



## A: Introduction

1. "Ordinary residence" is an important concept relevant to all those who may have dealings with the Court of Protection in connection with a person's welfare. It determines which social services authority is responsible for meeting a person's care and support needs (under the Care Act 2014) and which Supervisory Body is responsible for assessing and authorising deprivations of liberty (under schedule A1 of the MCA).
2. However, the classic test for "ordinary residence" is not directly applicable to those who lack capacity to decide where they wish to reside. In *Shah v London Borough of Barnet* [1983] 1 All ER 226 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.*

3. This guidance note sets out the key considerations to be applied when assessing the ordinary residence of a person who lacks the mental capacity to forming a settled intention where to live.

## Editors

Peter Mant  
Annabel Lee  
Alex Ruck Keene

**Disclaimer:** This document is based upon the law as it stands as at March 2018; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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## B: Key principles

4. The approach to determining the ordinary residence of a person with impaired capacity was considered by the Supreme Court in *R (Cornwall Council) v Secretary of State for the Home Department & Ors* [2015] UKSC 46. At the time, the relevant Department of Health Guidance on Ordinary Residence suggested two alternative tests based on the decision of Taylor J in *R v Waltham Forest Borough Council, Ex p. Vale* The Times, 25 February 1985 (often referred to as the “Vale Tests”). The first test was said to apply where a person was totally dependent on a parent or guardian, such that the concept of having independent ordinary residence adopted for settled purpose did not arise, and the person’s place of ordinary residence was that of the parents. The second test involved assessing a person’s ordinary residence as if they had capacity, considering all the facts, including the person’s physical presence in a particular place and the nature and purpose of that presence, as outlined in Shah, but without requiring the person themselves to have adopted the residence voluntarily.
5. In *Cornwall* the Secretary of State submitted that it was necessary to determine “the seat of the person’s decision-making power.” This submission was rejected by the Supreme Court which expressly disapproved the Department of Health’s then guidance. It held that the single question in *Vale* was whether the relevant person’s period of actual residence with her parents was sufficiently “settled” to amount to ordinary residence. Whilst an approach based on ordinary residence of the decision-maker might have force from a policy point of view, it was “impossible to reconcile with the language of the statute, under which it is the residence of the subject, and the nature of the residence, which provide the essential criterion”.
6. The Department of Health updated its Care and Support Statutory Guidance to take account of the *Cornwall* decision (and continues to update the broader Guidance on a regular basis, most recently on 12 February 2018). In material part, it reads as follows, as at March 2018:<sup>3</sup>

### ***Cases where a person lacks capacity to decide where to live***

*19.23 All issues relating to mental capacity should be decided with reference to the Mental Capacity Act 2005 (the 2005 Act). Under this Act, it must be assumed that adults have capacity to make their own decisions, including decisions relating to their accommodation and care, unless it is established to the contrary.*

*19.24 The test for capacity is specific to each decision at the time it needs to be made, and a person may have capacity to make some decisions but not others. It is not necessary for a person to understand local authority funding arrangements to have capacity to decide where they want to live.*

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<sup>3</sup> Footnotes deleted.

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19.25 *If it can be shown that a person lacks capacity to make a particular decision, the 2005 Act makes clear how decisions should be made for that person. For example, if a person lacks capacity to decide where to live, a best interests' decision about their accommodation should be made under the 2005 Act. Under section 1(5) of the 2005 Act, any act done, or decision made (which would include a decision relating to where a person without capacity should live), must be done or made in the best interests of the person who lacks capacity. Section 4 of the 2005 Act sets out how to work out the best interests of a person who lacks capacity and provides a checklist of factors for this purpose.*

19.26 *Where a person lacks the capacity to decide where to live and uncertainties arise about their place of ordinary residence, direct application of the test in Shah will not assist since the Shah test requires the voluntary adoption of a place.*

[...]

