

# The Moray Council

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## Ordinary Residence Policy and Procedure

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# 1 Introduction

- 1.1 This policy has been established to ensure that The Moray Council's Community Care Department determine and manage ordinary residence queries and disputes in a transparent, consistent and fair manner. The policy provides guidance to assist the Community Care Department in achieving consistency, transparency and fairness in the determination and management of ordinary residence issues.

## 2 Policy Statement

- 2.1 Through its procedures and practices for determining ordinary residence, The Moray Council shall uphold Scottish Government Circular No:CCD3/2010 and shall adhere to all relevant case law, Scottish Government Health Directorate Updates and Department of Health determinations and advice etc. In assessing a service user's ordinary residence status, The Moray Council will always be sensitive to the service user's needs and in accordance with current arrangements for care planning and provision, will ensure that those needs are given priority over any question or dispute relating to that service user's ordinary residence status.

## 3 Purpose

- 3.1 Most people requiring an assessment and provision of Community Care services from The Moray Council will live in Moray and for the purposes of the Community Care legislation will be considered to be "ordinarily resident" in the County of Moray. The Moray Council is liable to fund services to meet the assessed need of a person who is ordinarily resident in Moray, but that subject to standard financial assessments.<sup>1</sup>
- 3.2 This policy and procedure has been prepared to ensure that when determining a question of ordinary residence, there is a clear policy and procedure to follow.
- 3.3 This policy and procedure applies equally whether or not the query or dispute relating to ordinary residence focuses upon residence within or outwith the Moray area.

## 4 Scope

- 4.1 This policy applies to all employees of The Moray Council's Community Care Department.
- 4.2 This policy should be consulted by any member of the Community Care Department upon receiving a referral for Community Care services under the following legislation:-

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<sup>1</sup> Information in relation to financial assessment is more fully covered in the Charging for Residential Accommodation Guidance a copy of which is available from the following web link:

<http://www.scotland.gov.uk/Topics/Health/care/CrossCuttingIssues/CRAG>

The National Assistance Act 1948;.  
The Social Work (Scotland) Act 1968;.  
Part 2 of The Children (Scotland) Act 1995;  
Sections 25-27 of The Mental Health (Care and Treatment) (Scotland) Act 2003 and;  
The Recovery of Expenditure for the Provision of Social Care Services (Scotland);  
Regulations 2010

or any other legislation where ordinary residence is a condition of and/or relates to the provision of Community Care services.

## 5 Legal Context

5.1 The context for ordinary residence is set by:

- (i) the statutory framework as referred to in The Social Work (Scotland) Act 1968;
- (ii) the Scottish Government Circular Guidance CCD3/2010;
- (iii) principles established in case law, namely Shah –v- London Borough of Barnet (1983) 1 ALL ER 226, Levene –v- Commissioners for Inland Revenue (1928) AC 217 and R – v- Waltham Forest Borough Council ex parte Vale (1985) Times Law Reports 25/2/85 (these cases are more fully detailed in Appendix 3 annexed hereto);
- (iv) any principles established by The Secretary of State further to a request for determination;
- (v) an explicit Department of Health letter to The Scottish Government.

## 6 Mandatory Procedures for Determination of Ordinary Residence

- 6.1 The overriding principle in determining a person's ordinary residence status is that people who have a need or appear to need Community Care services should not be denied assessment and/or subsequent service provision if that ordinary residence status is in dispute with another authority, or where a decision has not yet been made by The Moray Council in relation to a person's ordinary residence.
- 6.2 If the Community Care Department decides to supply or fund a service while awaiting the outcome of a dispute about ordinary residence, this decision and any contractual arrangement entered into should clearly reflect the temporary nature of this decision pending resolution of the ordinary residence dispute. The decision must also be clearly explained to the other local authority and the Community Care Department, whose staff, with the support of their managers, should ensure that at no stage should The Moray Council assume or appear to have assumed responsibility for the person concerned as the local authority of ordinary residence whilst the dispute remains unresolved.
- 6.3 There is no statutory definition of ordinary residence nor any guidance relating to minimum residency periods, or whether ownership of a house or signature of a tenancy affects residency status. Ordinary residence involves questions of fact and degree, taking account of the length of time that a person has lived in a particular area, that person's intentions when moving to that area and the continuity of their

residence. These factors will be particular to each individual's circumstances and must be balanced accordingly.

