

Adult Social Care and Health

Ordinary Residence practice guidance

To be read with the [Care and Support Statutory Guidance](#), [Regulations issued under the Care Act 2014](#) by the Department of Health.

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ORDINARY RESIDENCE – KCC Adult Social Care

Version	Issue	Summary changes
14	17 Aug 2023	<p>1. Section 4: Ordinary residence overview updated. (Page 10)</p> <p>Updated following Supreme Court Judgment on 10 August 2023 R (on the application of Worcestershire County Council) (Appellant) v Secretary of State for Health and Social Care (Respondent) [2023] UKSC 31</p> <p>The Supreme Court unanimously allows Worcestershire's appeal and rejects the Secretary of State's cross-appeal. It declares that, following the second discharge, Swindon, and not Worcestershire, had a duty to provide after-care services for JG under section 117 of the Act.</p> <p>You can read the full judgment here.</p> <p>You can read the press summary release here.</p> <p>2. Updated to reflect locality team structure change.</p>

ORDINARY RESIDENCE – KCC Adult Social Care

Contents. Select each hyperlink to the location within this document.

- 1 [Key principles](#)
- 2 [Definition](#)
- 3 [Legislation and Statutory Guidance](#)
- 4 [Ordinary residence overview:](#)
 - [People with urgent needs](#)
 - [People who are party to deferred payments agreements](#)
 - [People who are accommodated under the 12 -week property disregard](#)
 - [People who are arranging and paying for their own care](#)
 - [NHS Continuing Healthcare](#)
 - [British citizens resuming permanent residence in England after a period abroad](#)
 - [Armed Forces veterans and families of armed forces personnel](#)
 - [Young people in transition from children’s services to adult social care and support](#)
 - [Other provisions under which ordinary residence determination can be sought](#)
 - [Section 117 \(aftercare\)](#)
 - [Direct Payments](#)
 - [University Students](#)

Practice Guidance

- 5 [Good Practice for Ordinary Residence Change – including collating information.](#)
- 6 [Checklist on managing requests for transfer of ordinary residence responsibility.](#)
- 7 [Disputed applications](#)
 - 7.1 [Checklist to be followed when in dispute with other local authorities on ordinary residence.](#)
- 8 [Placing a resident outside of Kent.](#)

Appendices

- | | |
|-------------------|---|
| Appendix 1 | List of supporting letters available on Tri-X |
| Appendix 2 | Specified Accommodation definitions |
| Appendix 3 | Briefing Notes Ordinary Residence and the Cornwall Judgment |
| Appendix 4 | Determining ordinary residence and local authority responsibility. when arranging extra care housing in another county-specific examples. |

ORDINARY RESIDENCE – KCC Adult Social Care

1. Key Principles

- 1.1 Kent's responsibility for meeting an adult's eligible needs under the Care Act 2014 is based on the concept of "ordinary residence".
- 1.2 It will be assumed that a person has capacity to make their own decisions relating to accommodation and care unless it is established to the contrary.
- 1.3 A person cannot have more than one ordinary residence in two local authorities under the Care Act: if their time is genuinely divided equally between two homes, it must be established to which of the two they have a stronger link.
- 1.4 Ordinary residence can be acquired as soon as the person moves to an area; determination will be dependent on the nature and quality of their connection with the new place.
- 1.5 People who have no settled residence, but are physically present in Kent, should be treated the same as those who are ordinarily resident in Kent.
- 1.6 When ordinary residence is an issue, the **Shah test** will be applied, for those with capacity to decide where they want to live, which states that **an individual's ordinary residence refers to an area which has been adopted voluntarily and for a settled purpose for short or long term duration**. There will be no minimum period in which a person has to be living in a particular place for them to be ordinarily resident there.
- 1.7 For people who lack the capacity to make decisions about where to live, a Best Interests decision must be made under the Mental Capacity Act 2005, involving the person as much as possible. The decision maker needs to be satisfied that the person lacks capacity when proposing the action in question is in the person's best interests.
- 1.8 For young people in transition and adults who lack capacity to make decisions about where to live, the Cornwall judgment case held that local authorities should not apply the Vale tests (1 and 2) general principles when determining ordinary residence. [The Care Act Care and Support Statutory Guidance](#) chapter19 to be followed. Also read Appendix 3.
- 1.9 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 it requires the voluntary adoption of a place. In this situation, the facts must be considered, including physical presence in a particular place, their purpose for living there, the person's connection with the areas, the person's views, wishes and feelings (insofar as these are ascertainable and relevant) but without requiring the person has voluntarily adopted the place of residence.
- 1.10 For carers with eligible support needs, the responsible local authority will be where the cared for adult lives, not where the carer lives. Therefore, establishing responsibility for the provision of care and support for the carer requires local authorities to consider the ordinary residence of the adult needing care.
- 1.11 When a person who is receiving care and support services in a local authority and

ORDINARY RESIDENCE – KCC Adult Social Care

voluntarily wishes to move to another local authority area for settled purposes (and as a result their ordinary residence changes), the person's needs will be met when they arrive in the new area. More details in the Continuity of Care Practice Guidance on [Tri-X](#)

- 1.12 If there is a dispute between Kent and another authority on the place of ordinary residence, the person must not be affected by the dispute until the dispute is resolved.

