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Presumption of Death Act 2013

- The Appendix below sets out the “Explanatory Notes” to the Presumption of Death Act 2013, which are very informative as to its rationale.
- Fully in force from 1 October 2014 (Presumption of Death Act 2013 (Commencement and Transitional and Saving Provision) Order 2014/1810);
- If a person is thought to have died and has not been known to be alive for ≥ 7 years, then “any person” (s 1 (2)) may apply to the High Court for a declaration that the missing person is presumed to be dead (s 1 (1));

Jurisdiction

- Jurisdiction (s 1 (3) and (4)):
 - Domiciled in England and Wales on day last known alive; or
 - Habitually residence in E & W for one year to that day; or
 - If applicant is a spouse / CP, the spouse or CP meets either of those conditions
- Court won’t entertain application if applicant does not have “sufficient interest in the determination of the application” s 1 (5)
- Cannot use for the Monarch (s 21 (2))!

Making the declaration: -

- s 2: - “the court must make the declaration if it is satisfied that the missing person—
 - (a) has died, or
 - (b) has not been known to be alive for a period of at least 7 years.”
- Must include a finding as to date and time of death (s 2)
 - End of the seven year period if date not known (whether or not court is satisfied as to whether the person has died, as long as satisfied missing for ≥ 7 years)

Effect of declaration

- Declaration is conclusive as to presumed death and as to date and time of death s 3 (1);
- effective against all persons and for all purposes s 3 (2), including for the purposes of
 - (a) the acquisition of an interest in any property, and
 - (b) the ending of a marriage or civil partnership to which the missing person is a party.
- Provision for appeals: time period (21 days) must have passed for s 3 (1) and (2) to apply.

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Other powers of the court: -

- s (4) Court may determine —
 - any question which relates to an interest in property and arises as a result of the declaration, and
 - domicile of the missing person
- Court may make such order as it considers reasonable in relation to any interest in property acquired as a result of the declaration
- Includes an order that the value of a property interest is not to be recoverable: -
 - in any circumstances;
 - where conditions specified in the order are met;
 - not to be recoverable by virtue of a variation order
- “interest in property” *means an interest in property of any description, including an estate in land and a right over property* (s 20);

Variation

- s 5 provides power for High Court to vary or revoke a PoD order when an application is made by any person with sufficient interest
- Effect of variation: -
 - Subject to s 7 (2), it does not affect an interest in property which arose as a result of an earlier declaration (according to s 6 (1));
 - Does not revive a marriage or CP s 6 (2);
 - But is conclusive as to death and as against all persons for all purposes (i.e. s 3 (1) and (2) apply).
- Court has analogous powers to make orders as per s 4 on a variation, which arise under s 7.
- Variation: If < 5 years after original declaration (unless “exceptional”) interests in property can be re-determined –
 - S 7(2) When making a variation order, the court must make such further order (if any) as it considers reasonable in relation to any interest in property acquired as a result of the declaration varied or revoked by the order (“the original declaration”) (but see subsections (3), (5) and (6)).
 - Income accrued in the intervening period is unaffected, and
 - Cannot challenge related good faith transaction or interest in property acquired as a result of such a transaction (e.g. house sale!)
- A trustee would be liable to a beneficiary for any breach of trust s 7 (8), subject to statutory limitation of liability or the trust deed itself N.B. trustee “includes an executor, administrator or personal representative” (s 20);
- Principles applicable when court deciding whether to make any further order in relation to property interests: -
 - Firstly, a person who, but for the prohibition on variations affecting interests in property (s 6 (1)), would have such a property interest or would have

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acquired such a property interest (s 8 (3)) “should be entitled to have made over to him or her by the trustee in full satisfaction of that interest: -

- “(a) the interest in the relevant property or an equivalent interest in property representing the relevant property, to the extent that such property is still in the hands of the trustee when the variation order is made, and
- (b) the value of the interest in the relevant property, to the extent that such property has been distributed.”
- Secondly, any capital sum paid by an insurer following the first declaration “should be repaid to the insurer if the facts in respect of which the variation order was made justify such repayment.”
- But annuities and periodical payments are excluded

Requirement to give notice: -

- (1) A person who makes an application under this Act for a declaration or a variation order must send to the persons specified by rules of court—
 - (a) notice of the application, and
 - (b) any other information specified by rules of court.
- (2) An application under this Act for a declaration or a variation order must be advertised in accordance with rules of court.
- **Or else:** s 9 (3) “The court *must refuse to hear an application* under this Act for a declaration or a variation order if the requirements in this section have not been met.