- 6.4 Where there is any question or uncertainty about a person's ordinary residence, full information and facts shall be provided to the Ordinary Residence Panel as per the attached information sheet in Appendix 1 hereof, within four weeks of the relevant social worker or Community Care Officer being aware that there is an issue in relation to ordinary residence.
- 6.5 A referral to the Ordinary Residence Panel will be required where, for example, a person was receiving services or was living in residential accommodation in another local authority area before moving to Moray, where that person still has a property in another local authority area.

### **Ordinary Residence Panel**

- 6.6 The relevant Ordinary Residence Panel shall comprise of at least five members of staff of The Moray Council, namely:-
- (i) the appointed Head and / or deputy Head of Community Care;
  - (ii) the Community Care Finance Officer;
  - (iii) the Community Care Service Manager
  - (iv) the Principal Accountant; and
  - (v) a Solicitor from the Legal Department.
- 6.7 The Ordinary Residence Panel members may be substituted and replaced at any time by members of The Moray Council staff suitably qualified to make a determination of ordinary residence and subject to the proviso that there must always be at least one legal representative and one representative from the Community Care Finance Department.
- 6.8 The Ordinary Residence Panel shall have no more than four weeks from the date of receipt of a referral in relation to a query regarding ordinary residence to reach a determination. In reaching a determination there is no necessity for the panel members to hold a meeting and communications may be adequately undertaken by means of electronic mail. A Community Care Secretary, will be responsible for advising the party concerned of the determination of ordinary residence.

### **Determinations and Referrals**

- 6.9 A motion will be carried where three out of the five panel members are of the same opinion in connection with an ordinary residence query or dispute, notwithstanding that the two other members of the panel disagree with this decision. The option of referral to the Corporate Director (Education and Social Care) will be available where the two remaining members of the panel are in strong disagreement with the majority's decision which would otherwise carry the motion.
- 6.10 Where a referral is made to the Director of Community Services, this must be made within 48 hours of the initial decision and thereafter the Director of Community

Services or his appointed representative will have fourteen days within which to issue a final decision, which decision shall be binding on the panel members.

- 6.11 The decision in respect of every case involving an assessment of ordinary residence will be clearly logged for auditing purposes.
- 6.12 In the event of a decision in respect of ordinary residence thereafter becoming a matter of complaint by the relevant service user or their family, then The Moray Council complaints procedure will be triggered at this stage.

## 7 External Funding

- 7.1 If a person's residential care has been funded by another local authority, that local authority retains responsibility for that funding unless or until there is a break in such funding. A funding break will normally arise where the service user has moved into independent accommodation or has become self funding.
- 7.2 If someone has been funded in residential care by another local authority and there is a change in the care provided or the facility closes, that funding authority is responsible for a review of the service user's needs and also for continued funding, except where the service user has moved into independent accommodation or has become self-funding.
- 7.3 Where 7.1 and 7.2 apply, the Community Care Department must offer no commitment and assume no responsibility on behalf of The Moray Council for that person. Decisions about a person's ordinary residence status should be made by the Ordinary Residence Panel following investigation.

## 8 Out of County Placements

- 8.1 A service user who is ordinarily resident in Moray may choose to take up a placement in another local authority, perhaps to be near family or simply as a matter of preference. Department staff may give them advice and information about choosing a placement but they will become ordinarily resident in the new local authority once they move, provided that:
- the Community Care Department has not contracted with the placement
  - the person is self-funding.
- 8.2 Should they require funding in the future, the service user will be treated as ordinarily resident in the local authority where they live at that time.
- 8.3 If the Community Care Department places someone in accommodation outside Moray, contracts with the placement and funds it, both directly and where costs can be recouped from the service user, that service user remains ordinarily resident in Moray unless or until there is a break in funding.

## 9 Changes to Residential Provision

- 9.1 The management of a residential care establishment may decide to change the nature of the provision, e.g. from residential to nursing care or vice versa, or to de-register and offer tenancies to current residents. In this situation, all current residents affected must have a review of their needs in order to ensure that their needs will still be met under the new regime.
- 9.2 The funding authority should carry out this review for their service users, although they may request assistance from the authority where the establishment is situated, if this is different.
- 9.3 The original funding authority will remain responsible for locating and funding alternative care provision if this is required.
- 9.4 If the establishment is de-registering and offering tenancies, the funding authority must be satisfied that this is appropriate for the service user, and that they have the capacity to understand the implications, to make a choice and to manage their tenancy.
- 9.5 If a service user in this situation becomes a tenant, as an agreed appropriate choice, they will be deemed to be ordinarily resident in the area in which the establishment is situated; they will have chosen to make their home there, and will be claiming benefits to support their tenancy.