The wellbeing of people is paramount in all disputes. It is critical that the person does not go without the care they need, should local authorities be in dispute.

2. Definitions

- 2.1 There is no definition of ordinary residence in the Care Act; therefore, the term should be given its ordinary and natural meaning.
- 2.2 Under section 39 of the Care Act, 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 below (**read 2.3 below**)¹, the adult is to be treated as remaining ordinarily resident:

*(a) “in the area in which the adult was ordinarily resident immediately **before** the adult began to live in accommodation specified in the regulations **or***

(b) if the adult was of no settled residence immediately before the adult began to live in the accommodation of the type specified, in the area in which the adult was present at the time”

Section 39(1) Care Act 2014

- 2.3 For the purposes of section 39(1) of the Care Act, the specified accommodation when the adult is to be treated as remaining ordinarily resident where they were living before they moved into the specified accommodation (the “deeming” provision) is:

- ✓ a care/nursing home
- ✓ a shared lives scheme
- ✓ supported living/extra care housing
- ✓

Read [The Care and Support \(Ordinary Residence\) \(Specified Accommodation\) Regulations 2014](#) for precise definitions of the above and the [Statutory Guidance](#).

- 2.4 Where an adult is provided with a specified type of accommodation as above to meet their care and support needs in another local authority area, ordinary residence will remain with the placing authority for the purpose of funding and meeting the person eligible needs - the deemed ordinary residence provision applies.

¹ Read Appendix 2: Important details about Specified Accommodation in The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014, definitions for each type and personal care definition.

ORDINARY RESIDENCE – KCC Adult Social Care

- 2.5 The ordinary residence “deeming” provision **does not apply** when a person arranges their own accommodation in another area i.e. the specified type of accommodation (read 2.3 above) was not judged to be necessary following the needs assessment and is outside what was specified in the care and support planning process involving the person. Then ordinary residence **will transfer** to the area where they moved. Read examples below.

Example one

X County Council place someone in residential care in Kent, ordinary residence stays with X later the residential home deregisters and becomes a supported living placement, ordinary residence remains with X

Example two

X County Council places someone in residential care in Kent; ordinary residence stays with X; later the person moves with the agreement of X into a supported living placement where care is also provided, ordinary residence remains with X.

Example three

X County Council assess that someone has eligible needs for care but that these can be met in the community. The person then moves to Kent to live near his daughter. Ordinary residence will transfer to Kent.

3. Legislation and Statutory Guidance

- 3.1 Sections 39-41 of the Care Act 2014 and associated regulations* and guidance have replaced

* Ordinary Residence Disputes (National Assistance Act 1948) Directions 2000.

* Department of Health guidance: Ordinary Residence, Identifying the ordinary residence of people in need of community care services (2013).

For detailed guidance on Ordinary Residence, read Care and Support Statutory Guidance chapter 19 and Annex H issued under the Care Act 2014.

Relevant regulations:

- [The Care and Support \(Ordinary Residence\) \(Specified Accommodation\) Regulations 2014](#)
- [The Care and Support \(Ordinary Residence Disputes, etc.\) Regulations 2014](#)

- 3.2 When a person is receiving care and support in a local authority and is planning a move to another local authority (and as a result their ordinary residence status changes), under section 37-38 of the Care Act 2014 and the [Care and Support \(Continuity of Care\) Regulations 2014](#), local authorities must ensure that an adults needs are met when they arrive in the new area. For details read the Continuity of Care guidance on Tri-X when an adult moves area voluntarily and for settled purposes.
- 3.3 Where a local authority places a looked after child in another local authority area under the Children Act 1989, the child **will remain ordinary resident** in the placing authority area when the person, after their 18th birthday, is in need of care under the Care Act 2014. However, where the accommodation is not of a type specified within the Care Act 2014 and the person who was a looked after child has the capacity to decide where to live then the Shah test must be applied to the facts to determine ordinary residence.

ORDINARY RESIDENCE – KCC Adult Social Care

4. Ordinary residence overview

The following provides a summary of some situations in relation to ordinary residence. Must be read in conjunction with the full guidance in Annex H: Ordinary Residence, issued under the Care Act 2014 and Care and Support Statutory Guidance chapter 19. NOTE: H8 has been adjusted to reflect the Supreme Court judgment 8 July 2015 (Cornwall case) and the updated (Dec 2016) Care Act Care and Support Statutory Guidance.