Attorney-General

- Court has power to direct that papers relating to the matter be sent to the Attorney-General (s 10).
 - on an application by a party or
 - court’s own motion (s 10), and
 - court has wide powers to make a costs order in A-G’s favour if A-G incurs costs

Interveners

- right to intervene (s 11) in declaration or variation for: -
 - Spouse
 - CP
 - Child
 - Sibling (including half-sibling)
 - Parentof the missing person; and
 - Attorney-General
- Anyone else needs permission to intervene.

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- Interventions can be for arguing
 - “any question in relation to the application which the court considers it necessary to have fully argued” s 11 (4); and
 - A determination or order re. property interests (s 4 / s 7).

Information from 3P

- S 12 Court can direct non-parties to provide “specified” information at any stage of the proceedings as to whether the missing person is alive or dead.
- Test of necessity (s 12 (2);
- May do so on own motion or upon an application being made by a party;
- Excludes following information: -
 - Subject to Public interest immunity;
 - Legal professional privilege;
 - Where info might incriminate provider, or info-provider’s CP or spouse of an offence;
- Court must give notice to the information-provider first;
- Court has power to discharge or vary such an order for provision if any person affected by it makes such an application
- “specified”? “In this section “specified” means specified in an order under this section.”

Insurance

- Court has power to direct trustees of property affected by a declaration or arising as a result of a declaration to take out insurance; and
- The premiums may be paid from “money or other property held under the trust” (s 13 (3))
- If paying out a capital sum, an insurer may require a payee to take out a policy, which must be in the payee’s own name for the benefit of the insurer insuring against future claims against the insurer for sums paid out in the event of a future variation order (s 14)
 - Annuities and PPs excepted.

Register of Presumed Deaths

- Registrar General must maintain a register which is to be called the Register of Presumed Deaths

“16 Other determinations about death of missing person

- (1) No declaration which may be applied for under section 1 may be made

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otherwise than under this Act.

- (2) Where a court or tribunal makes a declaration that a missing person is presumed to be dead (other than on an application under this Act), subsections (2) to (4) of section 2 apply to the court or tribunal as they apply to the High Court when it makes a declaration under this Act.
- (3) Schedule 2 (amendment of provisions about presumption of death) has effect.
- (4) Apart from subsections (1) to (3) and Schedule 2, nothing in the preceding provisions of this Act affects any power or duty that a court or tribunal has other than under this Act to determine a question relating to the death of a missing person.”

Other provisions

- Secretary of State is given power to amend time periods, make consequential amendments, pass regulations etc. by ss 17 - 19.
- Certified copy of an entry in the Register of Presumed Deaths
- Can obtain this upon payment of the appropriate fee to the Registrar (Sch 1 § 6)

Presumption of Death – Consequential repeal

- Matrimonial Causes Act 1973 - omit section 19 of the Matrimonial Causes Act 1973 (presumption of death and dissolution of marriage).
- S 5 (1) (b) of the Domicile and Matrimonial Proceedings Act 1973 is repealed. This was “proceedings for death to be presumed and a marriage to be dissolved in pursuance of section 19 of the Matrimonial Causes Act 1973”. s 5 (4) also repealed.
- Ergo no longer a county court or high court jurisdiction under DMPA 1973 for proceedings for death to be presumed and a marriage to be dissolved
- Section 222 of the Civil Partnership Act 2004 (proceedings for presumption of death order) is amended as follows: -
 - The court has jurisdiction to entertain proceedings for a presumption of death order [on an application made by a civil partner] 1 if (and only if)–
 - (ba) at the time the application is made, the High Court does not have jurisdiction to entertain an application by that civil partner under section 1 of the Presumption of Death Act 2013 for a declaration that the other civil partner is presumed to be dead, and
 - (c) the two people concerned registered as civil partners of each other in England and Wales and it appears to the court to be in the interests of

