

## **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.

### ***The facts***

2. The following information has been taken from the agreed statement of facts, legal submissions and other documents provided by CouncilA and CouncilB.
3. X was born on XX XX 1942. She lived in her own home in the area of CouncilB. She has a sister who was involved in her care ("Y1") and assisted with her finances. She also has a brother ("Y2") living in Greece who has also been involved with X albeit to a lesser extent. Concerns were raised in respect of X's ability to care for herself at home. In 2013 the NHS Community Mental Health Team became involved with X on account of her suffering from a "mild cognitive disorder". In September 2014 CouncilB assessed X's needs but she refused support.
4. In May 2015 X was assessed again by CouncilB and care was arranged for her at home. I note that X paid for that care herself. In August 2015 a financial assessment was completed by CouncilB which confirmed that X was a self-funder for the purposes of the Care Act 2014. Whilst there is some dispute as to Y1's knowledge of her current placement (see further below) it appears that she has been involved with many aspects of X's life. Around this time Y1 was advised to apply to be appointed as X's deputy so she could formerly make decisions about her sister's finances.
5. By the start of 2016 X was refusing care at home and was frequently falling and presenting with challenging behaviour. On 8 January 2016 X was assessed

again and it was concluded that she needed regular care to meet her needs. She remained a self-funder and so the cost of providing such care fell on her rather than the CouncilB.

6. On 8 March 2016 X was admitted to hospital when she suffered a urinary tract infection and refused care. By April 2016 Y1 and Y2 had begun looking for appropriate residential care homes for their sister to move to. On 5 May 2016 X was assessed as lacking mental capacity to make decisions about her care and treatment.
7. On 17 June 2016 X was detained under section 2 of the Mental Health Act 1983. She was assessed as lacking mental capacity to make decisions about her care needs, accommodation and finances. On 5 July 2016 a best interests meeting was held at which various professionals and Y1 attended (along with X's nephew). The joint decision reached was that it was in X's best interests to move to a residential care/nursing home placement rather than return home. It was recorded that the social worker would provide a list of EMI nursing homes to Y1. It was also recorded that X continued to be a self-funder. On 7 July 2016 it is recorded that Y1 was advised again to apply to become X's deputy.
8. On 12 July 2016 there is an email from a social worker to an accommodation officer that Y1 is looking for support to find a suitable placement for X. The next day there is a record that the social worker contacted Y1 who said she had completed the deputyship forms and that the social worker would send her a list of available placements. On 14 July 2016 X was assessed as having capacity to make decisions about her treatment.
9. On 15 July 2016 CouncilB's records note that Y1 had agreed to find a suitable placement for X with the local authority's support. It is noted that the care assessments and support plan had been provided. The letter sent to Y1 was uploaded onto CouncilB's system that same day.
10. On 2 August 2016 X's mental capacity was reviewed and it appears to be recorded that she indicated that she could not care for herself at home even

though her participation in the assessment was limited. X is recorded to have indicated that she wished to be placed near to her sister. CouncilB's notes record that Y1 wished for support to find a suitable placement for her sister and that a list of care homes was sent to her, including Care Home1.

11. On 12 September 2016 CouncilB records that appointments were made including at Care Home1 and that Y1 was available to attend. On 14 September 2016 it was noted that Y1 was aware of the planned move and would be in attendance. On 16 September 2017 CouncilB's records note that Y1 had confirmed she was happy with the location of Care Home1 and to organise to pay the bill for X. CouncilB's system also records that Y1 agreed to be present at Care Home1 when X was due to move there on 19 September 2016.

12. On 14 September CouncilB completed a needs assessment of X pursuant to the requirements of the Care Act 2014. It was recorded that X needed to move to a nursing home, that she had the support of her family and that no further action was required by CouncilB because she was a self-funder. On 19 September 2016 X moved to Care Home1. There is no suggestion that this was a temporary move. CouncilB's records show that Y1 met X at Care Home1 on the day she moved and that she was pleased with how she was responding to her new home.

