

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

Agreed Facts between the Parties

- 3 The Adult was born on 5th December 1975 in the area of Council A and lived there until his parents separated in 1977.
- 4 The Adult suffered a brain injury in early childhood, and from this was diagnosed with a learning disability. In 1999, the Adult was diagnosed with Autism. In addition he is understood to suffer from epilepsy and anxiety. The Parties agree that the Adult is unable to make his own decision on residency and lacks capacity.
- 5 In July 1977, the Adult moved within Council A’s area to live with his father in his grandparents’ home. He attended School in the area of Council A.
- 6 In May 1978, the Adult was moved to a School in the area of Council B.
- 7 The Adult returned to his father’s home for weekends and holidays and where he attended a local Childrens’ Home during the day on a respite basis. This continued when his father remarried and moved to an area within the region of Council A at the time. This was changed to alternate weekends when the family had difficulties and Council A arranged for placement in a foster home for alternate weekends and some holidays.
- 8 The Adult continues to spend time with both his father and his foster parents.

- 9 On the 27th June 1994, the Adult moved to a different address within Council B's area. This was accommodation run by X.
- 10 On the 19th August 2003, the Adult moved to a Care Home, also run by X.
- 11 In April 2010, the Care Home was de-registered as a Care Home and was re-classified as 'Accommodation with Support'.
- 12 On the 27th March 2012, The Adult's father and uncle obtained Welfare Guardianship powers for the Adult, for a period of ten years.
- 13 The Adult's father, as a guardian and on behalf of the Adult, signed a tenancy agreement with X for accommodation with support on the 6th November 2013. The tenancy agreement start date is stated within this tenancy agreement as the 1st April 2010.

Statutory Framework

Duty to Provide Accommodation and/or Services

- 14 Local authorities in Scotland have a general duty under section 12 of the Social Work (Scotland) Act 1968 ("the 1968 Act")
- 15 "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

- 16 Section 86 of the 1968 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.
- 17 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 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 residence 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”

- 18 In determining a person’s ordinary residence for the purpose of section 86(1) of the 1968 Act, certain “disregards” apply.
- 19 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.”
- 20 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 1968 Act and would therefore be disregarded from considerations of ordinary residence.

Decisions of a Legal Proxy

- 21 Paragraphs 21-28 of the 2015 Circular (CCD3/2015) states that where a person’s mental capacity prevents a voluntary choice of where to live then a legal proxy may make this decision on their behalf .
- 22 “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)
- 23 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

- 24 That Council A accept that the Adult was ordinary resident within the area of Council A as a child living with his parents.
- 25 Thereafter, as a child living in the area of Council B, the Adult continued to be ordinary resident in the area of Council A.

- 26 The Adult has been living in the area of Council B for over 35 years and as such is settled in the area.
- 27 The family 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.
- 28 The guardians made a decision as to where the Adult should live when signing a tenancy agreement with X on 6th November 2013. The Adult's ordinary residency accordingly changed on the 6th 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 and Support did affect the ordinary residency of the Adult on the 1st of April 2010, and refute Council B's claim that it did not.
- 30 Council A 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 In 1978 the Adult was placed by Council A into the accommodation within the area of Council B.
- 33 In 1994, at 18 years of age, the Adult moved to within the area of Council B to accommodation run by X.
- 34 In 2003, the Adult moved to a Care Home, within the area of Council B run by X.
- 35 The accommodation provided by X at both addresses, are to be disregarded under Section 86 (3) of the 1968 Act.
- 36 The 2010 de-registering of the Care Home did not change the address or materially change the services provided by X, which were provided under the 1968 Act.
- 37 Council B refute the claim that the de-registering of the Care Home in 2010 triggers a change to ordinary residency, referencing Circular CCD 3/2010.
- 38 A tenancy agreement of some type would have existed from April 2010, and would have been signed by someone who may not have had legal authority.
- 39 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 the area of Council B where many local authorities have placed individuals into specialised care homes.

40 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 a 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 circular 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.
- 46 The guardianship order was dated 27th March 2012, and therefore was not in place on the 1st April 2010. There was no change of address, services or the provider on the 1st April 2010 or 6th November 2013. In this instance, the submissions suggest that no one arranged a “move” on 6th November 2013 and there is no record made of a decision on this as having being made by the legal Guardians.
- 47 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, 1968 Act duties.
- 48 That the support services and accommodation provided within the area of Council B after 1st April 2010 were a continuation of those provided before that date to the Adult and

were agreed to be suitable by Council A. In 2013, there was no material change beyond the signature of a tenancy agreement.

- 49 It is the opinion of the Ministers, that the shortfall of a signed contract (tenancy agreement) to cover this period between 2010 and 2013 does not discharge the duty of Council A, under the 1968 Act. It is considered 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 would affect ordinary residency on the 6th November 2013.

Determination

The Scottish Ministers have determined, given the information provided and in line with the appropriate legislation and discussion above, that the Adult is ordinary resident in the area of Council A and remains ordinary resident in the area of Council A.