



**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

# CIVIL LAW ASPECTS OF MISSING PERSONS

[LRC CP 64 – 2011]





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## LAW REFORM COMMISSION'S ROLE

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 160 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at [www.lawreform.ie](http://www.lawreform.ie). Most of these proposals have led to reforming legislation.

The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

The Commission's role also involves making legislation more accessible through three other related areas of activity, Statute Law Restatement, the Legislation Directory and the Classified List of Legislation in Ireland. Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002*, where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to legislative changes. The Classified List of Legislation in Ireland is a list of all Acts of the Oireachtas that remain in force, organised under 36 major subject-matter headings.

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Full responsibility for this publication lies, however, with the Commission.



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## TABLE OF CONTENTS

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Table of Legislation		xi
Table of Cases		xiii
<b>INTRODUCTION</b>		<b>1</b>
A	Civil Law Aspects of Missing Persons	1
B	Statistics on Missing Persons in Ireland	2
C	Why People Go Missing and Scope of the Consultation Paper	3
D	Impact on Those Left Behind and Limits of Current Law	5
E	Outline of Consultation Paper	7
<b>CHAPTER 1</b>	<b>CATEGORISING MISSING PERSONS FOR CIVIL LAW PURPOSES</b>	<b>11</b>
A	Introduction	11
B	Defining a missing person for civil law purposes	11
C	The Current Law in Ireland on Missing Persons	16
	(1) Section 23 of the Coroners Act 1962	16
	(2) Common law presumption of life up to 7 years and presumption of death after 7 years	18
D	International and Comparative Analysis	25
	(1) 1950 UN Convention on Missing Persons in World War II	25
	(2) 2009 Council of Europe Recommendation on Missing Persons	26
	(3) The approach in Civil Law and Common Law countries to Missing Persons	30
	(4) Northern Ireland and Scotland	31
	(5) England and Wales	33
	(6) Australia	36
	(7) Canada	39
E	Conclusions and Provisional Recommendations	45
	(1) Categorising missing persons in connection with presumed death	45
	(2) Missing persons and interim administration procedures	48
<b>CHAPTER 2</b>	<b>INTERIM ADMINISTRATION OF A MISSING PERSON'S PROPERTY</b>	<b>53</b>
A	Introduction	53

	B	Australian Legislation on Interim Administration	53
		(1) When can an application be made?	54
		(2) The detailed criteria	54
		(3) How is an application made?	57
		(4) What can an administrator do?	59
		(5) Case study: Re Rosewall	61
	C	Canadian Legislation on Interim Administration	63
	D	Conclusions and Provisional Recommendations	66
		(1) When can an application be made?	66
		(2) Who can make an application to be appointed as an administrator?	67
		(3) What can an administrator do?	70
<b>CHAPTER 3</b>		<b>PRESUMPTION OF DEATH LEGISLATION</b>	<b>73</b>
	A	Introduction	73
	B	The Limited Nature of Existing Law	73
	C	Conclusions and Provisional Recommendations	77
		(1) Where death is virtually certain.	77
		(2) Where death is highly probable	78
		(3) Retaining the 7 year reference period where death is highly probable	79
		(4) Persons who may apply for a declaration of presumed death	82
		(5) The status of marriage or civil partnership	82
<b>CHAPTER 4</b>		<b>WHEN THE MISSING PERSON RETURNS AND INTERNATIONAL ASPECTS OF MISSING PERSONS</b>	<b>87</b>
	A	Introduction	87
	B	Property of the Missing Person Who Returns: Variation Order	87
	C	Marriage or Civil Partnership of the Missing Person Who Returns	90
		(1) Marriage	90
		(2) Civil Partnership	92
	D	International Aspects of Missing Persons	93
		(1) Where an Irish citizen disappears abroad	94
		(2) Where a person from abroad disappears in Ireland	95
<b>CHAPTER 5</b>		<b>SUMMARY OF PROVISIONAL RECOMMENDATIONS</b>	<b>99</b>

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## TABLE OF LEGISLATION

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Absentees Act 1990	c. A.3	Can
Bigamy Act 1603	11 Jac.1, c. 1	Eng
Cestui Que Vie Act 1666	18 & 19 Cha 2, c. 11	Eng
Civil Partnership Act 2004	c. 33	Eng
Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010	24/2010	Irl
Coroners Act 1962	9/1962	Irl
Coroners Act 1988	c. 13	Eng
Declarations of Death Act 2002	c. 14	Can
Guardianship and Administration Act 1986	No. 58/1986	Aus
Land and Conveyancing Law Reform Act 2009	27/2009	Irl
Matrimonial Causes Act 1973	c. 18	Eng
Missing Persons and Presumption of Death Act 2009	c. M-20.01	Can
Offences Against the Person Act 1861	24 & 25 Vict, c. 100	Eng
Presumption of Death (Scotland) Act 1977	c. 27	Scot
Presumption of Death (Northern Ireland) Act 2009	c. 6	NI
Social Security Act 1998	c. 14	Eng
Social Security Administration Act 1992	c. 5	Eng
Social Welfare Consolidation Act 2005	26/2005	Irl
Succession Act 1965	27/1965	Irl
Survivorship and Presumption of Death Act 1996	c. 444	Can
Verschollenheitsgesetz 1939	401-6	Ger



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## TABLE OF CASES

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In re Adoption (No.2) Bill 1987	[1989] IR 656	Irl
Axon v Axon	[1937] 59 CLR 395	Aus
Re Bennett	[2006] QSC 250	Aus
Re Burgess	[2004] BCJ No. 73	Can
Chard v Chard	[1956] P 259	Eng
Comey v Manufacturing Life Insurance Co.	[2010] AJ No. 1008	Can
Re Cyr	[2006] BCJ No. 2703	Can
Re Doherty	[1961] IR 219	Irl
In the Goods of Freytag	(1909) 42 ILTR 116	Irl
Re Hills	[2009] SASC 176	Aus
Kamboj v Kamboj	(2007) CanLII 14932	Can
Kotai v Queen of North (The)	[2007] BCJ No. 1573	Can
McMahon and Ors v McElroy	(1869) IR 5 Eq 1	Irl
Re Quang Lu	(2008) Ont SC	Can
Rosewall (Guardianship)	[2010] VCAT 1994	Aus
Sherman v National Life Assurance Co. of Canada	[1996] 92 OAC 19	Can
The State (Nicolaou) v An Bord Uchtála	[1966] IR 567	Irl
Re Vos Estate	[2008] ABQB 487	Can
Re Watkins	[1953] 1 WLR 1323	Eng





## INTRODUCTION

### A Civil Law Aspects of Missing Persons

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-14*<sup>1</sup> and examines the civil law aspects that arise when a person goes missing.<sup>2</sup> The main feature of current law in this area is that there is a presumption that a missing person is alive for up to 7 years, and that a presumption of death applies after 7 years. These presumptions may be rebutted by contrary evidence, so that a person can be presumed dead where they have been missing for less than 7 years; and an absence of 7 years does not always lead to a declaration of presumed death.

2. In the Consultation Paper the Commission examines how the existing law in this area deals with, for example, succession rights of family members, payment of any life insurance policy and the ongoing legal status of a marriage or civil partnership. The Consultation Paper also deals with the precise circumstances in which a declaration of "presumed death" (in some countries, also referred to as a declaration of "death *in absentia*") may be issued before or after 7 years have elapsed. The Commission also examines the effect that long absence (or a declaration of presumed death) has for the civil status of a missing person. This is especially important if he or she returns after a long time; in turn, this raises civil status questions such as whether his or her marriage remains valid, whether parental responsibilities to any children remain in place and whether any dealings with his or her property during his or her absence should stand.

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<sup>1</sup> *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 37.

<sup>2</sup> The Commission does not, therefore, consider in this Consultation Paper any criminal law aspects of the law of missing persons, such as the existence of specific protocols and procedures for notifying missing persons to the Garda Síochána Missing Persons Bureau (established in 1982), or international co-operation and mutual assistance between police forces through Europol or Interpol. These issues were dealt with comprehensively in the 2009 Report of the Garda Síochána Inspectorate, *Missing Persons Review and Recommendations* (2009), available at [www.garda.ie](http://www.garda.ie). Nor does the Consultation Paper deal with criminal procedure matters such as that a prosecution for the murder of a missing person may proceed in the absence of a body (the *corpus delicti*), provided there is sufficient circumstantial evidence to establish that death has occurred: see *The People (Attorney General) v Thomas* [1954] IR 319 and *The People (DPP) v Towson* [1978] ILRM 122.

3. In the Consultation Paper, the Commission also examines some immediate practical problems for family members – often referred to as those left behind – such as how to access a missing person’s bank account (especially where the bank account is in his or her sole name) so that bills can be paid. As discussed in the Consultation Paper, the Commission notes that this area needs to be dealt with separately from the question of presumed death.

## **B Statistics on Missing Persons in Ireland**

4. In Ireland, as set out in the Table below, the Garda Síochána Missing Persons Bureau notes that on average almost 20 people are reported missing every day, that is, between 7,000 and 8,000 annually.