## 10 Practical Guidance

### Outline Process

- 10.1 The flowchart at the end of this section aims to give further clarification of how and when the Community Care Department might accept that a person is ordinarily resident in Moray or not. It is relevant both for people who move into Moray from another county and also for people who move to another area from Moray. It sets out the basic principles however, not all cases will neatly follow the flowchart. Reference should always be made to Scottish Government Circular Guidance CCD3/2010 and all other relevant guidance and case law in this connection.
- 10.2 Where The Moray Council through its Corporate Director (Education and Social Care) is acting as a receiver for any person under Court arrangements, such arrangements have no impact on any decision as to where the person concerned is ordinarily resident. The Council may be appointed by the Court as a receiver where any party is concerned about financial abuse of a vulnerable adult who is no longer capable of handling their financial affairs due to mental incapacity.
- 10.3 There will be a number of situations where reference to the Outline Process and to other parts of this Guide do not give a clear direction to assist in determining a

person's ordinary residence status. In such circumstances, reference should be in the first instance made to the Ordinary Residence Panel.

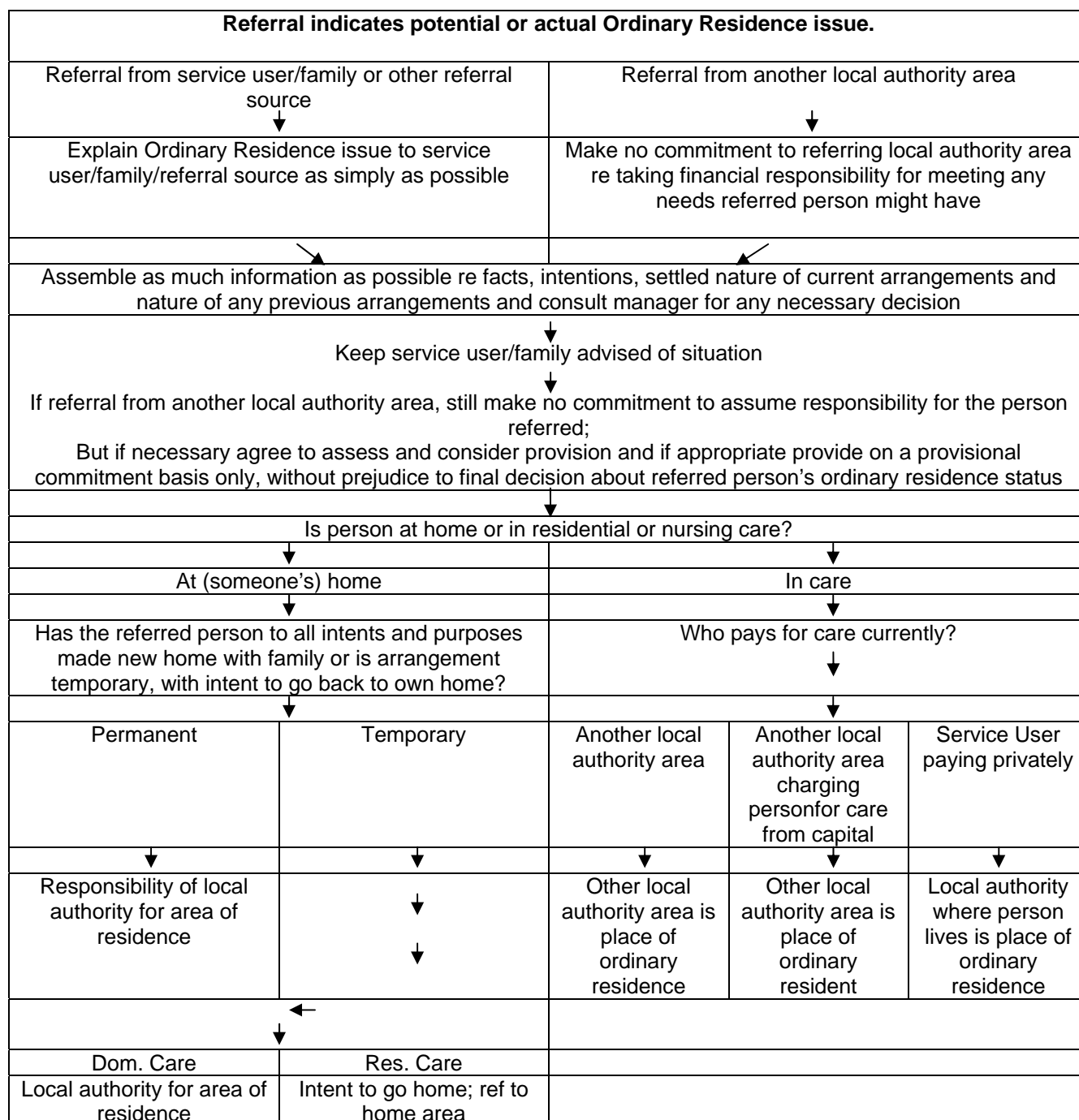
- 10.4 The Scottish Government Circular Guidance CCD3/2010 provides for ordinary residence disputes between local authority areas to be ultimately determined by the Secretary of State for Health. If a dispute between Moray and another local authority cannot be resolved by interpretation of guidance and precedent, and negotiation, the Head of Community Care with advice from Legal Services must decide whether to pursue a resolution by way of a Secretary of State Determination.