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justice to assume jurisdiction in the case

- paragraph 7 of Schedule 8 to the Family Law Act 1996 is also repealed (refers to s 19 MCA 1973)
- N.B. N-CPR s 53 – Leave to Swear Death remains

Presumption of Death – Procedure

- Amendment to Pt 57 CPR 1998, and new PD 57A
- Issue in High Court in *either* Chancery Division or Family Division (CPR 57.18). Difference = FPR 2010 apply re. drawing up and service of orders if Family. CPR 1998 apply to both
- Must issue under Part 8
 - Usual matters of r. 8.2 (question to be decided, remedy sought, relevant Act etc.), plus
 - Information from PD57B: -
- PD 57B stipulates that the following *must* be provided with claim form: -

Re. Claimant:-

- Claimant's name and address;
- Rel'p of claimant to missing person;
- if not spouse, CP, parent, child or sibling, details of interest in determining the application (PD 57B 1.1 (1) (c) and 1.2 (c));

Re. Missing Person (MP):-

- MP's name(s) / maiden surname / former name(s);
- MP's gender;
- MP's date and place of birth
- MP's occupation;
- Occupation, name and surname of MP's spouse, CP (even if deceased)
- If MP was <16 y o, MP's parents
- MP's NI number
- Date of presumed death or date when last known alive;
- On which ground court is said to have jurisdiction under s 1 (4) of the PoD Act;
- name and address of Sp, CP, parents, children or siblings of MP (if any, and if not Claimant);
- Steps taken to trace
- details of “any enquiries made or other steps taken” to trace the MP, or confirm when last known to be alive;
- details of results of such enquiries + steps

Information re. MP's Property

- estimate of total value of assets;

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- details of property
- details of interest of any other person in property which it is sought to have determined by the court

Information re advertisement and recipients of notice of the claim

- Details of “the newspaper in which the claimant proposes to advertise the claim”
- details of the persons to whom the claimant is giving notice of the claim, and if that person is pursuant to 57.20 (1) (f) (“other”, including insurance co.) the nature of that person's interest in the claim
- More limited information must be provided in an application for a variation order (see PD 57B, para 1.2): -

Re. Claimant:-

- Claimant's name and address;
- Rel'p of claimant to missing person;
- details of Claimant's interest in determining the application (PD 57B 1.1 (1) (c) and 1.2 (c));

Information about previous claim / missing person's property

- Details of Declaration of Presumed Death or a previous variation order which is sought to be varied or revoked;
- details of circumstances justifying application for variation, and evidence of enquiries / steps taken to verify circumstances, plus outcomes;
- details of any interest in property acquired as a result of the Declaration / previous variation which it is sought to have varied or revoked;

Information about advertisement and recipients of notice of claim

- details of newspaper in which Claimant proposed to advertise the claim;
- details of persons to whom the claimant is giving notice of the claim and where that person is under 57.20 (g) (i.e. “other” person / insurer) nature of that person's interest in the claim
- Modifications to Part 8 - : “defendant” to be read as “person giving notice of intention to intervene or applying for permission to intervene”: i.e. this deals with requirement for an filing acknowledgement of service, if there are going to be interveners.

Interveners – 57.22

- Application for permission to intervene must be made in accordance with requirements of PD 57B, para 3.1 (including requirement to serve on C).
 - any person *entitled* to intervene (spouse, CP, parent, child or sibling) should notify intention to do so ASAP by filing and serving on C written notice of: -
 - name / address;
 - relationship to missing person (if not A-G);
 - reasons for intervening;

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- particulars of any determination or order sought;
- An intervener who needs the court's permission must specify in his or her application: -
 - relationship to missing person / other interest in proceedings;
 - reasons for seeking to intervene;
 - particulars of any determination or order sought under s 11(4) (b) or (c) of the PoD Act : -
- Permission to intervene may be given on conditions and the court may give case management directions.
- Court directs whether interveners are joined as claimants or as defendants (57.22 (4)).