Annex H: Ordinary residence	
H1 People with urgent needs	<p>Local Authority (LA) has the power to meet the urgent need if the adult is known to be an ordinary residence in another LA area, including providing the necessary accommodation. The LA where the person is ordinary residence remains responsible to meet the person eligible needs.</p> <p>The LA of the moment should carry out an assessment of needs, provide accommodation, and inform the LA where the person is ordinary residence that it is doing so. Consent is not required from the LA where person is ordinary residence in deciding whether and how to exercise the power.</p> <p>Another LA may also meet a person's non urgent needs through the provision of accommodation if, for example, the person wishes to remain living in the LA area in which he or she received hospital treatment. If person intends to remain indefinitely then ordinary residence would transfer (Read below exception for Section 117 aftercare responsibility).</p>
H2 People who are party to deferred payments agreements	<p>It is the LA in which a person is ordinary residence that has responsibility for offering and arranging for a deferred payment agreement and remains responsible until the deferred payment agreement is concluded.</p>
H3 People who are accommodated under the 12-week property	<p>The person receives LA support where they are ordinary residence. The LA may place the person in a care home in the area of another LA; however, the placing LA remains the responsible authority during the 12-week property disregard period.</p>
H4 People who are arranging and paying for their own care	<p>When a person moves into permanent accommodation in a new area under private arrangements, and is paying for their own care, they usually acquire an ordinary residence in this new area. If their needs change, meaning they require other types of care and support, they should approach the LA in which the accommodation is situated.</p> <p>However, if the person is not able to enter into a private agreement with their care home, e.g. lacking mental capacity and does not have an attorney or deputy to act or has capacity but is not able to manage the arrangement, ordinary residence remains with the placing LA even where they enter accommodation in another LA area.</p>

ORDINARY RESIDENCE – KCC Adult Social Care

<p>H5 NHS Continuing Healthcare</p>	<p>Where a person is eligible for NHS CHC, the relevant Clinical Commissioning Group is responsible for care planning, commissioning health and care and support services and for case management. If a review of the person’s care and support needs subsequently determines that the person is no longer eligible for NHS CHC, the NHS ceases to be responsible for the provision of the person’s care and support. Instead, responsibility falls to the LA in which the person is ordinary residence.</p> <p>Where a person has been placed in a care home (or other accommodation funded by NHS) in another LA for the purpose of receiving NHS CHC, they continue to be ordinary residence in the LA where they were resident before entering the NHS accommodation.</p> <p>Ordinary residence remains with the LA before entering NHS accommodation. Even if a person ceases to be eligible for NHS CHC, and remains in the home, or is provided with accommodation elsewhere, the LA is responsible for meeting the person’s eligible needs and for funding their accommodation.</p>
<p>H6 British citizens resuming permanent residence in England after a period abroad</p>	<p>A British citizen would usually acquire an ordinary residence in the area in which they chose to locate if their intention is to stay there for settled purposes.</p> <p>If the person has no particular intention to settle in that area, the LA may decide they are of “no settled residence” and/or in “urgent need”. Read H1</p> <p>There is no minimum period in which a person has been living in a particular place to be considered ordinary residence.</p>
<p>H7 Armed Forces veterans and families of armed forces personnel</p>	<p>Veterans on leaving the Armed Forces, who have needs for care and support, would usually acquire ordinary residence in the area in which they chose to locate.</p> <p>If the person is found to be of no settled residence, then the LA in which they are physically present will be responsible for meeting eligible needs.</p> <p>If the person is determined as having urgent needs, then the same LA should consider exercising its power in advance of establishing where their ordinary residence lies.</p>
<p>H8 Young people in transition from children’s services to adult social care and support</p>	<p>Supreme Court’s judgment in R (Cornwall Council) v. Secretary of State for Health [2015] UKSC 46 [2015] 3 W.L.R. 213: 8 July 2015.</p> <p>When a child, who is an ordinary resident in area X, has been placed by area X in area Y, the placing authority (area X) remains responsible for eligible care after their 18th birthday: ordinary residence remains with area X.</p> <p>This applies to any person who moves from accommodation provided under the Children Act to specified accommodation under the Care Act. However, the Shah test (read paragraph 1.6) is to be applied to determine ordinary residence where the person moves to other than specified accommodation and the person has capacity to decide where to live. Read Appendix 3 for briefing note and scenario.</p>