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.*

19.33 *Physical presence provides a starting point for considering ordinary residence but does not necessarily equate to ordinary residence - a person could be physically present in an area but of no settled residence. This is covered in paragraphs 19.44 to 19.46 of the Care Act statutory guidance.*

19.34 *In certain situations, ordinary residence could be deemed to be in a different area to that in which a person is physically present. This is covered in paragraphs 19.44 to 19.59 of the Care Act statutory guidance and in the section below on looked after children transitioning to adult social care services.*

19.35 *Other situations such as temporary absences and people having more than one home are covered in paragraphs 19.70 to 19.74 of the Care Act statutory guidance.*

19.36 *The issue of duration is covered in paragraph 19.15 of the Care Act statutory guidance.*

7. This general approach is subject to any statutory "deeming" provisions. The majority in the Supreme Court held that a child who had been placed in foster care in local authority A, which had been arranged by local authority B under the Children Act 1989 continued to be ordinarily resident in local authority B when he reached 18 years of age. Lord Carnwath stated that the underlying purpose behind provisions in both children's and adult legislation is that:

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*an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it.*

### C: Deeming provisions

8. Under section 39 of the Care Act 2014, and the regulations made under it, a person who is placed “out of area” is deemed to remain ordinarily resident in the area of the placing authority and does not acquire ordinary residence in the area of the “host” authority.
9. The deeming provisions apply 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. Three types of accommodation are specified in the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014, namely:
  - a. “Care home accommodation” – defined as accommodation in a care home within the meaning of section 3 of the Care Standards Act 2000;
  - b. “Shared lives scheme accommodation”- defined as accommodation provided for an adult by an individual who, under the terms of a shared lives agreement, provides, or intends to provide, personal care for adults together with, where necessary, accommodation in the individual’s home; and
  - c. “Supported living accommodation”- defined as (a) accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible; and (b) accommodation which is provided—
    - (i) in premises which are intended for occupation by adults with needs for care and support (whether or not the premises are specifically designed or adapted for that purpose); and
    - (ii) in circumstances in which personal care is available if required.
10. Under previous legislation the deeming provision applied only to accommodation provided under Part III of the National Assistance Act 1948, which generally excluded shared lives and supported living placement.
11. Where the deeming provisions under the Care Act 2014 apply, an adult is to be treated as ordinarily resident in the area in which he was ordinarily resident immediately before he began to live in accommodation of a type specified in the regulations, or if the adult was of no settled residence immediately before the accommodation was provided, in the area in which the adult was present at that time.
12. In *R (Greenwich) v Secretary of State and Bexley* [2006] EWHC 2576 (Admin), Charles J held that the deeming provisions should be treated as applying also where a person “should have been” provided with the relevant accommodation. Accordingly, a local authority cannot avoid the effect of the deeming provisions through failure to comply with its statutory duties.

13. Deeming provisions also apply in respect of NHS accommodation and after care provision under section 117 of the Mental Health Act 1983. An adult provided with NHS accommodation is to be treated as ordinarily resident in the area in which he was ordinarily resident immediately before the accommodation was provided, or if the adult was of no settled residence immediately before the accommodation was provided, in the area in which he was present at that time.
14. An adult who is being provided with accommodation under section 117 of the Mental Health Act 1983 (after-care) is to be treated as ordinarily resident in the area of the local authority on which the duty to provide the adult with services under that section is imposed.
15. Under paragraph 183 of Schedule A1 to the MCA, the deeming provisions under section 39 Care Act 2014 apply to any determination of where a person is ordinarily resident the purpose of MCA DOLS. Accordingly, where a local authority provides or arranges an "out of area" care home placement it will be the Supervisory Body notwithstanding that the care home is in the area of another local authority.

#### D: Determining Ordinary Residence

16. Where two or more local authorities are in dispute as to a person's ordinary residence, they may apply to the Secretary of State to determine the issue (under section 40 of the Care Act 2014 or paragraph 183(3) of Schedule A1 to the MCA). The Secretary of State has published some anonymised determinations as examples of how the disputes are determined.<sup>4</sup>
17. The Care and Support (Disputes Between Local Authorities) Regulations 2014 set out the procedure to be followed where a dispute arises in respect of community care provision. Regulation 2 states that the authorities must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult or carer to whom the dispute relates. It provides that the local authority which is meeting the needs of the relevant person on the date on which the dispute arises must continue to meet those needs until the dispute is resolved. If no local authority is meeting the person's needs, the duty falls upon the authority in whose area the person is living or present. Regulations 3 sets out the steps that the authorities must take before any referral to the Secretary of State. All reasonable steps must be taken to resolve the dispute. If a referral is made, the procedure to be followed is set out in regulation 4.
18. Similar provisions apply in respect of DOLS disputes. Under regulation 18 of the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 a local authority that receives a request for a standard authorisation must act as Supervisory Body until the question of the person's ordinary residence has been determined.