Giving of Notice (57.20):

- Within 7 days of issuing the claim, the claimant *must* serve the claim on the following relatives of the missing person, if they exist: -
 - spouse / CP;
 - parent;
 - child
 - sibling
 - if no-one satisfies the above, the “nearest relative” known;
 - any other person, including an insurer, appearing to have an interest in the claim;
- For a variation order application, it is the list above PLUS service on the person who was the original claimant for the original declaration of presumed death / previous variation order;

Advertisement of the claim – 57.21:

- within seven days of issue the claimant must ensure that notice of the claim is published
 - in a form which complies with PD 57B; and
 - “in at least one newspaper circulating in the vicinity of the last known address of the missing person” (57.21)
- at least 5 days before the hearing C must file a copy of the relevant newspaper page and the date on which it was published.

Information from 3P

- An application under s 12 (1) of the PoD Act (info sought from 3P) must be supported by evidence, and must: -
 - specify order sought;
 - set out reasons why person making application believes 3P is likely to have such information;

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- include any further known details which are likely to assist in providing the information sought;
- Copy of the application notice for information from 3P must be served on the 3P and on every other party \geq 14 days before the date fixed for the hearing;
- Conversely, an application for variation or discharge of an order so obtained may be made without notice unless court directs otherwise.
- Form of advertisement (as set out in P 57N, para 2.1): -

IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF THE PRESUMED DEATH
OF *(INSERT NAME)*

A claim has been issued in the High Court of Justice, for a [declaration] [variation of a declaration] that (insert name), whose last known address was (insert address) is presumed to be dead. Any person having an interest may apply to the Court to intervene in the matter.

If you wish to apply to the Court, you should do so at [Court address] as soon as possible, and if possible within 21 days of the date of this notice. Delay may harm your prospects of being able to intervene.

[If the claimant is legally represented]

(Name)

Claimant's Legal Representative

(Address)

[If the claimant is not legally represented]

(Claimant's address for service)

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30.10.2014

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Appendix - Explanatory Notes to the Presumption of Death Act 2013

INTRODUCTION

“1. These Explanatory Notes relate to the Presumption of Death Act 2013 which received Royal Assent on 26 March 2013. They have been prepared by the Ministry of Justice in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

3. Under the law of England and Wales the disappearance of a person does not affect the ownership or control of their property and affairs. In such circumstances it may be difficult or impossible for those left behind to obtain a death certificate if they believe the missing person must be dead.

Without a death certificate, the missing person will for legal purposes generally be assumed to be alive. In these circumstances there are a number of specific procedures under which the missing person may be presumed dead. In most of these cases the presumption of death is limited to the purposes of the specific procedure in question. The specific procedures include:

- Coroner's Inquest under section 15 of the Coroners Act 1988;
- Decree of Presumption of Death and Dissolution of Marriage under section 19 of the Matrimonial Causes Act 1973;
- Presumption of Death Order under section 37 of the Civil Partnership Act 2004;
- Leave to swear death order under Rule 53 of the Non-Contentious Probate Rules 1987;
- Determinations of entitlement to benefit by the Secretary of State under section 8 of the Social Security Act 1998; and
- Consular Death Registration.

4. In addition, where the question of whether a person is alive arises in the course of litigation generally, an evidential presumption that a person is to be deemed dead after a seven year absence may be applied. This presumption can, however, be rebutted

5. People left behind by a missing person may therefore have to use various procedures to deal with different aspects of the missing person's property and affairs. Some of these procedures may lead to the issue of a death certificate, such as an inquest under section 15 of the Coroners Act 1988; others, such as leave to swear

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death under Rule 53 of the Non-Contentious Probate Rules 1987, will not. Different procedures may, for example, have to be followed, therefore, to end a missing person's marriage or civil partnership on the one hand and to obtain a grant of probate to administer his or her estate on the other.”