ORDINARY RESIDENCE – KCC Adult Social Care

<p>H9 Other provisions under which ordinary residence determination can be sought</p>	<p>Schedule 3 to the Care Act 2014</p> <p>This places a duty on LA and the NHS to work together to ensure the safe hospital discharge of people with care and support needs.</p> <p>Where it is not likely to be safe to discharge a hospital patient unless arrangements for meeting their care and support are put in place, the NHS body must notify the patient’s LA of this. Under the Act, it is the LA in which the patient appears to the NHS body to be ordinarily resident. Alternatively, where a person is not ordinarily resident in any LA, i.e. a person of “no settled residence”, the Care Act provides that it is the LA in which the hospital is situated that the NHS body must notify.</p> <p>If the LA believes the person is ordinary residence in another area, they should inform the NHS of this, and the NHS should withdraw the notification and re issue it to the correct LA. If the NHS disagrees, then the LA in receipt of the notification must carry out a needs assessment and arrange the provision.</p> <p>Where there is a dispute between LAs about ordinary residence, a determination can be sought under section 40 of the Care Act. Read section 7 in this guidance for further details.</p> <p>The Mental Capacity Act 2005 and Deprivation of Liberty Safeguards</p> <p>Under the MCA DoLS, the “managing authority” of a hospital or care home must request a standard authorisation from a LA (a “supervisory body”) if they believe an adult will be, or will be likely to be, deprived of their liberty in a hospital or care home setting within the next 28 days.</p> <p>Where a person needs to be deprived of liberty in a care home, the 2005 Act provides that the supervisory body is always the LA in which the person is ordinarily resident. This remains the case regardless of whether the person has been placed in the care home in another authority’s area by the LA or a</p> <p>Example</p> <p>A person remains ordinarily resident in the area of the local authority (A) in which the person is ordinarily resident before that local authority (A) places the person in the area of authority (B) in an arrangement that amounts to a deprivation of liberty. Therefore, the placing local authority remains the supervisory body.</p> <p>If a person is arranging and paying for their care under private arrangements, they usually acquire an ordinary residence in the area in which their care home is located. Therefore, the LA in which the care home is located will be the supervisory body.</p> <p>Where a person is not ordinarily resident in any LA (for example a person of “No settled residence”), the 2005 Act provides that it is the local authority in</p>

ORDINARY RESIDENCE – KCC Adult Social Care

	<p>which the care home is situated that becomes the supervisory body.</p> <p>Use the following link for Mental Capacity and Deprivation of Liberty Safeguards Operational Policy on Tri X</p>
<p>Section 117 (aftercare)</p> <p>Update following the Supreme Court judgment handed down on 10 August 2023 R (on the application of Worcestershire County Council) (Appellant) v Secretary of State for Health and Social Care (Respondent) [2023] UKSC 31</p>	<p>Section 117 of the Mental Health Act 1983 imposes a joint duty on LA and Integrated Care Board (ICB) to plan and provide free aftercare services.</p> <p>The duty on local authorities to commission or provide mental health aftercare rests with the local authority for the area in which the person concerned was ordinarily resident immediately before they were first detained under the 1983 Act. Read Section 117 Policy on Tri-X for further guidance.</p> <p>This means:</p> <ol style="list-style-type: none"> a) If P is placed by Local Authority A in the area of Local Authority B under section 117 aftercare, then Local Authority A will remain responsible for providing aftercare services until such time P is formally discharged from section 117 in accordance with section 117(2). b) If P is still receiving aftercare services and is re-detained under section 3 of the Mental Health Act 1983, Local Authority B will be under a duty to provide aftercare services (not Local Authority A) until such a time P is discharged from section 117 in accordance with section 117(2). And it is Local Authority B that will need to be involved in discharge planning, not Local Authority A for the duration of their detention. c) For everyone else, including those who have been formally discharged from receiving section 117 aftercare services following a previous detention, then responsibility for section 117 aftercare will fall to the local authority in whose area they were ordinary resident immediately prior to their most recent detention. d) If P was not an ordinary resident anywhere immediately before they were detained, then responsibility for their section 117 aftercare will fall to the local authority in whose area they are resident or to whose area they are sent on discharge. <p>Note: If P has been placed out of area by Local Authority A, but not under s117, then responsibility for aftercare should be determined by application of the Shah test not the Care Act 2014 deeming provisions in s29.</p> <p>So, if P has voluntarily adopted their residence in the area of Local Authority B, by choosing an out of area care home under the choice of accommodation regulations, for example, then Local Authority A will not automatically be responsible for aftercare.</p> <p>For example, P is placed in supported living in Local Authority B's area under s18 Care Act but then sometime later experiences a mental health crisis requiring hospital admission for treatment then Local Authority B may be responsible for P's aftercare. But it will be necessary to look at how long P has been living there, where P considers to be their home, whether the move was intended to be long-term and all the other usual factors to decide if the residence has been voluntarily adopted for settled purposes (application of the Shah test) or if P lacks capacity where to live to adopt the Shah approach of 'settled purpose' but disregard the voluntary aspect and consider all the facts such as physical presence, purpose, connection, (Read Appendix 3 Supreme Court case of R (on the application of Cornwall Council) v Secretary of</p>