## 11 Implementation & Review

This policy and procedure will be monitored by the Head of Community Care and will be subject to review on an annual basis. Further to any relevant legislative or other changes necessitating a review of the policy and/ or procedure, the Head of Community Care will ensure that this is undertaken within a practicable time scale. Pending completion of a review where such legislative or other changes require the same, the Head of Community Care will communicate the effects of such changes to all relevant staff members to enable current working practices to be updated, thereby ensuring compliance with all relevant policies, legislation or other instruments as may be applicable at that time.



# Ordinary Residence Flowchart



If person is in care and Moray are paying or charging person for care from capital s/he is ordinarily resident in Moray.

# Appendix 1

## **Questions to assist in gathering of information in the process of determining a person's Ordinary Residence status**

The undernoted questions are not exhaustive and wherever possible as much information should be obtained in connection with a person's background and intentions.

1. Where is the person currently resident?
2. How long have they been resident there?
3. History of former residence(s) including information as to when the person moved to any particular area, how long they were there for, whether it was their decision to be there and what age they were at that time [this is particularly relevant in dealing with children or where a young adult is leaving care].
4. Is the person concerned capable of forming a decision and expressing their intentions? Has the person always been capable of doing so?
5. What is the person's medical history? What relationship does this have to any of the above?
6. Where a person has made a decision to change residence, have they done so of their own free will or have there been any other factors or persons who have influenced this decision and does the person have a Power of Attorney, an appointed court representative or other legal body who is entitled to take decisions on their behalf?
7. Is the person dependent upon their parents?
8. To date, what other advice has the person received in connection with their residence status, care needs, payment of care fees etc?
9. Is the current placement or change of residence intended to be temporary or permanent?
10. What is the motive or main purpose for the change of residence?

# Appendix 2

## General Guidance in Determining Ordinary Residence

1. There is no statutory definition of the term “ordinarily resident”: where an individual is ordinarily resident is a question of fact and degree. The term “ordinarily resident” has not been the subject of interpretation by the courts under the legislation, however the term should be given its ordinary and natural meaning.
2. Section 24 of the National Assistance Act 1948 provides that:
  - (a) Where a person has no settled residence or is not ordinarily resident in the authority of the moment and is in urgent need of residential accommodation, the authority of the moment has power to accommodate the person as if they are so ordinarily resident.
  - (b) An authority can provide residential accommodation for a person ordinarily resident in the area of another local authority with the latter authority’s consent.
  - (c) A person provided with residential accommodation is deemed to be ordinarily resident in the area in which s/he was ordinarily resident immediately before the accommodation was provided.
  - (d) A hospital patient is ordinarily resident in the area, if any, in which s/he was ordinarily resident immediately before hospital admission.
3. In the situation described in 2 (a), it is for the authority of the moment to assess. This situation might arise if a person is visiting away from home or is on holiday. A person returning to the UK, following a period of residence abroad, may be assessed and provided for by the authority of the moment; if it can be shown that the person has a settled residence elsewhere in the UK, it is the authority for that other area which must assess and provide. In each of these situations, the authority of ordinary residence can ask the authority of the moment to carry out an assessment and make provision on its behalf. In practice, the priority to be given to carrying out the assessment should be the same priority that would be given to any other referral. Consideration should also be given to charging for assessment time where the authority of ordinary residence is outside Moray.
4. Provision of services, including assessment, for individuals requiring community care services should not be delayed because of uncertainty or disagreement about which authority is responsible. When a person has no settled residence, the authority of the moment is responsible for providing any services that the person needs.
5. Where a local authority arranges a placement in an independent sector home in another authority’s area, the placing authority will normally retain responsibility for that person as it would for someone living in its own area and that person will not normally become ordinarily resident in the host authority. This, however, has been qualified in Wales by a Secretary of State Determination and a Department of Health letter, where “arranges” appears to mean arranges, contracts and continues to provide funding rather than sets up the placement; thus any break in the financial

