

Determination by the Welsh Ministers under section 195 of the Social Services and Well-being (Wales) Act 2014

1. This is a determination of a dispute between LA1 and LA2 in respect of the ordinary residence of X and hence financial responsibility for her care and support at the point at which X's capital falls below the self-funding threshold.

Documents

2. The agreed factual background is set out within a statement of facts and a chronology.
3. Neither party has made written submissions for the specific purpose of this determination; they rely on arguments which are set out within e-mail exchanges between them.
4. The determination bundle also includes copies of letters sent to X by LA2, a Care and Support Plan, an assessment record and a review document.

The agreed facts

5. X was born on 21 November 1947. The parties agree that X is without the mental capacity to decide where to live and that this has been the case throughout the period relevant to this dispute. X's daughter holds a Lasting Power of Attorney in respect of her property and finances.
6. X resided for much of her life in a locality outside of LA1 and LA2. She moved to the area of LA2 after the death of her husband and this became the area in which she was ordinarily resident. She owned her home there.
7. On 5 November 2021, a best interest meeting was held and it was decided that X required full-time residential care.
8. X's family identified a residential placement ("the Care Home"). LA2 arranged X's placement at the Care Home and X moved there on 23 November 2021. The Care Home is in the area of LA1.
9. LA2 funded X's placement at the Care Home applying the 12-week property disregard and arranging a Deferred Payment Agreement until the sale of X's former home provided a sum of capital from which the Care Home's fees could be paid. The Care Homes' fees continue to be paid from this sum of capital but it is anticipated that it will have diminished below the applicable threshold within the next 12 to 18 months.
10. LA2 wrote to X and her daughter on 12 March 2022 stating that it was terminating its contract with the Care Home. The letter includes the following statement:

You will remain at the care home and you will need to arrange a private contract with them and all [LA2] involvement will cease, as you will be 'ordinarily resident' in the area in which the home is situated. This means the responsibility of providing services would rest with the Local Authority area in which you live.

11. On 26 January 2023, LA1 received a referral from X's daughter who mistakenly believed that her mother's capital sum was nearing the point at which it would reduce below the self-funding threshold.
12. LA1 and LA2 subsequently corresponded but were unable to reach agreement about which of the two authorities would become responsible for payment of the Care Home's fees once X's capital has diminished below the threshold.

The issue to be determined

13. The single issue on which the parties have invited a determination is "*whether the 'deeming' provision of Section 194 of the Social Services and Well-being (Wales) Act 2014 applies in relation to [X]*".
14. If the deeming provision applies, X remains ordinarily resident in the area of LA2 and LA2 will have responsibility for payment of the Care Home fees when X's capital has diminished below the threshold.
15. If the deeming provision does not apply, X will have acquired Ordinary Residence in the area of LA1 and future funding responsibility will fall to LA1.

The law and guidance

16. The relevant parts of Section 35 of the Social Services and Well-being (Wales) Act 2014 ("the 2014 Act") provide:

Duty to meet care and support needs of an adult

(1) A local authority must meet an adult's needs for care and support if it is satisfied that conditions 1, 2 and 3 are met (but see subsection (6)).

(2) Condition 1 is that the adult is—

(a) ordinarily resident in the local authority's area, ...

(3) Condition 2 is that—

(a) the needs meet the eligibility criteria ...

(4) Condition 3 is that—

(a) there is no charge for the care and support needed to meet those needs, or

(b) there is a charge for that care and support but—

(i) the local authority is satisfied on the basis of a financial assessment that the adult's financial resources are at or below the financial limit,

(ii) *the local authority is satisfied on the basis of a financial assessment that the adult's financial resources are above the financial limit but the adult nonetheless asks the authority to meet his or her needs, or*

(iii) *the local authority is satisfied that the adult lacks capacity to arrange for the provision of care and support and there is no person authorised to make such arrangements under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.*

17. Section 194 of the 2014 Act contains the deeming provision which is the subject of this dispute. Section 194(1) provides:

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 Wales of a type so specified, the adult is to be treated for the purposes of this Act 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*

18. The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015 ("the Welsh Specified Accommodation Regulations") were made on 7 July 2015 and came into force on 6 April 2016. They provide:

For the purposes of section 194(1) of the Act (ordinary residence), care home accommodation is accommodation of a specified type.

19. The meaning of "ordinary residence" is not defined within the 2014 Act and there is no higher court decision relating to its definition under the Welsh legislation. There is, however, a significant body of case law relating to the definition of ordinary residence for a range of other purposes.