ORDINARY RESIDENCE – KCC Adult Social Care

Direct Payments	<p>When a person has a direct payment to arrange their own care, and the care and support plan stipulates the persons needs can be met only if the adult is living in one of the specified types of accommodation, if the person or LA arranges that accommodation in another LA area which is not the one making the DP, the LA making the direct payment retains responsibility for the DP and eligible care and support needs.</p>
University Students	<p>Split accommodation.</p> <p>A student’s ordinary residence should be determined in the same way as a person who has more than one home (i.e. establish to which of the two they have a stronger link) when;</p> <ul style="list-style-type: none"> • They attend University in another Local Authority area; and • They spend term time in that area; and • They spend holiday time in their original area. <p>Permanent university accommodation</p> <p>If a student spends all of their time in the University area (term time <i>and</i> holiday time) their ordinary residence will change to that of the Local Authority in which the University is located (<i>unless</i> they have been placed into specified accommodation as defined in The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 by the first Local Authority area).</p> <p>This is because they will have;</p> <ul style="list-style-type: none"> • Adopted residence there voluntarily; and • Are there for settled purposes as part of the regular order of their life; and • Do not spend any time in another area. <p>If, after University the person chooses to move back to the original area they lived, their ordinary residence will be likely to change back to that area.</p> <p>Travel to University</p> <p>If a student travels into another Local Authority area to attend University daily but does not stay in that University area overnight their ordinary residence will not change to the area where they attend University.</p>

5. Good Practice for Ordinary Residence change.

- 5.1 The originating authority has a responsibility to demonstrate the reasons why they consider ordinary residence responsibility should change to Kent.
- 5.2 The practitioner should ensure that the information provided is robust and

ORDINARY RESIDENCE – KCC Adult Social Care

includes full assessment and care and support planning information.

- 5.3 When a person assumes ordinary residence in Kent and becomes the responsibility of KCC, the team who takes responsibility for the new person must make a referral to the Purchasing team.
- 5.4 The purpose of this is to agree a fee with the support provider, negotiated under KCC adult social care usual processes, as the placement will be classed as a new placement as far as KCC adult social care is concerned.
- 5.5 The following notes provide further information on good practice, which applies equally, when the residence relates to a person who may assume ordinary residence in Kent or a person for whom Kent believes ordinary residence is transferring to another local authority.
- **Record keeping** is key to a smooth transfer of responsibility and will provide a robust data set to support any potential dispute; a chronological record of all contacts with the other local authority must be kept, including who has been spoken to, their role and the date and content of the discussion. This could be maintained in a simple table format.
 - **It will be useful to start collating**, or at least ensuring that these are easily accessible, all documentation that may be relevant in the event of a dispute at the start of any discussions:
 - ✓ Tenancy agreement; (where relevant)
 - ✓ Housing benefit statement; (where relevant)
 - ✓ Evidence of mental capacity
 - ✓ Record of decision making
 - ✓ Chronology of the claim
 - ✓ Copies of correspondence and telephone attendances
 - ✓ Assessment of need.
 - ✓ Care and Support plan with a full breakdown of the support received
 - ✓ Breakdown of weekly care costs.
 - **If after 8 weeks there is no agreement, then Kent Legal Services should be instructed to provide advice on the merits of the case, and also on whether or not this is a case to be referred to the Department of Health for a determination by the Secretary of State.**
 - **Where there is a lack of engagement** on the part of the host local authority, a referral should be made to Kent Legal Services after 4 weeks and ensure that clear accurate records kept of all attempts at contact, even where there has been no answer and/ or voice mail messages have been left.

ORDINARY RESIDENCE – KCC Adult Social Care

6 Checklist on managing requests for transfer of ordinary residence responsibility.

6.1 Where Kent is approached by another authority with a request to accept ordinary residence responsibility, Kent expects that the responsible practitioner and/or their manager will follow the checklist below.

Step One	Always discuss any request with your Community Team Manager and/or Community Senior Practitioner
Step Two	Generic Letter One (either 1a or 1b as appropriate) to be sent by Community Team Manager or Community Senior Practitioner.
Step Three	<p>Community Team Managers and/or Community Senior Practitioners to review information received with practitioner and make a decision.</p> <p>A copy of the tenancy agreement, signed by the individual should be requested, if the individual lacks capacity the tenancy agreement should be either:</p> <ol style="list-style-type: none"> 1. Signed by a person authorised by the Court of Protection or 2. If unsigned, should be supported by evidence of a best interest meeting. <p>If it appears the person will have ordinary residence in Kent, the originating LA is contacted to arrange assessment before the move to Kent. <u>It is a legal requirement of the Care Act to assess on the appearance of need and this is regardless of a person ordinary residence.</u> If a person has already moved and appears assessment not completed prior to move, Kent will undertake the assessment, and if required meet urgent needs, liaising with the originating LA.</p> <p>Following assessment, the Community Team Manager will confirm ordinary residence with the originating LA, where the assessment demonstrates this is appropriate.</p>
Step Four	<ul style="list-style-type: none"> · Apply the cost matrix · Negotiate the package of support · Agree the start date
Step Five	Pass the information to the delegated authorisor for final agreement. Confirmed start date and final agreed cost

7 Dispute with another local authority

Decisions concerning an adult's ordinary residence **must not** be used to:

- Exclude people from the assessment process.
- Delay the process of assessment or determination of eligible needs.
- Prevent the local authority from meeting the individual's needs.