13. On 17 March 2018 X's finances fell below the threshold below which a local authority has a duty to fund care and support. The family therefore sought assistance from CouncilA who in turn contacted CouncilB about who was responsible under the Care Act. Sadly, on 15 July 2018 X passed away.

14. The two authorities have engaged in protracted correspondence but have been unable to agree as to who is responsible for X's needs due to a dispute over her ordinary residence.

### ***The authorities' submissions***

15. CouncilA provided written submissions dated 12 March 2018 along with a statement by Y1 dated 14 February 2018. CouncilA submit that X did not have capacity at the time she was placed at Care Home1. They submit that X was placed at Care Home1 by CouncilB without any involvement by or notice to Y1. CouncilA submit that X was placed by CouncilA in specified accommodation in order to meet her needs and that CouncilB had a duty to meet those needs. It is submitted that CouncilB sourced the accommodation for X and that X did not have capacity to make decisions about that accommodation. CouncilA submit that in the circumstances the deeming provisions under section 39 apply so that X should be deemed to remain ordinarily resident in the area of CouncilB.
16. CouncilA then provided supplementary written submissions dated June 2018 in which it is submitted that even if Y1 agreed to CouncilB contacting care homes and arranging the placement she was not her deputy and did not have authority to act for her and to manage her funds. CouncilA repeat their submission that CouncilB placed X in Care Home1 in order to fulfil its Care Act duties towards her.
17. CouncilB have provided written submissions dated 21 August 2018. They submit that X was assessed as not having capacity in respect of her care, accommodation and finances in June and July 2016 and do not dispute that she did not have capacity at the time she moved to Care Home1. They submit that Y1 dealt with all the admission and finance documents at Care Home1 on behalf of X. CouncilB submit that X moved to Care Home1 as a self-funder and immediately acquired ordinary residence as the move was permanent and she settled there and was happy. CouncilB refer to the statutory guidance and submit that because X was a self-funder they did not have a duty to meet her needs. CouncilB submit that because they had no duty to meet X's needs the deeming provisions under section 39 do not apply.

### ***The law***

18. I have considered all relevant legal provisions including Part 1 of the Care Act 2014 (“the 2014 Act”); 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 Care and Support Statutory Guidance and relevant case law, including *R (Shah) v London Borough of Barnet* (1983) 2 AC 309 (“Shah”), *Chief Adjudication Officer and Another v Quinn* [1996] 1 WLR 1184 (“Quinn”); *R (Greenwich) v Secretary of State for Health & anr* [2006] EWHC 2576 (“Greenwich”) and *R (Cornwall Council) v Secretary of State for Health* [2015] UKSC 46 (“Cornwall”).

19. From 1 April 2015, any dispute about an adult’s ordinary residence shall be determined in accordance with section 40 of the Care Act 2014.

20. 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, ...*

21. Section 39 (1), (2) and (3) of the Care Act 2014, provides:

*(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.*

*(3)The regulations may make provision for determining for the purposes of subsection (1) whether 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 the regulations.*

22. The concept of ordinary residence involves questions of both fact and degree. Factors such as time, intention and continuity (each of which may be given different weight according to the context) have to be taken into account. In the case of Shah, Lord Scarman stated:

*'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.'*

23. The Supreme Court in Cornwall held that where the adult lacks capacity the requirement that he adopted voluntarily and for settled purposes does not form part of the ordinary residence test as applied in Shah.

24. The current statutory care and support guidance states as follows in relation to cases concerned with adults who lack mental capacity:

*19.32 Therefore with regard to establishing the ordinary residence of adults who lack capacity, local authorities should adopt the Shah approach, but place no regard to the fact that the adult, by reason of their lack of capacity cannot be expected to be living there voluntarily. This involves considering all the facts, such as the place of the person's physical presence, their purpose for living there, the person's connection with the area, their duration of residence there and the person's views, wishes and feelings (insofar as these are ascertainable and relevant) to*

*establish whether the purpose of the residence has a sufficient degree of continuity to be described as settled, whether of long or short duration.*