arrangement due for example to a person obtaining money from the sale of a house or another asset is likely to lead to the host authority becoming the authority of ordinary residence if the person's capital falls below the current limit. Although Welsh Determinations are not directly applicable in Scotland, they are persuasive in nature and there is governmental desire for a united approach to ordinary residence issues.

6. A local authority placing a person, for whom they are financially responsible in an independent sector home, in another authority's area should notify that authority of the placement and should ensure that arrangements for any other services and reimbursing the cost of those services are in place.
7. If a person arranges to enter permanent residential or nursing care in a new area, without any Local Authority taking responsibility for the arrangements, that person usually becomes ordinarily resident in the new area, whose Social Services Department will need to assess and make provision if a future referral is made. If the original authority becomes aware of such arrangements, it should, with the permission of the person concerned, advise the new area of that person's move, particularly if Social Services help may later be required. (In practice, this is likely to apply only where involvement is current or has just ceased.)
8. Where a person's accommodation is to be partly financed by a Health Authority, any funding agreements entered into should record the ordinary residence status of the individual concerned, so that the question of future financial responsibility is addressed.
9. The approach for determining the ordinary residence status of people leaving prison, resettlement units or similar establishments should be similar to that where a patient leaves hospital.
10. A person who independently arranges and meets the costs of her/his own residential care, other than on a temporary basis, should normally be regarded as ordinarily resident in the areas where that establishment is located.
11. The responsible Health Authority for a person needing care is the one in which a person is usually resident. The framework for establishing responsibility for an individual's care within the NHS is available at :-  
[http://www.sehd.scot.nhs.uk/mels/HDL2004\\_15.pdf](http://www.sehd.scot.nhs.uk/mels/HDL2004_15.pdf).
12. The place of ordinary residence for a young person under 18 will usually be with one or both parents, or another family member. Support for a young person who has left care is governed by the Supporting Young People Leaving Care in Scotland Regulations 2003. This makes it clear that the responsible authority is the local authority that is or last looked after the young person. A young person with disabilities/special needs requiring residential care at the end of her/his education is likely to be ordinarily resident in the authority which funded her/his education, unless or until there is a break in the continuity of that funding.

# Appendix 3

## CASE LAW, PRECEDENT AND OTHER NATIONAL ADVICE

Some key cases take forward the interpretation of ordinary residence.

1. *Shah v London Borough of Barnet* (1983) confirmed that 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.
2. *Levene v Commissioners for Inland Revenue* (1928) highlighted that ordinary residence connotes residence in a place with some degree of continuity as apart from temporary absences.
3. *R v Waltham Forest Borough Council ex parte Vale* (1985) noted that people with learning disabilities should, in general, be regarded as capable of forming an intention of where they want to live; however people with severe learning disabilities, totally dependent on parents, should be treated as ordinarily resident at their parents' address. (It is arguable that even if the parents move within the lifetime of the placement, continuity of funding will not be broken.) The relevance of this case will vary with the ability of the person with the learning disability to make choices and the extent to which s/he relies on parents or some other person or body acting in and for their interests.
4. In *London Borough of Redbridge ex parte East Sussex County Council* (1992), twins with learning disabilities, originally ordinarily resident in Redbridge, but placed in a residential school in East Sussex, and whose parents then left the UK, became the responsibility of the East Sussex authority when the placement in Redbridge closed. The reason for this was that the twins were physically living in the county and had no settled residence elsewhere.