All reasonable steps must be taken to resolve disputes. Where agreement cannot be reached, **as a last resort**, local authorities must apply for determination from the Secretary of State within four months of the start of the dispute.

In accordance with regulations, the local authority that is meeting the needs on the date the dispute arises must continue to do so until the dispute is resolved.

If there are no local authority meeting needs, the local authority in which the person is living or physically present must provisionally accept responsibility and provide the services needed until a resolution is achieved.

The Care and Support (Disputes Between Local Authorities) Regulations 2014 [here](#).

7.1 Checklist to be followed.

Where it appears that there are insufficient grounds for transfer of ordinary residence to Kent, **refusal letter 2** is sent.

ORDINARY RESIDENCE – KCC Adult Social Care

Where it appears the person may be eligible for NHS Continuing Healthcare, **refusal letter 3** is sent.

Step One	The responsible worker should seek advice and guidance from their Community Senior Practitioner. The Community Senior Practitioner will consult the Community Team Manager and area finance manager
Step Two	<p>Collate all information which will be relevant to supporting a claim:</p> <ul style="list-style-type: none"> ✓ Evidence of all contacts with the other authority ✓ Tenancy agreement; (where relevant) ✓ Housing benefit statement; (where relevant) ✓ Evidence of mental capacity ✓ Record of decision making ✓ Chronology of the claim ✓ Copies of correspondence and telephone attendances ✓ Assessment of needs ✓ Care and Support plan with a full breakdown of the support received ✓ Breakdown of weekly care and support costs.
Step Three	<p>For Learning Disability Services support with ordinary residence claims to another local authority is provided through the Purchasing Team.</p> <p>All requests to Kent Legal Services should follow the legal protocols. For Adult Social Care legal requests, please use this form.</p>
Step Four	Kent Legal Services should provide its opinion and advise if a Secretary of State Determination should be sought.
Step Five	A briefing on the situation will be required by the relevant Director including cost implications. The Assistant Director will liaise with relevant Policy to decide how best to complete this.
Step Six	Following Secretary of State’s Determination, the Policy and Quality Assurance Team should extract the key policy and operational lessons from the case and disseminate the information to all relevant managers.

8 Placing a Kent resident outside Kent.

8.1 When a placement in a care/nursing home, shared lives scheme or supported living accommodation is made in another local authority, the purchasing team will send **letter 5** to inform the host authority that a person from Kent will be moving to their area. This needs to be done at the earliest opportunity before the planned move.

Full details in the “Out of Area Arrangements and Notifications” guidance on Tri-X.

8.2 The Care and Support plan **must** specify needs that are to be met by the provision of the type of accommodation described in section 2.3 above as defined in The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 – Read Appendix 2 for further details.

ORDINARY RESIDENCE – KCC Adult Social Care

Appendix 1

Supporting Letters (use the up-to-date template letters on [Tri-X](#))

Letter 1a	Template: acknowledgement of request, please send evidence
Letter 1b	Template: acknowledgement of request with accompanying evidence
Letter 2	Template: refusal following notification by other local authority -Specified accommodation
Letter 3	Refusal: Continuing healthcare
Letter 4	Request to other local authority to accept ordinary residence responsibility when person moving from specified accommodation to the community (Read also letter 6)
Letter 5	Notification to other local authority of a Kent funded accommodation placement made in their area.
Letter 6	Follow up letter for use where no response has been received to letter 4 (must be sent after two weeks where no response is received)

ORDINARY RESIDENCE

Appendix 2

Specified Accommodation in The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014

Care and Support Statutory Guidance: -

“19.29. The regulations specify the types of accommodation to which this provision applies.

The regulations explicitly set out three types of accommodation:

- ✓ **nursing homes/care homes** – accommodation which includes either nursing care or personal care²;
- ✓ **supported living/extra care housing**; this is either;

Specialist or adapted accommodation: this means accommodation which includes features that have been built in or changed to meet the needs of adults with care and support needs. This may include safety systems and features which enable accessibility and navigation around the accommodation and minimise the risk of harm, as appropriate to the individual.

Or

accommodation which is intended for occupation by adults with care and support needs, in which personal care is also available, usually from a different provider.