20. The leading authority is R (Shah) v London Borough of Barnet [1982] UKHL 14 which concerned use of an analogous term in the context of access to grants for further education. Lord Scarman expressed the meaning of "ordinarily resident" in the following terms ("the Shah test"):

"Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, the term '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. The application of the Shah test was considered in the context of an individual who lacked capacity to decide where to live in R v Waltham Forest Borough Council, ex p Vale (1985) The Times, 25 February 1985, [1985] Lexis Citation 443. The issue was re-visited by the Supreme Court in R (Cornwall Council) v Secretary of State for Health and another [2015] UKSC 46 and in the case of R (on the application of

Worcestershire County Council) v Secretary of State for Health and Social Care [2023] UKSC 31.

22. The Shah test cannot be applied without modification in the case of a person who lacks capacity because such an individual cannot be said to have “*adopted voluntarily*” the place where they live. The Vale and Cornwall cases suggest “*complementary common sense approaches to the application of the Shah test to a person unable to make decisions for herself*” (Cornwall paragraph 47). The ordinary residence test in Shah is to be applied without consideration of whether the person concerned has voluntarily adopted a place of residence but with reference to the other contextual factors, such as the purpose of the move to the place in question. The Worcestershire case suggests that consideration is given in this context to “*the state of mind of whoever has the power to make relevant decisions on behalf of the person concerned. Under the Mental Capacity Act 2005 that power would lie with any person who has a lasting power of attorney or with deputy appointed by the Court of Protection or with the court itself.*” (Worcestershire paragraph 58).

23. Deeming provisions similar to that set out within section 194 of the 2014 Act have been given judicial scrutiny. The intent of the deeming provision contained within the National Assistance Act 1948 was considered in R (Kent County Council) v Secretary of State for Health [2015] EWCA Civ 81. At paragraph 13, the court found:

The purpose of the deeming provision is to provide continuity of financial responsibility whilst a person is being provided with accommodation under section 21 of the 1948 Act. It is not uncommon for those who are eligible for such assistance, for practical reasons or reasons connected with securing their best interests, to be placed outside the area of the local authority with the statutory responsibility. The deeming provision avoids complications arising in connection with funding in those circumstances. It also avoids the possibility of a local authority placing someone outside its own area to ease its financial burdens.

24. In the Cornwall case, the Court expressed (at paragraph 55) a similar view in the context of placements for children:

It would run counter to the policy discernible in both Acts (i.e. the Care Act 2014 and the National Assistance Act 1948) that the ordinary residence of a person provided with accommodation should not be affected for the purposes of an authority's responsibilities by the location of that person's placement. It would also have potentially adverse consequences. For some needy children with particular disabilities the most suitable placement may be outside the boundaries of their local authority, and the people who are cared for in some specialist settings may come from all over the country. It would be highly regrettable if those who provide specialist care under the auspices of a local authority were constrained in their willingness to receive children from the area of another authority through considerations of the long term financial burden which would potentially follow.

25. The issue for determination by the court in the Worcestershire case was whether the deeming provisions of the Care Act 2014 and the National Assistance Act 1948 were to be transposed in the context of the provision of after care services under Section

117 of the Mental Health Act 1983, which, unlike the 2014 Act under consideration in this matter, does not contain specific deeming provisions.

26. The Explanatory Notes to the 2014 Act state in respect of section 194:

504. Subsection (1) sets out where an adult is to be treated as ordinarily resident, if the local authority which is responsible for meeting their needs for care and support makes arrangements for the adult to live in accommodation of a particular type. As a consequence of these arrangements, the adult may move to another area. In this situation, the effect of this provision is that the adult will be treated, for the purposes of this Act, as being ordinarily resident in the area of the local authority which made the arrangements (and not in the area to which they move).

509. The provision made by this section is based on provision which is made in section 24 of the National Assistance Act 1948 and section 105 of the Children Act 1989

27. The Explanatory Notes to the Specified Accommodation Regulations confirm:

Where an adult has needs for care and support which can be met only by living in accommodation of a specified type and is living in accommodation of a specified type in Wales, the adult is to be treated (by virtue of section 194(1) of the Act) as ordinarily resident in the area in which the adult was ordinarily resident immediately before the adult began to live in the specified type of accommodation.

28. The relevant sections of the Social Services and Well-being (Wales) Act 2014 Part 11 Code of Practice (Miscellaneous and General), issued under section 145 of the 2014 Act, state as follows:

Section 194(1) deals with where an adult is to be treated as ordinarily resident, if the local authority which is responsible for meeting their needs for care and support makes arrangements for the adult to live in accommodation of a particular type. As a consequence of these arrangements, the adult may move to another area. In this situation, the effect of this provision is that the adult will be treated, for the purposes of this 2014 Act, as being ordinarily resident in the area of the local authority which made the arrangements (and not in the area to which they move).

