

# Missing a trick

The family of a missing person cannot obtain a death certificate for seven years, and faces a myriad of legal procedures to deal with other issues like divorce and probate. But, says **Rita Bhargava**, effective legislation could address all these issues

Every 90 seconds, a missing person's report is made to the police in the UK. That adds up to about 350,000 a year, 200,000 of which are in England. Most are resolved in 48 hours, but 1% are still missing after a year. When a person goes missing, there are enormous emotional consequences for their family and dependents. Unlike with a bereavement, the family is denied closure and the right to perform rituals. The lack of information and knowledge about what happened to their loved one can also freeze the grief process.

Often less understood, but potentially equally important and equally distressing, the family will face far-reaching financial and legal consequences.

Those left behind will not be able to access the missing person's bank accounts, which means their bills may not be paid, insurance policies may lapse, and mortgages can go into arrears, potentially leading to the mortgagee bringing proceedings for possession of the property. Equally, regular payments made by standing order or direct debit will continue, as there is no authority to stop them – this may mean that unwanted services like gym membership may carry on being paid for, causing the missing person's account to be unnecessarily diminished.

The spouse or partner of a missing person will also be unable to move on personally or bring the relationship to a formal end, and we can only begin to imagine the difficulties they will face in relation to any property or tenancies held in the missing person's sole name.

Finally, even if the missing person is presumed dead (which can only happen after seven years), without a body, it is difficult to obtain a death certificate, and therefore administer the person's estate. This article explores this last issue.

## OBTAINING A DEATH CERTIFICATE

A death certificate is a legal document used to prove death, thereby allowing a deceased person's affairs to be dealt with.

If a person goes missing, there is no body to prove death, so a death certificate cannot be issued and the person's affairs remain in limbo. English law provides for a common law presumption of death where there is no clear evidence that the person was alive during the last seven years. This is a rebuttable presumption, and for the court to presume death, there should be evidence that persons who would have expected to have heard from or had contact with the missing person have not, and that all due enquiries have been made to locate the missing person without success.

The court's declaration of presumed death will allow the missing person to be treated as dead, and allow the family to administer their loved one's estate.

## OTHER OPTIONS FOR THE FAMILY

There are other options where a family wants or needs to start dealing with some of the issues caused by a person's disappearance, before the end of the seven years. However, each statutory provision deals with a specific issue caused by the missing person's disappearance – that is, each procedure means a missing person can be declared dead for one purpose, but not for another.

Under limited circumstances, where there is a presumption of death but no direct evidence of death, the family of the missing person does not have to wait for the seven years to be completed. Instead, they could make an application to court under the Non-Contentious Probate Rules 1987 once the person disappears. The district judge or registrar can grant the applicant leave to swear to the death of the missing person, solely for the purposes of allowing probate to be granted. However, it will not be accepted as conclusive proof of death.

There are also statutory provisions that the family of a missing person can rely on to deal with specific issues that might arise as a result of the disappearance. For example, the Matrimonial Causes Act 1973 allows the surviving spouse of the missing person to dissolve the marriage by obtaining a decree of presumed death and dissolution of marriage. However, this may not be used to obtain a death certificate or assist the surviving spouse to deal with other issues, such as handling the missing person's bank accounts or collecting the proceeds of an insurance policy.

## POTENTIAL CHANGES

Missing People is a charity which has, for many years, been assisting families and dependents of missing persons to address the issues they face as a result of the person's disappearance. It has been campaigning for a change in the law on presumption of death to allow the family, dependants or other interested parties of a missing person to apply to the court for a declaration of presumed death through a single court process, to resolve the financial and legal issues mentioned above.

In 2011, an all-party parliamentary group was set up to hear evidence from the families of missing people. It concluded that the suffering of families of missing people is exacerbated by what it called "a legislation patchwork of bewildering complexity", and recommended a Presumption Of Death Act to clarify and simplify the current legal position.

In February 2012, the House of Commons justice committee concluded that legislation is needed in this area, and will be modelled on the legislation in Scotland and Northern Ireland, which has a similar single procedure. To understand what this might mean in England and Wales, it is useful to look at how the



legislation works in Scotland.

Section 1(1) of the Presumption of Death (Scotland) Act 1977 states that: "Where a person who is missing is thought to have died or has not been known to be alive for a period of at least seven years, any person having an interest may raise an action of declarator of the death of that person ... in the Court of Session or the sheriff court in accordance with the provisions of this section." The Court of Session has jurisdiction to make a declaration if the missing person was domiciled in Scotland on the date on which they were last known to be alive, or had been habitually resident there throughout the period of one year ending with that date. As long as the court is satisfied, on the balance of probabilities, that the missing person has died, the court will grant a decree, and can state the date and time of death before the end of the seven-year period. The decree deals with all aspects of the missing person's affairs, from the dissolution of any marriage, to property rights. Approximately four or five such orders are made each year, and to date, only one person who was subject to a presumption of death order has reappeared; this should satisfy those who worry that a change in the law will lead to more fraud in the area. A further safeguard is the requirement to put insurance in place (payable from the missing person's estate) to cover the costs should they reappear and make a claim on the estate.

The House of Commons justice committee also felt that a presumption of death order would only solve part of the problem for missing people's loved ones, so it also recommended that legislation be extended to allow guardianship orders for the interim period while a person is missing and not declared dead. Such a system would be similar to that already in existence in some states in Australia.

Another issue that could be resolved by the introduction of new legislation is the fact that, when a person goes missing, their bank accounts, including any standing orders or direct debits, cannot be frozen. Financial organisations will not speak to anyone other than the account holder, due to the Data Protection Act 1998. For the family or dependants of the missing person, getting any information from financial organisations to protect the person's interests can be very frustrating and often impossible.

One solution to address this would be to create legislation similar to that introduced in the state of Victoria, Australia. The state's amended Guardianship and Administration Act 1986 provides that an application can be made to court if:

- a) a person has been missing for at least 90 days;
- b) it is not known if the person is alive;

- c) reasonable efforts have been made to locate them;
- d) persons with whom the person would be likely to communicate, have not heard from the person for at least 90 days; and
- e) it is in the best interests of the missing person to do so.

The order subsequently made is similar to a deputyship order under England and Wales' Mental Capacity Act 2005. The application can be made by any person over 18 who has an interest in the estate of the missing person – that includes an employee or employer, business partner or relative. There are safeguards: the court requires any person with an interest in the order to be notified of the application, even if they oppose it, and the court will only grant an order if there is a need for decisions to be made regarding the person's property, and it is in that person's best interests to do so. The person granted the guardianship order is called the administrator, and must act in the best interests of the missing person and make decisions that are "necessary and desirable for the payment of the missing person's debts, the maintenance of the missing person's dependents and the care and maintenance of the missing person's estate". The order is valid for two years, but can be renewed.

Missing People has been campaigning for a similar law in England and Wales. However, rather than creating a separate law, it may be more appropriate for the Mental Capacity Act 2005 to be amended to include this.

## CONCLUSION

The current position under English law is unsatisfactory for the family and dependents of missing persons. There is no single straightforward means by which family members or dependents can deal with the huge range of legal issues that arise from the disappearance of a loved one. A private member's bill entitled the Presumption of Death Bill, which would introduce a certificate of presumed death through a single court process, was scheduled for its second reading on 2 November 2012, after this edition of *PS* goes to press. While the government has accepted the need for some sort of guardianship order, there is unfortunately as yet no time frame for the implementation of this. ■

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