- ✓ **shared lives schemes**: accommodation which is provided together with care and support for an adult by a shared lives carer, approved by the scheme, in the shared lives carer’s home under the terms of an agreement between the adult, the scheme the shared lives carer and any local authority responsible for making the arrangement. The shared lives carer will normally be providing personal care, but they will not need to provide it in every case”

² The Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 defines personal care as: “personal care” means—

(a) physical assistance given to a person in connection with—

(i) eating or drinking (including the administration of parenteral nutrition), (ii) toileting (including in relation to the process of menstruation),

(iii) washing or bathing, (iv) dressing,

(v) oral care,

(vi) the care of skin, hair, and nails (with the exception of nail care provided by a chiropodist or podiatrist);

or

(b) the prompting, together with supervision, of a person in relation to the performance of any of the activities listed in paragraph (a), where that person is unable to make a decision for themselves in relation to performing the activity without such prompting or supervision.

ORDINARY RESIDENCE

Appendix 3

Briefing Note

Ordinary Residence post Statutory Guidelines update Dec 2016

Author: Cathy Worden Hodge

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Background

The Supreme Court case of *R (on the application of Cornwall Council) v Secretary of State for Health* considered the ordinary residence of PH, a disabled man who lacked capacity. The decision has led to a change in the approach used to determine ordinary residence for adults who lack capacity to decide where to live and looked after children transitioning to certain adult social care services.

The reported Cornwall decision, although on the facts considering a case involving a lack of capacity to voluntarily decide where to live, did not explicitly restrict its application to such cases. This therefore left it open to legal interpretation that the change in approach in determining ordinary residence that the Cornwall case represented applied more widely and could include cases not only where the person involved did not have capacity to decide where to live but also those with capacity.

KCC sought Counsel opinion on the application of Cornwall and specifically asked in the context of transitioning young people whether the rationale in Cornwall applies equally to those who lack capacity to decide where to live as those who have capacity. The advice received was that it does apply equally. KCC accepted and applied Counsel's advice in its determinations of ordinary residency for young people transitioning to adult social care.

The Cornwall case necessitated the Department of Health revising its guidance on determining ordinary residence and in so doing it clarified the issue of capacity. The new Statutory Guidance was published in December 2016. Considering the new guidance KCC has altered its stance on the issue of determining ordinary residence in certain cases.

Ordinary Residence post *Cornwall* and Department of Health revised guidance

There is no definition of 'ordinary residence' in the Care Act. It is a concept involving questions of fact and degree; and time, intention and continuity must be taken into account. The leading case considering the meaning of ordinary residence is *Shah v London Borough of Barnet* (1983).

'...ordinary residence 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'

ORDINARY RESIDENCE

A person's lack of mental capacity may mean they are not able to voluntarily adopt a particular place of residence. Where this is the case, a direct application of the *Shah* test requiring a **voluntary** adoption of a place, will not help determine ordinary residency.

The revised guidance directs Local Authorities in cases involving adults who lack capacity to adopt the *Shah* **approach** of 'settled purpose' but disregard the voluntary aspect and consider all the facts such as physical presence, purpose, connection, duration, person's views wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has sufficient degree of continuity to be described as settled, whether of long or short duration.

Effect of Deeming Provisions of Children Act and Care Act

Ordinary residence could be **deemed** by legislation to be in a different area to that in which a person is physically present. The Supreme Court in *Cornwall* set out that the underlying purpose behind deeming provisions in both children's and adult legislation is that: '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.'

For the purposes of the Care Act 2014, any person who moves from accommodation provided under the Children Act 1989 to specified accommodation under the Care Act, remains Ordinarily Resident in the local authority in which they were ordinarily resident under the Children Act. That is to say they are deemed to be ordinarily resident in the area in which they were ordinarily resident immediately before they began to live in a specified type of accommodation.

However, should the young person transition to other than specified accommodation and have capacity to decide where to live, then the *Shah* test is applied to determine ordinary residence.

Guidelines Study example re Donna,

Transition from accommodation under the 1989 Act to accommodation under the 2014 Act

Summary of study facts

- ✓ Children's Act deems Ordinary Residence of child
- ✓ Former looked after child has capacity
- ✓ Accommodation is not of specified type

Outcome

- ✓ Application of *Shah* test – chosen area is Ordinary Residence
- ✓ *If* move had been to specified type of accommodation: then will be deemed to be ordinarily resident in the area in which ordinarily resident immediately before beginning to live in a specified type of accommodation

ORDINARY RESIDENCE

Donna is taken into care by local authority A at the age of eight. She is placed with foster carers living in local authority B and therefore under the Children Act is deemed to be ordinarily resident in local authority A. She has learning disabilities, and she has the capacity to decide where to live. Upon turning 18, in March 2016, she wishes to remain living in local authority B. The foster carers in local authority B agree to sign a Staying Put licence agreement in order that she can remain with them for a year. Donna has ongoing care and support needs and will need to be supported by an adult learning disability team. Her needs will be met under the 2014 Act. Local authority A is claiming that Donna is now ordinarily resident in local authority B and that local authority B should meet and fund her care and support needs as an adult. If Donna has chosen to remain living in local authority area B in a type of accommodation that is not specified in regulations under section 39 of the 2014 Act - the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 (the accommodation regulations), Donna's place of residence will be in the area of local authority B.