Ordinary residence when arranging accommodation in another area

There will be cases where the local authority considers it appropriate for a person's care and support needs to be met by the provision of accommodation in the area of another authority. If the person has needs which can only be met through certain types of accommodation, then in addition to their involvement in the planning process, the person will also have a right to make a choice about their preferred accommodation. This right allows the person to make a choice about certain types of accommodation, including where this is situated within the area of another authority. Provided that certain conditions are met, the local authority must arrange for the preferred accommodation the person has chosen. (See the Care and Support (Choice of Accommodation) (Wales) Regulations 2015 and the codes of practice

relating to Parts 4 and 5 on direct payments, choice of accommodation, financial assessment and charging).

This will mean that local authorities will in some circumstances be required to arrange accommodation that is located in a different area. Moreover, there will also be other situations in which a local authority chooses to arrange accommodation for a person in another area, because that has been agreed with the person concerned. In any such case, it should be clear which local authority is responsible for meeting the person's needs in the future.

... where an adult has needs which can only be met through the provision of care home accommodation, and the accommodation is arranged in another local authority area, then the principle of "deeming" ordinary residence applies. The adult is therefore treated as remaining ordinarily resident in the area where they were resident before the placement began. The consequence of this is that the local authority which arranges the accommodation will remain responsible for meeting the person's needs, and responsibility does not transfer to the authority in whose area the accommodation is physically located. The 'placing' authority's responsibility will continue in this way for as long as the adult's needs are met by the specified type of accommodation.

The ordinary residence 'deeming' principle applies most commonly where the local authority provides or arranges the accommodation directly. However, the principle also applies where a person takes a direct payment and arranges their own care and support. In such cases the individual has the choice over how their needs are met, and arranges their own care and support. If the care and support plan stipulates that the person's needs can be met only if the adult is living in care home accommodation, and the person chooses to arrange that accommodation in the area of a local authority which is not the one making the direct payment, then the same principle would apply – i.e. the local authority which is meeting the person's care and support needs by making a direct payment would retain responsibility. However, if the person chose accommodation that is outside what was specified in the care and support plan or of a type of accommodation not specified in the regulations (for example, if the person moves into a shared lives arrangement or into supported living accommodation), then the 'deeming' principle would not apply.

If it is determined that the individual's needs could best be met by staying with the new service, and the individual chooses to remain in that setting, then the status of the individual will change from that of a care home resident to a tenant in supported living accommodation. The individual's place of ordinary residence will therefore have changed, and responsibility for meeting their care and support needs will transfer to the local authority where they are living. Where, following re-assessment, it is decided that the person's needs can still only be met by being accommodated in a care home, the placing local authority will need to arrange a different care home placement for that person. In these circumstances, the deeming provisions will continue to apply and responsibility for meeting that person's care and support needs will remain with the placing authority.

29. Annex 2 to the Code of Practice contains the following:

Self-arranged placements

This guidance does not apply in relation to individuals who arrange their own care. Individuals who arrange and pay for their own care will normally become ordinarily resident in and/or the responsibility of the area to which they move. This guidance does apply to individuals who pay for their own residential care where that care is arranged by an authority.

30. The argument advanced by LA2, which is set out below, references the equivalent legislation in England. That legislation is different to the Welsh legislation in one material respect. The deeming provisions under section 194 of the 2014 Act in Wales and those under section 39 of the Care Act 2014 in England mirror one another. Section 39(1) reads:

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,

31. However, a difference exists in the wording of the respective sets of subordinate regulations which define “Specified Accommodation”. In the case of the English legislation, the Care and Support (Miscellaneous Amendments) Regulations 2015 introduced a change to the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014. The amending regulations were made on 10 March 2015 and their effect is to insert Regulation 2(2) which specifies:

The types of accommodation referred to in paragraph (1) are specified in relation to an adult for the purposes of section 39(1) of the Act only if the care and support needs of the adult are being met under Part 1 of the Act while the adult lives in that type of accommodation.

32. The reason for the addition of Regulation 2(2) is set out within the accompanying Explanatory Notes, which state:

Regulation 4 amends the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014. These Regulations set out the types of accommodation to which the ordinary residence rule in section 39(1) of the Act applies. The effect of the amendments is that the deeming of ordinary residence applies only from when the person living in one of the specified types of accommodation begins to receive care and support under the Act.