25. The guidance goes on to state as follows in relation to care arranged in another area:

*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.*

*19.51 Need should be judged to be 'able to be met' or of a kind that 'can be met only' through a specified type of accommodation where the local authority has made this decision following an assessment and a care and support planning process involving the person. Decisions on how needs are to be met, made in the latter process and recorded in the care and support plan, should evidence that needs can only be met in that manner. Where the outcome of the care planning process is a decision to meet needs in one of the specified types of accommodation and it is the local authority's view it should be assumed that needs can only be met in that type of accommodation for the purposes of 'deeming' ordinary residence. This should be clearly recorded in the care and support plan. The local authority is not required to demonstrate that needs cannot be met by any other type of support. The local authority must have assessed those needs in order to make such a decision - the 'deeming' principle therefore does not apply to cases where a person arranges their own accommodation and the local authority does not meet their needs.*

26. Finally, Annex H to the guidance is also relevant to this matter. Paragraph 21 states as follows:

*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.*

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

27. For the deeming provisions under section 39 to apply the following conditions must be satisfied. First, the relevant authority must have concluded that the needs of the adult concerned can only be met in one of the specified types of accommodation. Second, that the local authority arranged or provided that accommodation.



28. It is the second of these conditions that is central to this ordinary residence dispute. Paragraph 19.48 refers to the first local authority “placing” the person in the area of the host authority and “arranging the care” in the specified accommodation. Paragraph 19.50 confirms 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. Paragraph 19.51 is of particular relevance. It refers to the outcome of the care planning process where there is a decision to meet needs in one of the specified types of accommodation. In the instant case, Council B has not gone through a *care planning process* to reach a decision to meet needs in one of the specified types of accommodation. It has completed an assessment of X’s needs. That is very different from completing a support plan setting out how it will meet those needs. Paragraph 19.51 goes on to state that the deeming principle does not apply to cases where the adult arranges their own accommodation and the local authority does not meet their needs. In the instant case, Council B has never met X’s needs.

29. Council A have mistakenly believed that because Council B assessed X as requiring care home accommodation to meet her needs that they had a duty to provide such accommodation under the Care Act. It is clear from the information I have been provided that Council B never accepted a duty to provide X with care home accommodation (or any type of specified accommodation). That was because they were not under a duty to provide care and support services of any kind whilst X’s financial resources were above the financial threshold and she was able to fund her own care. Which she did. The submission by Council A that Council B placed X at Care Home 1 pursuant to their duties under the Care Act is mistaken.

30. I recognise that there is a factual dispute as to whether Y1 was part of the arrangements for X moving to Care Home 1. However, it is clear to me that Council B never accepted a duty to provide X with a specified type of accommodation and never provided the same by funding it or paying for it in some other way. I refer to Annex H to the statutory guidance and in particular to paragraph 21. This provides that 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. In this case, X moved in to Care Home1 on a private basis and was paying for it privately from the time she moved there. Whilst CouncilB may well have been assisting the process and working with the family the reality is that X was paying for her care and not CouncilB. In such circumstances, it follows that the deeming provisions under section 39 do not apply.

31. There is no suggestion by CouncilA that CouncilB ought to have provided the accommodation but failed to do so in breach of its duties under the Care Act thereby forcing X to fund her own care. For the avoidance of doubt, even if such an argument had been raised I would not have been able to conclude that CouncilB was clearly in breach of their statutory duties in the sense that would found a successful claim for judicial review. There appears to be no dispute that X's financial resources exceeded the relevant threshold at the time that she moved to Care Home1 and that she was a self-funder at that time.

32. For the avoidance of doubt, I have carefully considered all of the information provided to me and find on balance that Y1 was aware that Care Home1 had been identified as a potential suitable placement for X before she moved there. I find that she was supportive of X's move and that it is more likely than not that she dealt with the home in relation to the "paperwork" and funding arrangements. I find no evidence that CouncilB entered into any contract or provided any funding for X's move to and occupation of Care Home1. Finally, I find that that X immediately settled into her new home at Care Home1 and that she moved there on a long-term basis.

### **Conclusion**

33. For the reasons referred to above I conclude that X acquired ordinary residence in the area of CouncilA from the date she moved to Care Home1 on 19 September 2016.