**Table: Missing Persons in Ireland 2003-2010<sup>3</sup>**

Year	Number of Reports	Number still Missing
2010	8,339	28
2009	7,749	66
2008	7,980	39
2007	7,992	52
2006	6,811	53
2005	5,997	34
2004	5,060	51
2003	3,987	58
<b>Total</b>	<b>53,915</b>	<b>381</b>

5. In 2009, the Garda Síochána Inspectorate noted that, of this total, young persons in contact with the Health Service Executive (HSE) account for 43% of all missing persons reports filed with the Garda Síochána, but represent only 8% of persons reported missing. The Garda Síochána Inspectorate concluded that this indicated that “many were reported missing on multiple occasions, including one child who was reported missing 169 times.”<sup>4</sup> It is important to note, however, as the Table also indicates, that the overwhelming majority of missing persons, including young persons in contact with the HSE, are located within a short time.

<sup>3</sup> Source: Garda Síochána Missing Persons Bureau, available at [www.garda.ie/Controller.aspx?Page=85&Lang=1](http://www.garda.ie/Controller.aspx?Page=85&Lang=1) (last accessed 28 November 2011).

<sup>4</sup> Report of the Garda Síochána Inspectorate, *Missing Persons Review and Recommendations* (2009), p.21, available at [www.garda.ie](http://www.garda.ie).

6. Thus, in the 8 year period from 2003 to 2010 covered by these figures, out of a total of 53,915 persons reported missing, 381 remained missing at the time of writing (November 2011), that is, about 0.7% of the total.<sup>5</sup> These figures are consistent with the statistics collated by the Irish Missing Persons Helpline, which indicate that 95% of missing persons are found within “a short period of time.”<sup>6</sup> This is also reflected in similar statistics internationally. For example, in Australia, 90% of missing persons are found within 2 weeks, rising to 98% within 6 months.<sup>7</sup> It is clear therefore that in Ireland, as in many other countries, only a small percentage of missing person cases remain unsolved in the sense that the vast majority of missing persons turn up within a short time.

### **C Why People Go Missing and Scope of the Consultation Paper**

7. Persons from all ages and walks of life go missing in many different circumstances and for different reasons.<sup>8</sup> As the Garda Síochána Inspectorate has noted, young persons in the care of the Health Service Executive (HSE) account for 43% of all missing persons reports filed with the Garda Síochána, but represent only 8% of persons reported missing. The position of missing children generally is quite different from adult missing persons, and aside from those who come to the attention of the HSE, children go missing primarily because of abduction, whether by family members or others. The Commission is conscious that where children go missing this gives rise to specific issues for those left behind, including for example how to deal with the person who has abducted the child. This issue, which often has an international and trans-border aspect, is largely outside the scope of this project.<sup>9</sup>

8. By contrast with children, adults who go missing often do so voluntarily: they may simply wish to break contact with family or friends, which can sometimes be connected with emotional issues. Another major reason is financial difficulties such as personal debt, and the missing person may consider that a sudden disappearance will facilitate leaving the debt behind.

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<sup>5</sup> Source: Garda Missing Persons Bureau, available at <http://www.garda.ie/Controller.aspx?Page=85&Lang=1>.

<sup>6</sup> Available at <http://www.missingpersons.ie/>.

<sup>7</sup> James, Anderson and Putt, *Missing Persons in Australia* (Australian Institute of Criminology, 2008) at 15.

<sup>8</sup> Holmes *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008) at 11, available at [www.missingpeople.org.uk](http://www.missingpeople.org.uk).

<sup>9</sup> The *Child Abduction and Enforcement of Custody Orders Act 1991* regulates the international civil law aspect of this area of missing, abducted, children.

Another small group of people go missing due to memory loss sustained in a fall or traffic accident: some are located through established missing persons bureaus or through media coverage, as in the case of the missing Irishman John Delaney.<sup>10</sup>

9. In other instances, the circumstances of the person's disappearance indicate that he or she has committed suicide but the body has not been found. In a small number of extreme cases, of course, the missing person may wish to use his or her disappearance to personal advantage, by being able to make a claim on, for example, a life insurance policy. There are well-known examples of where this has been accompanied by leaving evidence of what turns out to be a faked suicide. These instances pose clear difficulties for those left behind, and for an insurance company that must decide whether to make a payment under the life policy. In some instances, of course, this includes the need to determine whether a missing person has committed suicide or whether the circumstances indicate an attempt to defraud. This was the position in the disappearance in 1974 of the English MP John Stonehouse and, in 2002, of Englishman John Darwin.<sup>11</sup>

10. Another group of missing adults are those who disappear where the circumstances indicate they have been abducted and killed, an example being the disappearance in 1986 of the English estate agent Suzy Lamplugh.<sup>12</sup> In Ireland, during the violence associated with Northern Ireland between the 1970s and late 1990s, a number of people were abducted but have not been found: they are often referred to as "the Disappeared". While the number of persons involved is small,<sup>13</sup> the Commission acknowledges that this group of missing persons merit specific recognition in any reform proposals.<sup>14</sup>

11. This Consultation Paper is primarily concerned with missing adults because these cases are more likely to raise the specific issues that require civil law resolution: how to deal with a missing person's bank accounts or investments; whether payment should be made under a life insurance policy; whether those left behind may apply for administration of the missing person's

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<sup>10</sup> See the discussion in Chapter 1, below.

<sup>11</sup> See the discussion in Chapter 1, below.

<sup>12</sup> See the discussion in Chapter 1, below.

<sup>13</sup> As discussed in Chapter 1, below, seven of the Disappeared currently (November 2011) remain unaccounted for.

<sup>14</sup> The *Presumption of Death (Northern Ireland) Act 2009*, discussed in detail in the Consultation Paper, includes specific provision for the families of the Disappeared: see in particular Chapter 4.

estate on the basis that he or she is presumed dead; and the civil status of those left behind (for example, whether they are free to remarry).

## **D Impact on Those Left Behind and Limits of Current Law**

12. Regardless of the circumstances of a disappearance or the period of absence of the missing person, the impact on those left behind, family members in particular, cannot be understated. As the disappearance of a person is often unanticipated and unexpected, the emotional trauma caused by the disappearance can be devastating for those left behind. The mother of a missing teenager in England stated: “There is no preparation, no luxury of hindsight for dealing with the loss of a loved one. You are thrown into an alien world.”<sup>15</sup>

13. The emotional impact on those left behind can be directly attributed to the lack of information that occurs when a person goes missing.<sup>16</sup> Therefore, in place of certainty, those left behind are forced to deal with the “ambiguous loss”<sup>17</sup> of the person. In attempting to cope with this uncertainty, those left behind often feel stuck or “frozen” in time. This is a normal human response to having a loved one disappear. As the figures mentioned above indicate, in most situations where a person goes missing, those left behind will, within a short time, know what has happened, in particular whether the missing person is alive or dead. For the small minority where the person does not turn up, the concept of “missing” occupies an emotional space where those left behind have no absolutes.<sup>18</sup>

14. The Commission accepts that the law should, as far as is practicable, be responsive to the complexity of the consequences that arise when an adult goes missing; and that the current law does not meet this standard. In Ireland, there is no generally applicable law concerning the civil law of missing persons. The current law is confined to: (a) a limited reference to missing persons in the

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<sup>15</sup> *Supporting Families of Missing People: Existing Provisions and the Missing Persons Taskforce Recommendations* (UK Houses of Parliament All-Party Parliamentary Group for Runaway and Missing Children and Adults, 2011) at 4.

<sup>16</sup> Holmes *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008) at 17.

<sup>17</sup> See Boss “Ambiguous Loss: Working with Families of the Missing” (2002) 41 *Family Process* 14-17, and Boss, “Ambiguous Loss in Families of the Missing” *The Lancet* Vol 360, December 2002, at 39-40.

<sup>18</sup> Wayland, *Supporting Those who are Left Behind: A Counselling Framework to Support Families of Missing Persons* (Australian Federal Police National Missing Persons Coordination Centre, 2007) at 8.

*Coroners Act 1962* and (b) the common law presumption of life up to 7 years, and a corresponding presumption of death after 7 years (both presumptions being rebuttable).

15. Section 23 of the *Coroners Act 1962* provides for an inquest to be held where a coroner believes that the person's body was, for example, lost at sea or destroyed in a fire; such an inquest can lead to a declaration of death and the consequent issuing of a death certificate. The 1962 Act does not, however, provide for an inquest in respect of missing persons in general terms; most inquests require the presence of the deceased's body.

