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Members of the Ordinary Residence and Cross-Border Working Group

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Dear Colleague

ORDINARY RESIDENCE – UPDATE ON CASE LAW AND LINK TO GUIDANCE

The Scottish Government published revised guidance in June 2015 on the determination of Ordinary Residence of individuals. Since this was published, there have been two additional judgments from case law which have further clarified and reinforced this guidance.

A Determination of Ordinary Residence made by the Scottish Ministers was subject to a challenge last year. However, the Court of Session refused the petition and upheld that the Determination made by the Scottish Ministers was legitimate, transparent, consistent with the guidance of the Scottish Government as set out in the Scottish Government Circular, and made according to law. We welcome the Court's consideration that the Scottish Ministers had applied the correct tests and made the Determination in the correct manner. Attached is Lord Armstrong's judgement. A critical part of the judgement is set out below :

“On that basis, the determination of whether there has been a change in ordinary residence must necessarily involve an assessment of the extent to which any adoption of a particular abode has been voluntary. In the case of a person lacking mental capacity, such an assessment must necessarily involve a consideration of the nature of such legal authority as there is in place. That is consistent with the legal framework in place in Scotland to protect the interests of those lacking full capacity. The respondents and the interested party were correct therefore to assert that the Scottish Government Circular sets out a correct statement of the law in that regard, and that it was appropriate for the respondents to follow the guidance contained within it.”

Following the outcome of this case, this has confirmed the position set out in our guidance that when a person, who lacks the mental capacity to decide for themselves where to live, moves to another authority area, their Ordinary Residence may not change on the basis of a decision made on that person's behalf without the requisite legal authority. In Scotland legal authority would be required by way of power of attorney or guardianship, or other form of intervention order, granted by the Court.

In *R (on the application of Cornwall Council) (Respondent) v Somerset County Council (Appellant)* the Supreme Court in the Cornwall case held similar principles of law in that the service user's residence remained with Wiltshire despite having left the area many years ago.

Social Care Institute for Excellence (SCIE) has produced a Best Practice Guidance on the behalf of the Department of Health which is intended to assist authorities in the UK, (England, Scotland, Wales and Northern Ireland) involved in cross-border placements. This guidance aims to provide guidance on the legal and practical arrangements under Schedule 1 of the Care Act 2014.

Ordinary Residence is a complicated area but these cases set precedent and help to provide clarity. The guidance set out by the Scottish Government seeks to encapsulate the principles derived from case law.

Yours sincerely



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