The local authorities in question could reasonably start from a presumption that Donna remains ordinarily resident in local authority A as the local authority that had responsibility for her under the 1989 Act. However, this presumption can be rebutted by the facts and the application of the Shah test. Donna has the capacity to decide where to live and has chosen to remain in local authority B. She has lived in local authority B for around ten years, is well settled there and is expected to continue to live there on a long-term basis. Therefore, in line with the Shah test, Donna has acquired an ordinary residence in local authority B. But if Donna is in a specified type of accommodation as set out in the 2014 Act and the accommodation regulations, for example shared lives scheme accommodation, where her care and support needs can only be met whilst she is in a specified type of accommodation, then she will be deemed to be ordinarily resident in the area in which she was ordinarily resident immediately before she began to live in a specified type of accommodation, that is to say, the area of local authority A. For the purposes of the 1989 Act, she was, at that time, deemed to be ordinarily resident in local authority A. Although that deeming provision applied in determining ordinary residence for the purpose of the 1989 Act, this will also apply in relation to the deeming provision in the 2014 Act. This is on the basis of the principles in Cornwall that there is a broad similarity between the deeming provisions in the children's and adult legislation, the underlying purpose of which are that 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.

ORDINARY RESIDENCE

Appendix 4

Determining ordinary residence and local authority (LA) responsibility when arranging extra care housing in another county.

Extra care housing is a form of supported living accommodation where person (P) already needs a certain amount of personal care when she moves in, but in addition, extra care is then provided by home carers situated on-site, who can attend to P if required.

Specific examples:

1) LA B advises a person to seek assessment from Kent County Council because they have applied for extra care in LA B area and are currently residing in Kent County Council.

This is perfectly alright. LA B would expect that if P is OR in Kent and P wants to move to extra care accommodation in LA B, then firstly there should be a needs assessment done by Kent and an agreed care and support plan which stated that P's needs could only be met by the extra care type of accommodation. Once this was done then P could propose through the Choice of Accommodation regulations, that the extra care accommodation she wishes to consider is the one in LA B. LA B will not pay for P to have this extra care accommodation in its area though, as P is OR in Kent, and if Kent has agreed to it in the assessment and care plan then Kent remains responsible for the provision of care even if it is in another county area.

2) LA B is providing care and P wants to move to Kent into extra care

Again, P can only do this if LA B in which she is OR, has assessed her and her care plan stipulates she has needs which can only be met through extra care type accommodation. If P (or her family) wants P to move to extra care in Kent, they can make this known to LA B under the Choice of Accommodation regulations. However, if the assessment determines that P's needs do not have to be met through extra care, but by some lesser provision, then LA B has no duty to consider any extra care provision or to pay for it whether it is in Kent or in LA B.

If P or the family consider the assessment to be inadequate or unreasonable by not recommending extra care accommodation as being necessary to meet P's needs, then they need to make this known to LA B and if necessary, pursue their case through LA B's complaints procedure and, even further to the Local Government Ombudsman, or even further through Judicial Review to the High Court.

If P decides to move into extra care in Kent even though it is not in her assessment and care plan, then she will have to pay for it as a private self-funder or the family will have to pay.

3) LA B is not providing care and P applies to Kent for extra care

This assumes that P wants to move to live in Kent and make Kent her place of OR. P will have to move to Kent first and set up some form of residency here. It does not have to be for a lengthy period, but Kent must look at the nature and purpose of the move to establish for itself if P's OR is now in Kent. e.g. P might have moved in with a relative to be

ORDINARY RESIDENCE

near family. If P can be said to have OR now in Kent, then Kent should do a needs assessment and formulate a care and support plan. If that plan determines that extra care is the only provision that will meet Ps needs now, then Kent must provide that extra care accommodation (following the usual financial assessment). This obligation will be the same if P is found to have no settled OR but is in Kent.

If, however, P cannot show that he has established his residence in Kent but wants to or has moved solely for the purpose of trying to get into a certain accommodation provision in Kent, then Kent is at liberty to say that P is still OR in LA B. P must approach that LA B to request a needs assessment and if the subsequent care and support plan stipulated that P's needs can only be met through extra care, then P needs to negotiate with LA B through Choice of Accommodation regs to place her in the extra care provision in Kent and for LA B to pay for it.

Another option is for P to negotiate directly with the extra care provision in Kent and if P is accepted as being suitable for that provision, then to pay for it herself as a self-funder.

4) Who is responsible in the interim if there is a funding dispute ongoing?

During any dispute, the LA which is currently supporting the person would have to continue to do so (on a without prejudice basis) until the dispute was resolved.