33. There is no corresponding provision under Welsh law.

34. The Care and Support Statutory Guidance issued under the Care Act 2014 is in the same terms as the Welsh Code of Practice but it includes, at Annex J2, further guidance on ordinary residence for “People who are accommodated under the 12 week property disregard”. The relevant section reads:

18. At the end of 12 weeks, the value of the person’s home is taken into account ... This may result in the person becoming liable to pay for all of the costs of their care

and choosing to enter into a private contract with the care home for the provision of their care on a permanent basis, rather than continuing to be provided with accommodation by their placing authority. In such a case the person would be likely to acquire an ordinary residence in the new area, in line with the settled purpose test in Shah.

19. If the person's needs or circumstances change and they subsequently require additional or different care and support, including residential care, they should approach the local authority where their care home is situated. However, if they enter into a deferred payment agreement with the original authority or there is another reason such as lack of mental capacity as to why they were unable to enter into a private contract with the care home, they will remain the responsibility of the original authority.

The parties' submissions

35. LA1 and LA2's respective contentions are set out within the correspondence which precedes this determination.

36. LA1 contends that:

- a. X is ordinarily resident within the area of LA2, by virtue of the operation of the deeming provision.
- b. X's situation is analogous to that of the individual who was the subject of a determination of the Welsh Ministers dated 9 February 2021, in which a change in funding arrangements did not result in the disapplication of the deeming provisions.

37. LA2 contends that the deeming provision ceased to apply to X when she became self-funding. Within an email dated 8 March 2023, LA2 expressed its position as follows:

[X] becoming a self funder was a "break in the chain" for the purposes of the deeming provision to which you refer. The deeming provisions cannot apply indefinitely so long as a person remains in the same placement when there is a different source of funding or no further involvement from the placing authority.

[Section 194] can only apply if the person has needs for care and support which can only be met if the adult is living in accommodation of a type specified in regulations. Under the Care and Support (Ordinary Residence)(Specified Accommodation) (Wales) Regulations 2014 one of the types of accommodation specified is a care home. However, [X's] care and support needs were no longer being met by [LA2] under Part 4 of the 2014 Act whilst she remained in the accommodation as a self funder. In England, this point has been confirmed by an amendment to their Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 which specify at regulation 2(2):

'The types of accommodation referred to in paragraph (1) are specified in relation to an adult for the purposes of section 39(1) of the Act only if the care and support needs of the adult are being met under Part 1 of the Act while the adult lives in the type of accommodation'.

The ordinary residence regime is similar to that in Wales and therefore essentially it must also be the case in Wales. This view is reinforced by the fact that the Part 11 Code of Practice adopts almost identical wording to that in the English Guidance ...

The application of the law to this case

38. Whilst ordinarily resident in the area of LA2, X was assessed as having (employing the words of section 194) needs for care and support which could only be met within a care home.
39. By virtue of section 194, X is to be treated as remaining ordinarily resident in the area in which she was ordinarily resident immediately before she began to live in accommodation of a type specified in the Welsh Specified Accommodation Regulations, namely care home accommodation.
40. She was ordinarily resident in the area of LA2 before she began, on 23 November 2021, to live in the Care Home and she has remained in that accommodation ever since. The placement was identified by X's family and arranged by LA2. X has remained without capacity to arrange her own care throughout this period.
41. X has had sufficient capital to meet the fees payable to the Care Home since March 2022 and she is likely to be self-funded for a significant further period. Section 194 of the 2014 Act and the Welsh Specified Accommodation Regulations do not require that, for the deeming provision to continue to apply, the local authority must continually fund the placement. The only requirement is continued need for care and support which can only be met in a care home (however funded).
42. Although the Code of Practice expressly contemplates the disapplication of the deeming provision in circumstances where an individual moves from care home accommodation to some other form of support, it does not specify disapplication of the deeming provision in the event of a period of self-funding.
43. It is beyond the remit of this determination to speculate on what the outcome might be if the same situation arose in England. Even if it could be shown that the amendment of the English regulations was designed to cause a break in the deeming provision during a period of self-funding, this would be of limited relevance. No corresponding change has been made in Wales, notwithstanding that the amendment of the English regulations preceded the coming into force of the Welsh counterpart.
44. Consideration of the equivalent legislation in England is, therefore, of limited assistance to this determination, which must be based solely on the applicable Welsh legislation.
45. The fundamental purpose of the deeming provision is to create a system in which local authorities do not escape long-term financial responsibility by placing individuals outside their own areas. That purpose would be defeated if a period of self-funding (potentially of very short duration) interrupted the application of the deeming provision.

Determination

46. For the reasons set out above, the Welsh Ministers have determined that:
- a. the deeming provision under section 194 applies in X's case;
 - b. X's ordinary residence remains in the area of LA2;
 - c. responsibility for the funding of her care will rest again with LA2 once her capital reduces below the applicable threshold.

Dated: 04 December 2023