16. More significantly, the common law presumption of life up to 7 years and presumption of death after 7 years allows those left behind to apply to the High Court to have a declaration of presumed death after 7 years, and this may be shortened if it is reasonable to conclude that the person is already dead. As discussed in the Consultation Paper, this declaration of presumed death is limited to allowing the deceased's estate to be administered by an executor. It does not have the effect in law of a death certificate, and therefore it does not, for example, have any effect on any marriage or civil partnership. The Commission notes in the Consultation Paper that this 7 year rule has been recognised in specific, limited, circumstances such as in section 18 of the *Land and Conveyancing Law Reform Act 2009* in connection with beneficiaries under a trust concerning land who are missing.<sup>19</sup>

17. The Commission also notes that, irrespective of whether the missing person returns, those left behind are faced with immediate practical problems, such as how to deal with mortgage payments, access to bank accounts that might become overdrawn, or insurance renewal on a car or motorbike. One mother of a missing person in England stated: "I didn't want my son's account to go overdrawn. It mattered so much to me."<sup>20</sup> The existing law does not facilitate immediate access to, for example, the missing person's bank accounts because, in the immediate aftermath of a disappearance, it will be difficult to establish that the circumstances indicate any probability that the person is unlikely to return, so that the common law presumption of life will be difficult to rebut.

18. It is clear, therefore, that in the absence of a comprehensive set of legislative provisions that deal with all civil law aspects of missing persons, those left behind face legal and practical problems which can increase the emotional trauma they experience. The Commission accepts that reform of the

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<sup>19</sup> See the discussion of section 18 of the 2009 Act in Chapter 1, below.

<sup>20</sup> Holmes *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008) at 32.

civil law aspects of missing persons may go some way to alleviate the emotional impact for those left behind, while at the same time protecting the legitimate claims of a missing person who later returns.

## **E Outline of Consultation Paper**

19. The Commission now turns to outline the contents of the Consultation Paper.

20. In Chapter 1 the Commission examines how the various ways in which people go missing can suitably be categorised with a view to developing a clear legislative framework to deal with the practical civil law issues that fall within the scope of this Consultation Paper. The Commission has provisionally concluded that, for the purposes of a declaration of presumed death, there are two main categories. The first category, where the circumstances of their disappearance indicates that death is virtually certain, would deal with persons who go missing in circumstances (whether arising from a civil accident or arising from a violent incident) where their death is virtually certain given the circumstances. The second category, where the circumstances of their disappearance, and its length, indicates that it is highly probable that they have died and will not return, would apply where the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed.

21. The Commission provisionally recommends that, in determining whether a presumption of death is to be ordered, all the circumstances surrounding the disappearance must be taken into account, including the following: (a) the time, location, and circumstances of the disappearance, (b) the extent and nature of post-disappearance searches, (c) a prior history of fraud, (d) the presence or absence of a motive for the missing person to remain alive but disappear, (e) the time between a life insurance policy being obtained and the subsequent disappearance, (f) facts suggesting the disappearance was a consequence of foul play, and (g) abandonment of valuable property.

22. The Commission also provisionally recommends that separate arrangements should be put in place to deal with the interim administration of the property of a missing person, in particular where it is not clear whether the person will return. This would deal with the immediate and practical issues already mentioned.

23. In Chapter 2, the Commission examines how a proposed legislative framework could provide for the practical day-to-day issues (such as bill-paying from the missing person's bank account) that arise when a person remains absent for a relatively short period of time but where those left behind should be in a position to take relevant, limited, action to administer and manage the assets of the missing person. The Commission examines in this respect

legislation in place in Australia and Canada that permits a limited and specific use of the property of missing persons, building on the existing structure of their adult guardianship legislation. Arrangements that might be put in place in that context could include the appointment of an interim administrator of the missing person's property (who could be a family member). Such an arrangement would not have an impact on the civil law status of the missing person (for example their status as living) or of those left behind (for example, married). Pending the enactment of modern adult guardianship in Ireland, the Commission concludes that such applications could be made to the Probate Office of the High Court.

24. In Chapter 3, the Commission discusses the details of the proposed presumption of death legislation recommended in Chapter 1. This includes an analysis of comparable laws in other countries, including the *Presumption of Death (Northern Ireland) Act 2009*. The application of legislation concerning presumed death involves a change in civil status for the missing person and the consequences that flow from this (such as administration of the estate and consequential effects for insurance purposes).

25. The Commission draws important distinctions between the procedures that it envisages would be involved in obtaining a declaration of presumed death, depending on the category of missing person involved. In the case of a missing person where the circumstances indicate that death is virtually certain, the Commission considers that an application could be made to a coroner; this would build on the, admittedly limited, powers already contained in the *Coroners Act 1962* to hold an inquest involving a missing person. On the other hand, where the circumstances indicate that death is highly probable, the Commission considers that an application should be made to the High Court, as is the case at present.

26. In Chapter 4, the Commission discusses the consequences of the return of a missing person in respect of whom either the interim arrangements discussed in Chapter 2 have been applied or in respect of whom a declaration of presumption of death has been made in accordance with the proposals in Chapter 3. The Commission also discusses the international dimension, where persons go missing outside Ireland and also where non-Irish nationals go missing in Ireland. This also includes discussion of specific provisions to recognise the Disappeared, those associated with the violence in Northern Ireland between the 1970s and the late 1990s.

27. Chapter 5 contains a summary of the provisional recommendations made in this Consultation Paper.

28. This Consultation Paper is intended to form the basis of discussion and therefore all the recommendations are provisional in nature. The Commission will make its final recommendations on the subject of the civil law aspects of missing persons following further consideration of the issues and consultation.



Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of the Report, which will contain the Commission's final recommendations in this area, those who wish to do so are requested to make their submissions in writing to the Commission or by email to [info@lawreform.ie](mailto:info@lawreform.ie) by **31 March 2012**.



## **CHAPTER 1      CATEGORISING MISSING PERSONS FOR CIVIL LAW PURPOSES**

### **A            Introduction**

1.01        In this Chapter, the Commission begins in Part B by examining the circumstances in which people go missing in order to arrive at a general definition of missing persons for the purposes of the civil law, which is the focus of this Consultation Paper. In Part C, the Commission outlines the current law in Ireland concerning missing persons, which primarily concerns the circumstances in which the missing person is either presumed to be alive or presumed dead. The Commission then examines in Part D international and comparative developments in this area. In the context of the presumption of death, the Commission notes the importance of the 2009 Council of Europe Recommendation on Missing Persons which provides a general framework around which the law on presumption of death may be reformed. The Commission also notes that many countries have, in addition to enacting legislation on presumption of death, put in place specific provisions to deal with interim financial issues for those left behind, such as limited administration of the missing person's assets and estate. These provisions operate quite separately from the question of presumption of death. In Part E, the Commission sets out its conclusions and provisional recommendations for reform on the question of presumption of death and the separate issue of interim measures to administer the estate and assets of the missing person.

### **B            Defining a missing person for civil law purposes**

1.02        The focus of this Consultation Paper is the civil law aspects of missing persons, and in this Part the Commission examines the circumstances in which people disappear in order to arrive at a general definition of missing persons. As already noted in the Introduction to this Consultation Paper, there are many reasons why people go missing, or disappear. Where the circumstances are unexpected or unusual, it is often unclear precisely what has happened, although as the figures referred to in the Introduction indicate, over 99% of people reported missing will turn up alive within a short time. As for the remaining small number of long-term missing, their family and friends will often retain the hope that, even where there has been no contact or word for many years, the missing person is still alive and may return.

1.03 This hope is actually grounded in reality, because the general literature on adult missing persons notes that, in a substantial minority of such cases, the person may have “simply drifted away” and subsequently had “no desire to renew contact” with those previously associated with them.<sup>1</sup> These people may be alive for many years, may never return home but may have assets which need to be administered at some stage. The High Court decision in *Re Doherty*<sup>2</sup> is an example of this, where the State (with the assistance of the missing person’s stockbrokers) applied to have him declared presumed dead after 42 years absence.

1.04 There have also been instances where a person goes missing, is presumed dead, but who later turns up or is found. For example, John Delaney was an Irish person who, while living in England, went missing. His family, after numerous efforts to locate him, were told that his remains had been discovered, and they had them cremated. John Delaney’s son subsequently discovered, while watching a television documentary on unidentified missing persons in England, that his father had suffered a head injury which resulted in a loss of memory and he had ended up in a nursing home and was still alive.<sup>3</sup>

1.05 As for missing children, there have also been a number of high-profile cases internationally of children who have gone missing and who have been found many years later, such as the American Jaycee Lee Dugard and the Austrian Natascha Kampusch. For many families and friends, therefore, “missing” does not in any sense equate with being “presumed dead”. The case of the young English girl Madeline McCann who disappeared in Portugal in 2007 and was assumed abducted is an example of a case where her parents continue to believe that she, too, will one day be found.

1.06 In other instances involving an adult who disappears, the circumstances of the person’s disappearance indicate that he or she has committed suicide but the body has not been found. In a small number of extreme cases, of course, the missing person may wish to use his or her disappearance to personal advantage, by being able to make a claim on, for example, a life insurance policy. There are well-known examples of where this has been accompanied by leaving evidence of what turns out to be a faked suicide. These instances pose clear difficulties for those left behind, and for an insurance company that must decide whether to make a payment under the life policy. In some instances, of course, this includes the need to determine

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<sup>1</sup> Biehal, Mitchell and Wade, *Lost from View* (The Policy Press, 2003) at 45.

<sup>2</sup> [1961] IR 219, discussed below.

<sup>3</sup> Cummins, *Without Trace – Ireland’s Missing* (Gill & Macmillan, 2010) at 231.

whether a missing person has committed suicide or whether the circumstances indicate an attempt to defraud.

1.07 This was the situation in the disappearance in 1974 of the English MP John Stonehouse, who had faked his suicide in order to avoid regulatory investigations into his businesses and other personal financial problems. He had also taken out a life insurance policy shortly before his disappearance in order to benefit his wife (who was unaware of his plans, and who never made a claim on the policy). He was later found in Australia and deported to England, where he was convicted of attempting to obtain money by false pretences.<sup>4</sup> Similarly, in March 2002 the Englishman John Darwin disappeared while canoeing, and appeared at the time to have drowned. His wife had reported him missing and, in April 2003, an inquest into his disappearance<sup>5</sup> recorded an open verdict, and a death certificate was issued. Arising from this, Mrs Darwin successfully made claims totalling £250,000 on a life insurance policy and a mortgage protection policy on their family home. In 2007, John Darwin entered a police station in London claiming he had suffered from amnesia for the previous 5 years. After further investigations, he and his wife were later convicted of conspiracy to defraud.<sup>6</sup>

1.08 There have also, of course, many equally highly-publicised cases where a disappearance has been followed by an extensive but fruitless search for the missing person, leading ultimately to an acceptance that he or she has died. For example, in 1986 an English estate agent, Suzy Lamplugh, disappeared after she went to meet an unknown client. Her body was never found but it was eventually accepted that she had been killed. In 1993, her parents accepted that, 7 years after her disappearance, they should apply to the English courts for a declaration that she was “presumed dead”<sup>7</sup> and the English High Court made a presumed dead declaration in 1994. This is an example of

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<sup>4</sup> See *DPP v Stonehouse* [1978] AC 55 and *Report on Inchoate Offences* (LRC 99-2010), paragraphs 2.44-2.47.

<sup>5</sup> The inquest was held under section 15 of the English *Coroners Act 1988*, which is broadly similar to section 23 of the *Coroners Act 1962*, both discussed below.

<sup>6</sup> See *R v Darwin* [2009] EWCA 860, in which the English Court of Appeal examined in detail the background to what it described as a “notorious” case.

<sup>7</sup> Oxford, “Suzy Lamplugh ‘declared dead’ by her family” *The Independent* 28 July 1993. Her parents also established the Suzy Lamplugh Trust, which promotes general personal safety and which also led to the inauguration in England of a national personal safety day. Many workplace-based policies on lone working are also often referred to as “Suzy Lamplugh policies.”

applying the long-established rule of presumed death after 7 years which, as discussed below, also applies in Ireland.

1.09 Major civil accidents have also resulted in the death and disappearance of many people. In 2009, an Air France plane crashed into the Atlantic off the coast of Brazil en route to Paris; it is generally accepted that all 228 persons on board died (three of whom were Irish), but that over 70 bodies will never be recovered. The 1977 collision between two planes on the ground in Tenerife (Canary Islands) also led to the virtual impossibility of identifying some of the remains of those who had boarded.

1.10 The outcome in terms of missing persons in such civil accidents is also reflected in terrorist-type attacks, such as the “9/11” attack on the Twin Towers of the New York World Trade Centre in 2001.<sup>8</sup> It is clear that thousands of people died in the attack on 11 September 2001, and many of them were identified, some from extremely limited remains using the most-recent advances in DNA identification techniques. Nonetheless, many people who died in the 9/11 attack will never be identified, but a number have since been declared presumed dead under New York law. In Ireland, the violence connected with Northern Ireland between the 1970s and late 1990s led to a particular category of missing persons known as “the Disappeared”. This group of missing people are assumed to have been kidnapped by paramilitary groups and murdered, in circumstances where their bodies were hidden. At the time of writing (November 2011), seven of “the Disappeared” have yet to be found.

1.11 The definition of a missing person should, therefore, be sufficiently broad to include the varying circumstances in which persons may go missing. This should include cases of persons who simply choose to break contact with their family and close friends, as well as where the person has gone missing in circumstances which indicate that death is a probability. The definition must also be sufficiently sensitive to those left behind. As previously noted, “missing” should not necessarily be equated with “presumed dead.”

1.12 It is therefore useful to note firstly that a missing person is a person whose whereabouts are unknown to those left behind. In this respect, a missing person is:<sup>9</sup>

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<sup>8</sup> Both the 1977 and 2001 incidents were discussed in the Meeting of the Council of Europe Working Party on Missing Persons (5-7 November 2008), paragraph 6, available at [www.coe.org](http://www.coe.org). The Working Party’s deliberations led to the Council of Europe 2009 Recommendation on Missing Persons, discussed below.

<sup>9</sup> Holmes, *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008) at 16.

“someone who is absent from their accustomed network of social and personal relationships to the extent that people within that network define the absence as interfering with the performance by that person of expected social responsibilities, leading to a situation in which members of the network feel obliged to search for the missing person and may institute official procedures to identify the person as missing.”

1.13 Cohen, McCormick and Plecas summarise this succinctly:<sup>10</sup>

“In other words, missing people are those observed to be missing from their normal patterns of life.”

1.14 A second important element is that, as there is often an absence of information regarding the missing person, it is natural that those left behind have fears for the safety and well-being of the missing person. Thus, James, Anderson and Putt note that, from a law enforcement perspective, a missing person can be defined as:

“someone whose whereabouts is unknown, and there are serious concerns for their safety and welfare.”<sup>11</sup>

1.15 This view is echoed by the English Association of Chief Police Officers who define a missing person as:

“anyone whose whereabouts is unknown whatever the circumstances of disappearance. They will be considered missing until located and their well-being or otherwise established.”<sup>12</sup>

1.16 Having regard to this overview, the Commission has therefore concluded that, in the context of any legislative framework concerning the civil law status of missing persons, a missing person should be defined as a person who is observed to be missing from their normal patterns of life, that those who are likely to have heard from them are unaware of their whereabouts and that the circumstances of their being missing raises concerns for their safety and well-being.

1.17 *The Commission provisionally recommends that, in the context of any legislative framework concerning the civil law status of missing persons, a*

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<sup>10</sup> Cohen, McCormick and Plecas, *A Review of the Nature and Extent of Uncleared Missing Persons Cases in British Columbia* (School of Criminology and Criminal Justice, University College of the Fraser Valley, British Columbia, 2008) at 1-2.

<sup>11</sup> James, Anderson and Putt, *Missing Persons in Australia* (2007) at 4.

<sup>12</sup> *Guidance on the Management Recording and Investigation of Missing Persons* (English Association of Chief Police Officers, 2005) at paragraph 1.1.

*missing person should be defined as a person who is observed to be missing from their normal patterns of life, that those who are likely to have heard from them are unaware of their whereabouts and that the circumstances of their being missing raises concerns for their safety and well-being.*

## **C The Current Law in Ireland on Missing Persons**

1.18 In this Part, the Commission outlines the current law in Ireland concerning missing persons, which primarily concerns the circumstances in which the missing person is either presumed to be alive or presumed dead. There is currently no generally applicable law concerning the civil law of missing persons. The current law is confined to: (a) a limited reference to missing persons in the *Coroners Act 1962*, and (b) the common law presumption of life up to 7 years, and a corresponding presumption of death after 7 years (both presumptions being rebuttable). This common law 7 year rule has been recognised in specific, limited, circumstances such as in section 18 of the *Land and Conveyancing Law Reform Act 2009* in connection with beneficiaries under a trust concerning land who are missing.

### **(1) Section 23 of the Coroners Act 1962**

1.19 Section 23 of the *Coroners Act 1962* provides:

“Whenever a coroner has reason to believe that a death has occurred in or near his district in such circumstances that an inquest is appropriate and that, owing to the destruction of the body or its being irrecoverable, an inquest cannot be held except by virtue of this section, the Minister may, if he so thinks proper, direct an inquest in relation to the death to be held by that coroner or another coroner, and thereupon the coroner so directed shall hold an inquest in relation to the death in like manner as if the body were lying within his district and had been viewed by him.”

1.20 Section 23 of the 1962 Act thus provides for an inquest to be held where a coroner believes that “a death has occurred” in circumstances that indicate an inquest is appropriate, but where, because the body has been destroyed or is irrecoverable, it would not be possible to hold an inquest but for the provisions of section 23 itself. This refers to the fact that, in general, inquests require the presence of the deceased’s body, whereas section 23 of the 1962 Act is a clear exception to this. Section 23 also provides that such an inquest can only be held by a coroner where the Minister for Justice issues a direction to do so.

1.21 The Commission understands that, while section 23 of the 1962 Act has not been used on many occasions, it has been used in cases where a body has become virtually completely destroyed by fire (destruction) or has been lost



at sea, for example in a fishing boat (irrecoverable). For example, in 2011 an inquest was held under section 23 of the 1962 Act. This arose from the disappearance of Alice Clifford over 31 years previously when, in 1979, she went missing from a hospital aged 57.<sup>13</sup> At the time of her disappearance she suffered from dementia. Despite extensive searches for her, she has never been found and her family ultimately accepted that she had died. The family then requested that an inquest be held under section 23 of the 1962 Act, and the Minister for Justice consented to this. At the inquest, having heard Garda evidence and evidence from family members, the coroner directed the jury to record an open verdict. As a result, the coroner issued a declaration of death under the 1962 Act, which recorded that the cause of death was undetermined. The Commission also understands that, in recent years, a coroner was requested by the Minister for Justice to conduct an inquest under section 23 of the 1962 Act in respect of a person who had gone missing over a year previously from a long-term care facility and whose body had not been found. The Commission also understands that an inquest was scheduled to be held under section 23 of the 1962 Act but that, before this occurred, the body of the person involved was found and that the inquest proceeded under the usual procedures in the 1962 Act. The Commission notes that section 23 of the 1962 Act is broadly similar to section 15 of the English Coroners Act 1988, discussed below.

1.22 The Commission understands that, in terms of the procedure followed in cases under section 23 of the 1962 Act, a Garda report concerning any criminal investigation is usually submitted to such an inquest. The Commission notes that the important effect of any inquest held under the 1962 Act, including one held under section 23, is that a coroner issues a declaration of death and that this, in turn, allows those left behind to register the death under the *Civil Registration Act 2004* in the Register of Deaths and to obtain a death certificate. This means that all the normal civil law consequences of death come into effect, such as the administration and distribution of the person's estate and assets, the activation of any life insurance policy and consequential effects on any marriage or civil partnership.

1.23 The Commission notes that section 23 of the 1962 Act clearly provides for inquests in some instances that concern missing persons. While not specifically intended to deal with missing persons in general, section 23 indicates that the Oireachtas intended to resolve the civil law status of some missing persons.

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<sup>13</sup> See O'Halloran, "Daughter tells of pain over missing mother" *Irish Examiner* 23 February 2011.

1.24 The Commission also notes that the *Coroners Bill 2007*, currently before the Oireachtas, proposes to modernise and reform the law in this area in accordance with the 2000 *Report of the Coroners Review Group*.<sup>14</sup> One of the significant reforms proposed in the 2000 Review Group Report, and reflected in the 2007 Bill, would be the establishment of an Office of Chief Coroner, who would have an important co-ordinating and general guidance role in the development of a national Coroner Service.

1.25 In terms of an inquest being held in the circumstances to which section 23 of the 1962 Act currently applies, the Commission notes that section 44(2) of the 2007 Bill proposes to dispense with the requirement for approval of the Minister of Justice to hold an inquest. Section 44(2) of the 2007 Bill proposes that a coroner would be empowered to hold such an inquest:

“if he or she has reason to believe that the death has occurred in such circumstances that an inquest is appropriate, even if the body has been destroyed or is irrecoverable.”

1.26 Section 44(2) would, therefore, continue to deal, albeit indirectly, with inquests concerning missing persons, as does section 23 of the 1962 Act.

**(2) Common law presumption of life up to 7 years and presumption of death after 7 years**

1.27 The provisions of section 23 of the *Coroners Act 1962* are clearly very limited in scope, which is underlined by the rare circumstances in which it has been invoked in respect of missing persons. More significantly, the common law presumption of life up to 7 years and presumption of death after 7 years allows those left behind to apply to the High Court to have a declaration of presumed death after 7 years, and this may be shortened if it is reasonable to conclude that the person is already dead. As discussed below, this declaration of presumed death is limited to allowing the deceased's estate to be administered. It does not have the effect in law of a death certificate, and therefore it does not, for example, have any effect on any marriage or civil partnership.

1.28 The common law therefore currently provides that a person is presumed to be alive for up to 7 years after going missing, and may be presumed to have died after 7 years' absence. As this common law presumption is rebuttable, it also recognises that a presumption of death may

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<sup>14</sup> The 2000 *Report of the Coroners Review Group* is available at [www.justice.ie](http://www.justice.ie).

be made before the 7 years has elapsed, provided that there is sufficient circumstantial evidence to justify this.<sup>15</sup>

1.29 The precise origin of the rule that death can be presumed after 7 years is difficult to trace, but it was first set out in statutory form in section 1 of the *Bigamy Act 1603* which provided a defence to a charge of bigamy if either:

“those that were charged, married a second time when the first spouse had been beyond the seas for seven years, or;

Those whose spouse had been absent for seven years, although not beyond the seas, were not known to the former to be living within that time.”

1.30 The presumption in the 1603 Act operated as a presumption of *law*; that is to say, the presumption was applied automatically in the circumstances described in the 1603 Act. The 7 year rule in the 1603 Act is now reflected in section 57 of the *Offences Against the Person Act 1861*, which contains a similar defence to a charge of bigamy.

1.31 A 7 year rule was also enacted in the English *Cestui Que Vie Act 1666* and a virtually identical Act, the *Life Estates Act 1695*, was enacted by the pre-1800 Irish Parliament. Section 1 of the 1695 Act (like the 1666 Act) allowed a litigant to invoke a presumption of death in connection with settled life estates where the beneficiary of the settlement:

“shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of *seven years* together, and no sufficient and evident proof be made of the lives of such person or persons respectively, in any action... the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead.” (emphasis added)

1.32 The *Life Estates Act 1695* was one of over 150 pre-1922 Acts repealed by the *Land and Conveyancing Law Reform Act 2009*, which derived from the Commission’s 2005 *Report on the Reform and Modernisation of Land Law and Conveyancing Law*.<sup>16</sup> The 2009 Act consolidated into a single statutory code the pre-1922 Acts in this area and also introduced significant reforms. While the 2009 Act repealed the 1695 Act (and other pre-1922 Acts dealing with

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<sup>15</sup> The Commission has drawn on the detailed discussion of the common law rule and relevant case law in Ireland contained in Power “Body of Evidence,” *Gazette, Law Society of Ireland*, April 2004, p.18.

<sup>16</sup> *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

settled land), Part 4 of the 2009 Act (sections 18 to 22), enacted new provisions concerning trusts of land. Section 18(5) to (7) of the 2009 Act also re-enacted the substance of the 1695 Act in modern form and provides:

“(5) Where, by reason of absence from the State or otherwise, it remains uncertain for a period of at least 7 years as to whether a person upon whose life an estate or interest depends is alive, it shall continue to be presumed that the person is dead.

(6) If such presumption is applied to a person but subsequently rebutted by proof to the contrary, that person may bring an action for damages or another remedy for any loss suffered.

(7) In dealing with an action under *subsection (6)*, the court may make such order as appears to it to be just and equitable in the circumstances of the case.”

1.33 Thus, in 2009, the Oireachtas re-enacted in section 18(5) of the 2009 Act, a 7 year rule concerning the presumption of death; and it is notable that the Oireachtas provided that “it shall continue to be presumed that the person is dead,” thus indicating a clear awareness that this was not a new rule. It is also notable that section 18(6) of the 2009 Act expressly provides for the possibility that, if the person who has been declared dead later returns, he or she “may bring an action for damages or another remedy for any loss suffered.” In such an action, section 18(7) of the 2009 Act specifies that the court has a wide discretion to make an order that is “just and equitable in the circumstances.” While an order for monetary compensation is the most likely order to be made, section 18(7) clearly envisages the possibility that ownership could be transferred back to the returned missing person where this was “just and equitable.”

1.34 As the Commission notes in its comparative analysis in Part D, below, the 7 year rule is also found in the statutory social welfare codes of other jurisdictions, such as England. The *Social Welfare Consolidation Act 2005* does not contain an explicit reference to the 7 year rule, but the Department of Social Protection has published guidance on the widowed pension available under Part 2, Chapter 18 of the 2005 Act.<sup>17</sup> This guidance states that the pension may be payable in respect of a person whose spouse is missing. The guidance states that:

“The following matters can be taken into account in deciding whether a person who has disappeared can be presumed dead:

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<sup>17</sup> *Guidelines to Area Managers and Inspectors: Widow's/Widower's Pensions (Contributory and Non-Contributory)* (October 2008), available at [www.welfare.ie/EN/OperationalGuidelines/Pages/swi\\_widorph.aspx](http://www.welfare.ie/EN/OperationalGuidelines/Pages/swi_widorph.aspx).

- The length of time elapsed since s/he was last seen or heard of (if a person is missing for a period over seven years one can apply to the courts for a declaration stating the person is dead).
- The age and state of health of the person when s/he disappeared
- Whether s/he had any reason to disappear, (financial embarrassment, threat of court proceedings, desertion from the Army)
- Whether a person who would normally be in contact if s/he were alive has made contact with spouse, if so ascertain how long it has been since spouse was last seen or heard from.
- The efforts the claimant has made to contact his/her spouse.”

1.35 It is clear, therefore, that the 7 year rule has been adopted both legislatively and administratively in Ireland.

1.36 The 7 year statutory rule in the *Life Estates Act 1695* – as recently confirmed by the Oireachtas in the *Land and Conveyancing Law Reform Act 2009* – was drawn on by way of analogy in the 19<sup>th</sup> Century Irish decision *McMahon and Ors v McElroy*.<sup>18</sup> This was a case in which the plaintiffs claimed ownership of land, which their brother had sold to the defendant. After he had sold the land, the brother had left with his wife and family for the United States of America. The brother had inherited the land but this was subject to the condition that, if he died before his sisters, it was to be divided between them. Nine years after their brother had left for the United States, the plaintiff sisters applied to court to have him declared presumed dead; if they were successful, the sale to the defendant would have been declared invalid. The plaintiffs sought to rely on the 7 year rule alone, and had not, for example, made any efforts to trace their brother or provide any proof that he might have died. The case was heard in the Vice-Chancellor’s Court (the equivalent of the High Court), and the Court refused to make the declaration of presumed death. Chatterton V-C summarised the common law presumption as follows:<sup>19</sup>

“Of [the brother’s] death there is not any positive evidence, and I am called upon to act entirely on the ordinary presumption as to which, and as to its operation there can be no doubt – namely, that, as a general rule, a man’s death will be presumed after an interval of seven years since he was last heard of. But this is not an invariable rule, and it admits of exceptions; and indeed in any case the Court in following the

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<sup>18</sup> (1869) IR 5 Eq 1.

<sup>19</sup> *Ibid* at 12.

analogy of the Statutes,<sup>20</sup> on which analogy the rule depends, is bound to consider the circumstances of the particular case in order to see whether the presumption is rebutted, or rather whether it fairly arises.”

1.37 It is clear, therefore, that the common law rule is a *general but rebuttable* presumption which could be applied after 7 years absence. In the court’s view, 7 years absence in itself was insufficient to obtain a declaration of presumed death, and that further evidence is required to establish, on the balance of probabilities, that death had occurred before the presumption of death would apply. The Court also accepted, however, that where such evidence is available, the presumption of life up to 7 years may also be rebutted and that the court “is bound to consider the circumstances of the particular case” as they arise.

1.38 As to the case itself, Chatterton V-C concluded that, as the plaintiffs had made no inquiries as to their brother, they were not entitled to a declaration of presumed death. He indicated, however, that he would be prepared to rehear the case if evidence was later produced that demonstrated that (a) the brother had not been heard of “by those who might reasonably expect to hear from him”, (b) if proper enquiries were made as to his supposed place of residence in America and (c) he had disappeared from there and could not be traced.

1.39 The *McMahon* case was cited as the main authority in this area in the 1961 decision of the High Court in *Re Doherty*.<sup>21</sup> In this case, Mr Doherty had purchased shares from his stockbrokers in 1919, and had then gone to Australia. The stockbroker firm never heard from him again, even though they had placed advertisements in Irish and Australian newspapers looking for him or anyone who knew him to contact them. After 40 years had passed, the Minister for Finance applied to have Mr Doherty’s shares declared *bona vacantia* (“ownerless goods”) and therefore, by default, the property of the State. In the High Court, Kenny J accepted that, as the firm of stockbrokers had purchased the shares for Mr Doherty, they could “reasonably be expected to have heard from him about them during the last 40 years.”<sup>22</sup> The Court thus applied the criteria in *McMahon and Ors v McElroy* to show that the legal

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<sup>20</sup> The headnote to the case ((1869) IR 5 Eq 1, at 1) refers to the Court “following the analogy of the Statute (7 W.3, c.8, s.1)” and this is the only specific reference in the case to section 1 of the *Life Estates Act 1695*. It is notable that Chatterton V-C referred to “the Statutes” so he may also have had in mind the 7 year rule in the *Offences Against the Person Act 1861*.

<sup>21</sup> [1961] IR 219.

<sup>22</sup> *Ibid* at 222.

presumption of death could be applied after 7 years absence.<sup>23</sup> In this light, and having regard to the fact that advertisements had been placed in newspapers in Ireland and Australia, Kenny J granted an order declaring him presumed dead. Kenny J was also prepared to make an order that Mr Doherty had died intestate (that is, without making a will), unmarried and with no next-of-kin.

1.40 It is clear that the mere absence of a person for 7 years is not sufficient to establish that a person is to be presumed dead. Conversely, if the facts of a particular case demonstrate, a person may be declared dead by the High Court *before* 7 years have passed. Thus, in *In the Goods of Freytag*<sup>24</sup> the circumstances were that Mr Freytag had been staying in a hotel in Messina, Sicily and had arranged a business meeting for the next morning, 28 December 1908. That was the date on which a catastrophic earthquake destroyed most of Messina (this remains one of the most devastating earthquakes in modern European history). Mr Freytag did not turn up for his meeting (or any subsequent meeting ever again). His Italian colleagues wrote to the family, outlining the circumstances and indicating that attempts were made to locate him, but his body was never located. Mr Freytag's brother travelled to Messina and made extensive searches for him, including advertising for his whereabouts, but again this proved fruitless. The family applied to the High Court for an order of presumed death and in the proceedings the letter from the Italian colleagues was produced, but for some reason the advertisements were not. Notwithstanding this, Boyd J granted an order that Mr Freytag should be presumed dead and that his brother should be given liberty to apply for a grant of probate. In this case, the time from Mr Freytag's disappearance to the date of the order was only *3 months*. Similarly, in *In the Goods of Inkerman Brown*<sup>25</sup> the High Court declared Mr Inkerman Brown presumed dead just 2 months after the ship he was on had sunk.

1.41 A similar recent example is of the Irish citizen Brendan Donegan who disappeared while attempting to climb the Peruvian Andes in South America. His wife successfully applied to the High Court for an order for administration of his estate on the basis that, although his body had not been found, the evidence in this case was sufficient to establish that his death was, in the language of the terminology used in this Consultation Paper, *virtually certain*.<sup>26</sup>

1.42 In summary, at common law, where the person is missing for 7 years, and they have not made contact with those likely to have heard from them, and

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<sup>23</sup> *Ibid.*

<sup>24</sup> (1909) 42 ILTR 116.

<sup>25</sup> (1902) 36 ILTR 173.

<sup>26</sup> "Wife of dead climber granted probate order" *The Irish Times* 5 May 2000.

reasonable efforts have been made to locate them, they may be presumed dead. If it can be proved on the balance of probabilities, however, that, as in *In the Goods of Freytag*,<sup>27</sup> the missing person has in fact died *before* 7 years has passed, then a declaration of presumed death may be issued by the High Court. The declaration of presumed death does not have the same automatic effects as the issuing of a standard death certificate. It is, rather, a declaration of limited power and generally is made to allow a grant of administration of the person's estate. This declaration does not, for example, affect or alter the status of a marriage or civil partnership.<sup>28</sup>

1.43 Commenting on the case law in Ireland, Power sets out the following detailed list of matters which should be included in any application for a declaration of presumed death:<sup>29</sup>

1. The applicant should provide the court with a watershed, a date that was the last time the supposed deceased was heard from.
2. The applicant should provide evidence tending to indicate that the individual is dead, such as:
  - (a) the circumstances surrounding the disappearance,
  - (b) lack of communication with people who were likely to hear from him or her, detailing the last known correspondence or communication, and
  - (c) the length of time since disappearance.
3. In most cases, unless there are exceptional circumstances, the applicant should advertise for information concerning the whereabouts of the supposed deceased.
4. If possible, the applicant should arrange for the search-and-rescue authorities to confirm, by way of affidavit if possible, that attempts were made to locate the individual, but were fruitless.
5. The applicant should set out the full background relating to the disappearance, including the background as to the supposed deceased's age and health. This should include mental health, where relevant, such as suicidal tendencies.
6. The applicant should also arrange for the details to be corroborated as much as possible by a family member.
7. The applicant's affidavit should set out the next-of-kin entitled to distribution of his assets on his death.
8. The applicant must aver their belief that the individual is dead.

1.44 The Commission notes that this comprehensive list of matters reflects those referred to in the decisions of courts in other countries and jurisdictions that apply a similar "presumed dead" rule, including in Australia and

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<sup>27</sup> (1909) 42 ILTR 116.

<sup>28</sup> See the discussion in Chapter 2 below of the specific provisions enacted in this respect in English law.

<sup>29</sup> Power "Body of Evidence," *Gazette, Law Society of Ireland*, April 2004, 18, at 21.



Canada. The Commission now turns to examine the position in other countries, against the background of the development of international standards in this area, notably in the 2009 Council of Europe Recommendation on Missing Persons.

## **D International and Comparative Analysis**

1.45 In this Part, the Commission examines international and comparative developments concerning missing persons. In approaching the categorisation of missing persons for the purpose of this Consultation Paper, the Commission has had the benefit of the research that lay behind the 2009 Council of Europe *Recommendation on Principles Concerning Missing Persons and the Presumption of Death*.<sup>30</sup> In the context of the presumption of death, the Commission notes the importance of the 2009 Council of Europe Recommendation on Missing Persons, because this provides a general framework around which the law on the presumption of death may be reformed. In terms of comparative analysis, the Commission also notes that many countries have, in addition to enacting legislation on the presumption of death, put in place specific provisions to deal with interim financial issues for those left behind, such as limited administration of the missing person's assets and estate. These provisions operate quite separately from the question of presumption of death.

### **(1) 1950 UN Convention on Missing Persons in World War II**

1.46 In the aftermath of World War II (1939-1945), the United Nations recognised the need for the international community to provide for situations where a declaration of death is required for missing persons.<sup>31</sup> The resulting 1950 UN *Convention on the Declaration of Death of Missing Persons*<sup>32</sup> facilitated issuing a declaration of death of missing persons who disappeared during the years 1939-1945:

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<sup>30</sup> Council of Europe Recommendation CM/Rec (2009) 12 of the Committee of Ministers to Member States on Principles Concerning Missing Persons and the Presumption of Death (9 December 2009).

<sup>31</sup> United Nations Conference on Declaration of Death of Missing Persons, Lake Success New York, March - April 1950.

<sup>32</sup> United Nations Convention on the Declaration of Death of Missing Persons, U.N. Doc A/Conf. 1/9.

“under circumstances affording reasonable ground to infer that they have died in consequence of events of war or of racial, religious, political or national persecution”.<sup>33</sup>

1.47 The 1950 UN Convention is limited to deaths arising from war and does not, therefore, apply to persons whose disappearance is connected with non-military or related events referred to in the Convention, such as those who go missing in earthquakes, civil air disasters or merchant shipping disasters.<sup>34</sup> Such circumstances, where death is virtually certain, were dealt with in the 1966 Convention on Establishing Death (sometimes referred to as the Athens Convention), which was developed by the International Commission on Civil Status (ICCS) (the Athens Convention).<sup>35</sup> Ireland is not a member state of the ICCS and is not a party to the 1966 Convention, but the 1966 Convention formed the background to the 2009 Council of Europe Recommendation on Missing Persons, which deals not only with circumstances in which death is virtually certain but also the much wider situation where the circumstances of the person being missing raises concerns for their safety and well-being to the point where death is highly probable.

## **(2) 2009 Council of Europe Recommendation on Missing Persons**

1.48 In 2009, the Council of Europe adopted a *Recommendation on Principles Concerning Missing Persons and the Presumption of Death*.<sup>36</sup> In preparing this 2009 Recommendation, the Council of Europe’s Working Party on Missing Persons noted the limited nature of existing international law instruments concerning missing persons, including that the 1966 ICCS Convention on Missing Persons deals only with situations where death is virtually certain.<sup>37</sup>

1.49 The Council of Europe’s Working Party on Missing Persons thus noted that the 1966 Convention would apply in situations such as the 1977 collision between two planes on the ground in Tenerife (Canary Islands) or the

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<sup>33</sup> Article 1(1) of the 1950 UN Convention.

<sup>34</sup> Friedmann “Declarations of Death – A New International Convention” (1950) 25 St. John’s Law Review 18, at 25.

<sup>35</sup> ICCS Convention on Establishing Death, ICCS Convention No 10 (1966) (the Athens Convention).

<sup>36</sup> Council of Europe Recommendation CM/Rec (2009) 12 of the Committee of Ministers on Principles Concerning Missing Persons and the Presumption of Death (9 December 2009), available at [www.coe.org](http://www.coe.org).

<sup>37</sup> Article 1 of the ICCS Convention on Establishing Death, ICCS Convention No 10 (1966).

2001 attack on the New York “Twin Towers”.<sup>38</sup> The Working Party also considered that the 1966 Athens Convention could also apply, for example, where a person is a passenger on board a ship out at sea who was seen shortly before his or her disappearance and who proves to have been suffering from psychological problems.<sup>39</sup>

“The ship is of course thoroughly searched, in vain, but only his or her bathrobe is found on a chair on deck. When it further emerges that the stretch of sea in question is shark-infested at the relevant time of year, and that the coastguard has (therefore) failed to find a corpse, it can obviously be assumed that the person went overboard (whether he or she jumped or was pushed) and that his or her death can be regarded as certain.”

1.50 The Working Party also noted that the 1966 Convention does not deal with situations where death is less than certain but is highly probable, such as where a person is believed to be dead but whose body cannot be recovered because of the inaccessibility or other natural condition of a given area.<sup>40</sup> In other situations where missing persons are believed to have died, which do not involve shipwreck, any other type of accident, a disaster or warfare, the Working Party noted that:

“it is pointless and excessive to require the survivors to wait for a specified period before launching a procedure to secure a finding of death.”

1.51 The Council of Europe 2009 Recommendation thus concluded that it was appropriate to put in place general principles that deal not only with situations where death is virtually certain but also where death is highly probable. The 2009 Recommendation therefore set out a number of principles that should inform any legislation enacted in this area by the Member States. The Commission has had regard to these principles in preparing this Consultation Paper.

1.52 The 2009 Recommendation refers to three categories of missing person in the context of presumed death. These are where:

“(a) death can be taken as *certain*; or

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<sup>38</sup> Council of Europe Draft Recommendation CM/Rec (2008) 8 of the Committee of Experts on Family Law Working Party on Missing Persons (5-7 November 2008) at paragraph 6.

<sup>39</sup> *Ibid* at paragraph 7.

<sup>40</sup> *Ibid*.

- (b) it is reasonable to conclude that the death of the missing person is *likely*; or
- (c) although the missing person's death is *uncertain*, his or her disappearance cannot be reasonably attributed to any cause other than death.<sup>41</sup> (emphasis added)

1.53 For the reasons given below, the Commission considers that, while these three categories are of considerable assistance in delineating different cases of missing people, it may be more useful to consider two general categories, where death is virtually certain and other circumstances where it is highly probable that the person will not return.

1.54 In addition to the categorisation of missing persons for the purposes of enacting laws on presumed death, the 2009 Recommendation sets out a number of detailed Principles for member states. For completeness, these are set out in full here.

*Principle 1 (cases where a declaration of presumed death in respect of a missing person may be issued).*

A declaration of presumed death of the missing person may be issued if, in the light of all the circumstances of his or her disappearance: (a) death can be taken as certain; or (b) it is reasonable to conclude that the death of the missing person is likely; or (c) although the missing person's death is uncertain, his or her disappearance cannot be reasonably attributed to any cause other than death.

*Principle 2 (competent authority).*

An authority competent to issue a declaration of presumed death with regard to a missing person ("competent authority") may be designated: (a) where the missing person was a national of the state to which the competent authority belongs, or was domiciled or had his or her habitual residence in its territory; (b) where the person concerned was reported missing in the territory of that state; (c) where the person concerned was reported missing during a voyage of a vessel or aircraft registered in that state.

*Principle 3 (requesting person, body or authority).*

A request for a declaration of presumed death may be lodged by any person or body demonstrating a legitimate interest or by an authority designated by the state for this purpose.

*Principle 4 (waiting period for lodging the request).*

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<sup>41</sup> Principle 1, Council of Europe Recommendation CM/Rec (2009) 12 of the Committee of Ministers to Member States on Principles Concerning Missing Persons and the Presumption of Death (9 December 2009).

4(1). Where, in the light of all the circumstances, the death of the missing person can be taken as certain, the lodging of the request mentioned under Principle 3 should preferably be possible without a waiting period.

4(2). Where the circumstances of disappearance of the missing person are such that it is reasonable to conclude that his or her death is likely, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be one year at the most.

4(3). Where the death of the missing person is uncertain, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be seven years at the most.

*Principle 5 (date and hour of presumed death).*

The date and, if possible, the hour of presumed death of the missing person should be determined by referring to any evidence or indication relating to the circumstances of the case.

*Principle 6 (effects).*

6(1). By operation of law, the declaration of presumed death should have all the legal effects of death.

6(2). Nevertheless, member states may make such exceptions to this provision as they consider strictly necessary. These exceptions should be limited but may cover matters such as marriage, registered partnerships, legal affiliation, property rights and inheritance rights and should aim at maintaining a fair balance between the interests of those concerned, including the person whose presumed death is declared.

*Principle 7 (return of the person whose presumed death has been declared).*

7(1). Should the person, in respect of whom the declaration of presumed death has been issued, return, or where there is information establishing that he or she is still alive, member states should prescribe measures aiming at annulling the decision declaring this person's death.

7(2). A request for annulment of a declaration of presumed death may be lodged by the person whose presumed death has been declared or by any person or body demonstrating a legitimate interest, as well as by an authority designated by the state for this purpose.

7(3). Member states may make provision for the protection of persons who may be adversely affected by the annulment of the decision.

*Principle 8 (transcription of decisions)*

A decision declaring the presumed death of the missing person or a decision on annulment, referred to in Principles 2 and 7 respectively, should be transcribed in the relevant registers of the state where such a decision was pronounced.

*Principle 9 (procedural aspects)*

1. Access to proceedings and their duration should balance the concerns and needs of all those having a legitimate interest in the declaration of presumed death, as well as of the missing person. This should also apply to proceedings concerning annulment.

2. When publicity concerning the search for a missing person is deemed necessary during the course of proceedings regarding a declaration of presumed death, this should be carried out by any appropriate means, including new technologies, and taking into account the financial situation of the requesting person.