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<sup>4</sup> See [www.gov.uk/government/publications/ordinary-residence-anonymised-determinations-2017](http://www.gov.uk/government/publications/ordinary-residence-anonymised-determinations-2017) for examples from 2017. Determinations from previous years are also available.

The Ordinary Residence Disputes (Mental Capacity Act 2005) Directions 2010 set out the procedure to be followed where a dispute arises.

### E: Health warnings

19. Practitioners should be aware that the approach to ordinary residence in relation to those with impaired capacity is different in Scotland. In very general terms, unless there is specific authority granted to move such a person (for instance under a power of attorney) their ordinary residence will not change: see the Scottish judicial review concerning Milton Keynes Council discussed in the [Scotland](#) section of the December 2015 issue of our Newsletter and also SCIE's guidance on cross-border placements to be found [here](#). The DH has been "[considering its position](#)" in relation to this decision since 11 March 2016.
20. Practitioners should also be aware that "ordinary" residence is not necessarily the same as "habitual" residence. The jurisdiction of the Court of Protection to make orders relating to the welfare of a person is based (generally) upon their habitual residence in England and Wales,<sup>5</sup> and a person may be habitually resident here without being ordinarily resident here. For an overview of the case-law relating to habitual residence in this context, see the judgment of Baker J in [Re DB and Re EC](#) [2016] EWCOP 34.

### F: Useful resources

4. Useful free websites include:
  - <https://www.gov.uk/government/collections/ordinary-residence-pages> - anonymised examples of how the Department of Health arrives at decisions in ordinary residence disputes between authorities in the health and social care sector.
  - [www.39essex.com/resources-and-training/mental-capacity-law](http://www.39essex.com/resources-and-training/mental-capacity-law) – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing [marketing@39essex.com](mailto:marketing@39essex.com).
  - [www.mclap.org.uk](http://www.mclap.org.uk) – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.
  - [www.mentalhealthlawonline.co.uk](http://www.mentalhealthlawonline.co.uk) – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983.

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<sup>5</sup> Although a High Court judge can, in principle, make protective orders relating to a British national with impaired capacity wherever they are resident in the world even if they are no longer habitually resident in England and Wales. See [Re Clarke](#) [2016] EWCOP 46.

It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.

- [www.scie.org.uk/mca-directory/](http://www.scie.org.uk/mca-directory/) - the Social Care Institute of Excellence database of materials relating to the MCA.

**Michael Kaplan**  
Senior Clerk  
michael.kaplan@39essex.com

**Sheraton Doyle**  
Senior Practice Manager  
sheraton.doyle@39essex.com

**Peter Campbell**  
Senior Practice Manager  
peter.campbell@39essex.com



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[clerks@39essex.com](mailto:clerks@39essex.com) • [DX: London/Chancery Lane 298](mailto:DX: London/Chancery Lane 298) • [39essex.com](http://39essex.com)

**LONDON**  
81 Chancery Lane,  
London WC2A 1DD  
Tel: +44 (0)20 7832 1111  
Fax: +44 (0)20 7353 3978

**MANCHESTER**  
82 King Street,  
Manchester M2 4WQ  
Tel: +44 (0)16 1870 0333  
Fax: +44 (0)20 7353 3978

**SINGAPORE**  
Maxwell Chambers,  
#02-16 32, Maxwell Road  
Singapore 069115  
Tel: +(65) 6634 1336

**KUALA LUMPUR**  
#02-9, Bangunan Sulaiman,  
Jalan Sultan Hishamuddin  
50000 Kuala Lumpur,  
Malaysia: +(60)32 271 1085

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