], the ORG, the leading case of R v Barnet LBC ex parte Shah (1983) 2 AC 309 ("Shah") and the case of R v Waltham Forest London Borough Council, ex parte Vale (1985) The Times 25 February ("Vale"). My determination is not influenced by the interim funding of the care home placement by CouncilA.

17. 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, disability or any other circumstances are in need of care or attention which is not otherwise available to them. Section 24(1) provides that the local authority empowered to provide residential accommodation under Part 3 is, subject to further provisions of that Part, the authority in whose area the person is ordinarily resident. Section 24(3)

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[2] 2003/2277

provides that where a person in the area of a local authority has no settled residence, or is in urgent need of accommodation, the authority has the same power to provide accommodation as under section 24(1) as if he were ordinarily resident in its area. The Secretary of State's Directions under section 21 provide that local authorities are required to provide residential accommodation to those qualifying under Part 3 not only for those ordinarily resident in their area or in urgent need of such accommodation but also for persons with no settled residence who are or have been suffering from mental disorder and who are in the authority's area.

18. Section 24 makes further provision as to the meaning of ordinary residence. Section 24(5) provides that, where a person is provided with residential accommodation under Part 3 of that Act "he shall be deemed for the purposes of this Act to continue to be ordinarily resident in the area in which he was ordinarily resident immediately before the residential accommodation was provided for him".

19. Section 24(6) of the 1948 Act, as amended, provides that a patient in NHS accommodation should be deemed to be ordinarily resident in the area, if any, in which he was ordinarily resident immediately before the NHS accommodation was provided.

20. "Ordinary residence" is not defined in the 1948 Act. The guidance (paragraph 18 onwards) notes that the term should be given its ordinary and natural meaning subject to any interpretation by the courts. The concept

involves questions of fact and degree. Factors such as time, intention and continuity have to be taken into account. The leading case on ordinary residence is that of Shah. In this case, 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 “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”.

21. By virtue of section 2 of the 2003 Act, a responsible NHS body must serve notice upon the local authority which appears to it to be the local authority where the patient is ordinarily resident where it considers it unlikely to be safe to discharge the patient unless one or more community services are made available. The local authority served with such a notice must then carry out an assessment of the patient’s needs. Disputes as to ordinary residence can be referred to the Secretary of State for determination pursuant to section 8 of the 2003 Act.

The application of the law

22. The first issue I must address is that of capacity. A capacity assessment conducted on 13 June 2012 concluded that X lacks capacity to decide where to live and as to where her needs can best be met. I have no information as to

X’s capacity prior to her admission to hospital and in particular when she was living in CouncilB. However, the reports of her agitated and wandersome behaviour together with her daughter’s report of self-neglect lead me to consider that, on the balance of probability, X lacked capacity to decide where to live at that time also.

23. When a person lacks capacity, paragraph 21 of the ORG provides that one of the tests set out in Vale should be used. In Vale, Taylor J held that a young person with severe learning difficulties was ordinarily resident at her parents’ house where she was temporarily living at the time. She was found to be in the same position as a small child who was unable to choose where to live. Her total dependence on her parents meant that “the concept of her having an independent ordinary residence of her own which she has adopted voluntarily and for which she has a settled purpose does not arise”. However, this test (known as Vale 1) should only be used with similar material facts to Vale. In cases involving older people whose parents are deceased or have become ordinarily resident in a place and then lost capacity, the test may not be appropriate and Vale 2 should be used (see paragraph 33 of ORG). Vale 2 requires consideration of a person’s ordinary residence as if they had capacity. All the facts of the person’s case should be considered, including physical presence in a particular place and the nature and purpose of that presence as outlined in Shah, but without requiring the person to have adopted the residence voluntarily.

24. It is clear to me that this case concerns a lady who lost capacity in later life and that Vale 2 is the appropriate test.

25. The date at which it is appropriate to determine X's place of ordinary residence is immediately before she was provided with Part 3 accommodation in accordance with section 24(5) of the 1948 Act. X was placed in the ResidentialHomeB on 19 June 2012. Immediately before, which I take to mean the day before, X was in HospitalA. Section 24(6) applies to disregard the period spent in HospitalA when assessing the place of ordinary residence. X was admitted to HospitalA on 21 May 2012 and the day prior to this she was on a three week holiday to stay with her daughter. She still had a council flat in CouncilB and a twice daily package of domiciliary care was to commence upon her return.

26. The case of Levene v Inland Revenue Commissioners (1928) AC 217 is instructive when considering the effect of temporary absences on a person's ordinary residence. Viscount Cave stated:

"It [ordinary residence] connotes residence in particular place with some degree of continuity apart from accidental and temporary absences".

In the case of Fox v Stirk (1970) 2 QB 463 Lord Denning set out the principle that temporary absence does not negate a person's place of ordinary residence. He said:

“If he happens to be away for a holiday or away for the weekend or in hospital, he does not lose his residence on that account”.

27. I am satisfied that looking at the facts but without requiring voluntary adoption, X was at her daughter’s house on holiday on 20 May 2012 and did not lose her ordinary residence in CouncilB. As a result of the deeming provisions in sections 24(5) and (6) of the 1948 Act, X’s place of ordinary residence remains CouncilB and it is that authority which bears responsibility for delayed hospital charges pursuant to the 2003 Act and responsibility for care services under the 1948 Act following discharge from hospital.

Signed:

Dated: