

DETERMINATION

Mr X
ORDINARY RESIDENCE DISPUTE BETWEEN
COUNCIL A
&
COUNCIL B

Introduction

- 1 By letter dated 17th December 2015, Council A requested a determination of ordinary residence by the Scottish Ministers in terms of section 86 of the Social Work (Scotland) Act 1968 (“the 1968 Act”) in respect of Mr X (“the Adult”). That letter enclosed a statement of facts jointly agreed between Council A and Council B, “The Parties”, together with submissions from both local authorities.

With reference to this documentation and the applicable legal framework, Scottish Ministers conclude that the Adult is ordinarily resident in the area of Council A.

Agreed Facts between the Parties

- 2 The Adult was born on 7th March 1975 in the area of Council A and lived there with his parents.
- 3 The Adult was born with cerebral palsy, and is registered blind. He has been assessed with physical, sensory and learning disabilities as well as epilepsy, a number of allergies and chronic eczema. The Parties agree that the Adult lacks capacity and is unable to make a decision about where to live or settle.
- 4 Up until the age of 5 the Adult resided with his parents in the area of Council A.
- 5 At age 5, the Adult was assessed by Council A as requiring 24 hour care and placed by Council A, via the Education Department, into a Care Home run by Charity A in the area of Council B.
- 6 On the 21 December 1992 Council A moved the Adult to an address within Council B’s area on a supported residential basis. It was run by X.
- 7 In 2003, the Adult was moved to a Care Home, also run by X.
- 8 On 1st April 2010, X de-registered the Care Home and the property became “Accommodation with Support”. The Adult continues to live there.

- 9 On the 20th July 2010, the parents acquired Welfare Guardianship powers for the Adult for an indefinite period.
- 10 One of the Adult's guardians signed a tenancy agreement on behalf of the Adult, with X, on the 1st November 2013. The tenancy start date within the agreement was 1st April 2010.
- 11 The Parties have been communicating since May 2013 and have been unable to reach a resolution. Originally the disagreement related to the change from care home to accommodation with support and then evolved to take account of the tenancy agreement.
- 12 The dispute revolves around the ordinary residency for the Adult from 1st November 2013, when the Adult's Guardian signed the tenancy agreement.

Statutory Framework

Duty to Provide Accommodation and/or Services

- 13 Local authorities in Scotland have a general duty under section 12 of the Social Work (Scotland) Act 1968 ("the 1968 Act")

"to promote social welfare by making available advice, guidance and assistance ... and in that behalf to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate ... to any relevant person." In this context a relevant person is a person who is 18 years or over and who is "...within their area."

Accommodation and/or Services: Charging Framework

- 14 Section 86 of the 1968 Social Work (Scotland) Act provides for adjustments in relation to expenditure incurred between a local authority which is itself providing accommodation and/or services, and the local authority of the area in which the person, in respect of whom such accommodation and/or services is provided, is ordinarily resident.
- 15 Similarly, the Recovery of Expenditure for the Provision of Social Care Services (Scotland) Regulations 2010 ("the 2010 Regulations") entitles a local authority which incurs expenditure through the provision of services or facilities in accommodation with support to a person who is ordinarily resident in another local authority area under arrangements made under section 86(4) of the 1968 Social Work (Scotland) Act, to recover those costs from the local authority of the area where the person is ordinarily resident. Any dispute arising in relation to the ordinary residency of a person can be determined by Scottish Ministers under section 86(2) of the 1968 Act, the powers of the Secretary of State, as

cited originally in section 86, having transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998.

Determining Ordinary Residence: Statutory “Disregards”

- 16 In determining a person’s ordinary residence for the purpose of section 86(1), certain “disregards” apply.
- 17 Section 86(3) of the 1968 Act states that “in determining...the ordinary residence of any person..., any period during which he is provided with accommodation under this Act...., or in the case of a child, any period during which he resided in any place as an inmate of a school or other institution, or provided with accommodation under ... paragraph (c) of, section 26(1) of the Children (Scotland) Act 1995 shall be disregarded.”
- 18 Paragraph 9.3, of the 2010 Circular CCD3/2010, additionally provides that time spent by a person in accommodation with support is to be considered as accommodation provided under Section 86 of the Social Work (Scotland) Act, 1968.

Decisions of a Legal Proxy

- 19 Paragraphs 21-28 of the 2015 Circular (CCD3/2015) provides that where a person’s mental capacity prevents a voluntary choice of where to live then a legal proxy may make this decision.
- 20 “The effect of a person having formally acquired proxy decision making status is that any decision made in that capacity is to be treated as if the individual who lacks capacity has made the decision themselves.” (Paragraph 23)
- 21 Paragraph 26 of the 2015 Circular (CCD3/2015) states that where the “proxy arranges the move without the local authority making arrangements, the individual’s ordinary residence will change to the new area”.

Parties’ Submissions

Submissions on behalf of Council A

- 22 That Council A accept that the Adult was ordinary resident in the area of Council A as a child living with his parents.
- 23 That thereafter, as a child living in the School in the area of Council B, he continued to be ordinary resident in the area of Council A during that time.
- 24 That the Adult has been living in the area of Council A for over 35 years and as such is settled in the area, actively goes to church and takes part in activities in the area.
- 25 That the Adult returns to his parents on alternative weekends.

- 26 That the parents are now legally Financial and Welfare Guardians, with the ability to make a decision in terms of where the Adult lives and with that his ordinary residency status.
- 27 That the guardians have made a decision when signing a tenancy agreement with X on the 1st November 2013.
- 28 That the Adult's ordinary residency changed on the 1st of November 2013, when the tenancy agreement was signed by a legal guardian.
- 29 Council A believe that the change in status from Care Home to Housing Support and Care at Home did affect the ordinary residency of the Adult on the 1st of April 2010, and therefore refute Council B's claim that it did not.
- 30 They refute Council B's argument that the tenancy agreement was a part of the de-registration process of the care home and submit that it constitutes a decision made by someone legally able to do so.

Submissions on behalf of Council B

- 31 That the Adult is ordinary resident in the area of Council A.
- 32 That the Adult was born in the area of Council A and moved by Council A to the School within the area of Council B in 1980.
- 33 That in 1992, the Adult moved to different accommodation within the area of Council B run by X.
- 34 In 2003, the Adult moved to a Care Home within the area of Council A run by X.
- 35 That the School and the accommodation provided by X at both addresses is to be disregarded under Section 86 (3) of the 1968 Act.
- 36 That the 2010 de-registering of the Care Home did not change the address or materially change the services provided by X.
- 37 Council B refutes the claim that the de-registering of the Care Home in 2010 triggered a change of ordinary residency, referencing Circular CCD 3/2010.
- 38 That the tenancy agreement should be considered part of the de-registration of a Care Home.
- 39 That if the tenancy agreement is sufficient to change ordinary residency then this would allow the exportation of liability, with the person, and would impact on areas such as Council B's area where many local authorities have placed individuals into specialised care homes.
- 40 That correspondence between the Parties since 2013 has failed to resolve the dispute.

Discussion

- 41 It is well established that accommodation provided under the 1968 Social Work (Scotland) Act is to be disregarded from consideration of ordinary residency as outlined and elaborated by Section 86 of the Act. Whilst a person is accommodated under the 1968 Act, the location of the accommodation will not impact on the ordinary residency of that person. Therefore, the placing of an individual by one local authority into accommodation in the area of another local authority, whilst exercising their responsibilities outlined in the 1968 Act is not expected to change the ordinary residence of the individual moved.
- 42 Whilst there has been disagreement in the past between the local authorities regarding the deregistration in 2010, this determination has been made in relation to the signing of the lease in November 2013.
- 43 It is the understanding of the Scottish Ministers that the de-registering of the Care Home on 1st April 2010 did not provide a material change to the services provided which can still be considered disregarded in terms of defining ordinary residence under Section 86 of the Social Work (Scotland) Act 1968. The de-registration was in line with a policy shift. As such, the accommodation provided after 2010, should also be disregarded from consideration of ordinary residency.
- 44 Circular CCD3/2015 states that prior to the 2010 Guidance CCD3/2010, local authorities could “offload” expensive care packages and local authorities with specialist units, in some instances, ended up paying for expensive care packages. Whilst “offloading” is discouraged, Circular CCD3/2015 re-iterates the ability of an individual to choose a location for permanent residency (Paragraph 67).
- 45 Where an individual lacks the capacity to make an decision in terms of residence, Circular CCD3/2015 clarifies that this decision must be made in terms of the guidelines and can be made by a legal proxy. However, the guidance further qualifies that where the local authority “arranges the move” then there will be no change in ordinary residency even if the proxy supported the move. To change ordinary residency, the legal proxy would have to be responsible, rather than the local authority.
- 46 The Welfare Guardianship Order was dated 20th July 2010, and as such was not in place at the time of de-registration of the care home on 1st April 2010.
- 47 The tenancy agreement we have been provided with was signed on 1st November 2013 but with a start date of the 1st April 2010. There was no change of address, services or the provider on the 1st April 2010 or 1st November 2013. There are no records to suggest the Welfare Guardian was responsible for a decision at this point.
- 48 In this instance, the submissions suggest that no one arranged a “move” on 1st November 2013, in addition there is no record of a decision made by the Guardians at the time of the de-registration or following the de-registration, when their guardianship document was ratified.
- 49 In this instance, at the time of the change in status of the care home, there was no legal proxy. As there was no legal guardian to agree/organise or change the residence of the

adult, the only body capable of doing so in a legal capacity was Council A in discharging their Section 86, 1986 Act duties.

- 50 That the support services and accommodation provided at the Care Home after 1st April 2010 were a continuation of those provided before to the Adult.
- 51 It is the opinion of the Ministers, that the shortfall of a signed contract to cover this period between 2010 and 2013 does not discharge the responsibilities of Council A under the 1968 Act. That a backdated tenancy agreement does not constitute a 'move' driven by a legal proxy and that there was no change of address, provider, services or a decision made that could impact on ordinary residency on the 1st of November 2013.

Determination

The Scottish Ministers determine, given the information provided by the Parties and in line with the discussion above, that the Adult is ordinary resident in the area of Council A and remains ordinary resident in the area of Council A.