1.55 As already mentioned, the Commission considers that the principles set out in the 2009 Council of Europe Recommendation provide an extremely helpful template against which to consider reform of the law in this area.

**(3) *The approach in Civil Law and Common Law countries to Missing Persons***

1.56 The preparation of the 2009 Council of Europe Recommendation was influenced by the existence of long-established legislation on missing persons in many Council of Europe member states, notably those with a Civil Law tradition. In the early 19<sup>th</sup> Century, many Civil Law states, such as France and Germany, introduced specific statutory provisions dealing with the civil law status of missing persons. Thus, the Napoleonic *Code Civil Francaise* of 1804 contained detailed provisions on the issue, which was directly related to the need to deal with the consequences of French soldiers going missing for many years in wartime (which the UN, as mentioned above, dealt with in the aftermath of World War II). As discussed below, other Civil Law states outside Europe, such as Canada, have been influenced by this historical inheritance.

1.57 In Scotland, whose legal system reflects its mixed Civil Law and Common Law history, the *Presumption of Death (Scotland) Act 1977* permits a declaration of presumed death for missing persons who have disappeared in circumstances where either it is reasonable to believe they have died, or due to the 7 year absence of the person the death of the person may be presumed. The Scottish 1977 Act has been mirrored substantially in Northern Ireland in the *Presumption of Death Act (Northern Ireland) 2009*. The enactment of the Northern Ireland 2009 Act was influenced, in part, by the need to address the civil law status of the “Disappeared”, those who went missing in Northern Ireland in the violent conflict that took place between the early 1970s and the late 1990s. As noted in the Introduction to this Consultation Paper, the Commission points out that the legacy of that conflict has also affected this State, since a number of people either went missing in the State or are presumed to have been killed in Northern Ireland or this State and were later buried in this State.

1.58 There has also been growing recognition in a number of Common Law states that the law on missing persons must cater, as has been the case in many Civil Law states since the 19<sup>th</sup> Century, for situations where the missing person is not to be presumed dead. For example, in the Australian state of Victoria<sup>42</sup> and the Canadian province of Ontario,<sup>43</sup> adult guardianship and mental capacity legislation has incorporated specific provision for limited administration and management of the property of missing persons so that day-to-day practical matters, such as the ongoing payment of bills, can be dealt with by those left behind. In the remainder of this Part, the Commission discusses these comparative legislative developments.

**(4) Northern Ireland and Scotland**

1.59 In Northern Ireland, as in this State, there is implicit provision for holding an inquest in connection with a missing person. Section 14 of the *Coroners (Northern Ireland) Act 1959* provides:

“Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry or investigation, held any inquest into or done any other act in connection with the death.”

1.60 It is notable that section 14 of the 1959 Act is more broadly drafted than the equivalent section 23 of the *Coroners Act 1962* and thus, at least implicitly, could be applied to all cases of missing persons, not merely those whose bodies have, as the 1962 Act provides, been “destroyed” or are “irrecoverable.” Nonetheless, it appears that section 14 of the 1959 Act has not been used in connection with cases where the “Disappeared” have remained missing, and the only inquests into such persons have been “standard” inquests where the bodies have been recovered.<sup>44</sup> Indeed, the absence of a suitable process for obtaining a declaration of presumed death for the “Disappeared” was one of the key reasons given in the 2008 Consultation Document for the

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<sup>42</sup> Section 5A of the *Guardianship and Administration Act 1986*.

<sup>43</sup> *Absentees Act 1990*.

<sup>44</sup> See O'Halloran, “Family glad of closure at inquest into ‘disappeared’” *Belfast Telegraph*, 22 September 2011 (inquest into death of two “Disappeared” whose bodies had been recovered).

enactment of what became the *Presumption of Death (Northern Ireland) Act 2009*.<sup>45</sup>

1.61 The *Presumption of Death (Northern Ireland) Act 2009* largely reflects the content of the Scottish *Presumption of Death (Scotland) Act 1977*. Both Acts deal with situations where those left behind wish to bring a claim for a declaration of presumed death of the missing person. They do not deal with arrangements for dealing with the property of missing person falling short of a presumption of death.

1.62 The enactment of the *Presumption of Death (Northern Ireland) Act 2009* was preceded by a 2008 Consultation Paper<sup>46</sup> and 2008 Report<sup>47</sup> published by the Department of Finance and Personnel. The Consultation Paper and Report recommended reform of the law to allow for a procedure to obtain a declaration of presumed death for missing persons who are presumed dead.<sup>48</sup>

1.63 In terms of the type of persons that should be included in the reformed presumption of death law, the Report noted that:

“the wider group of missing persons will likely include the young and the elderly, men and women, people who are married with children as well as those who are single and childless. There will always remain, however, a number of missing persons who do not return for some reason. The majority may wish simply to break contact with family and friends. However, some of those who are reported missing will have died either at the time of their disappearance or sometime thereafter either as a result of self-harm, accident or foul play.”<sup>49</sup>

1.64 The 2009 Act that resulted from the 2008 Report therefore deals with the small, but appreciable, number of missing persons who are not found. In

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<sup>45</sup> Department of Finance and Personnel, *Missing Persons A Consultation by the Department of Finance and Personnel on the Draft Presumption of Death Bill (Northern Ireland) 2008* (January 2008), Foreword, at ii.

<sup>46</sup> Department of Finance and Personnel, *Missing Persons A Consultation by the Department of Finance and Personnel on the Draft Presumption of Death Bill (Northern Ireland) 2008* (January 2008).

<sup>47</sup> Department of Finance and Personnel, *Presumption of Death Bill (Northern Ireland) 2008 Report on Consultation* (May 2008).

<sup>48</sup> Department of Finance and Personnel, *Missing Persons A Consultation by the Department of Finance and Personnel on the Draft Presumption of Death Bill (Northern Ireland) 2008* (January 2008) at 31.

<sup>49</sup> *Ibid* at paragraphs 7-8.



categorising these missing persons, section 1 of the *Presumption of Death (Northern Ireland) Act 2009* provides for the making of a presumption of death order:

“[w]here a person who is missing—

(a) is thought to have died; or

(b) has not been known to be alive for a period of at least 7 years.”

1.65 Section 1(a) of the 2009 Act provides for situations where the missing person is believed to have disappeared in circumstances that indicate that he or she may have died. Section 1(b) of the 2009 Act provides for situations where the 7 year absence, coupled with a lack of information regarding the person, raises the presumption that the person may no longer be alive. In both circumstances, a presumption of death order may be issued. This order permits the standard consequences of death to arise, such as the grant of administration of the estate or affecting the status of a marriage or civil partnership.

1.66 Similarly in Scotland, section 1(1) of the *Presumption of Death (Scotland) Act 1977* provides for a declaration of presumed death for a missing person: “[w]here 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.” Therefore, as in Northern Ireland, the *Presumption of Death (Scotland) Act 1977* provides for the categories of where it is believed that the missing person has died.

## **(5) England and Wales**

1.67 As in Ireland, there is currently no general legislation dealing with missing persons in England and Wales, although as discussed below the introduction of presumption of death legislation along the lines enacted in Scotland and Northern Ireland is currently under consideration. At present, therefore, the law in England is broadly comparable to the position in Ireland, including comparable provisions in the English *Coroners Act 1988* and the common law presumption of death after 7 years.

1.68 In terms of the categorisation of missing persons who may be presumed dead, section 15 of the English *Coroners Act 1988* allows for the issuing of a death certificate in situations where the body of the missing person is either destroyed by fire or cannot be recovered. Section 15 provides:

“(1) Where a coroner has reason to believe—

(a) that a death has occurred in or near his district in such circumstances that an inquest ought to be held; and

(b) that owing to the destruction of the body by fire or otherwise, or to the fact that the body is lying in a place from which it cannot

be recovered, an inquest cannot be held except in pursuance of this section,

he may report the facts to the Secretary of State.

(2) Where a report is made under subsection (1) above, the Secretary of State may, if he considers it desirable to do so, direct a coroner (whether the coroner making the report or another) to hold an inquest into the death.”

1.69 This corresponds closely to section 23 of the *Coroners Act 1962*, discussed above (and it may be noted that, in this respect, both are more narrow in scope than section 14 of the *Coroners (Northern Ireland) Act 1959*). As in Ireland, this has been used in the context of missing persons. For example, when Englishman John Darwin disappeared while canoeing in March 2002, and appeared at the time to have drowned, and after his wife had reported him missing, in April 2003 an inquest into his disappearance under section 15 of the 1988 Act. Having heard evidence of the police investigations into the matter, which at that stage were consistent with his death, the coroner recorded an open verdict, and a death certificate was issued. Arising from this, Mrs Darwin successfully made claims totalling £250,000 on a life insurance policy and a mortgage protection policy on their family home. In fact, as already discussed, Mr Darwin had faked his suicide with his wife’s knowledge. In 2007, he entered a police station in London claiming he had suffered from amnesia for the previous 5 years. He and his wife were later convicted of conspiracy to defraud.<sup>50</sup>

1.70 Clearly, the Darwin case was an instance of a fraudulent attempt to take advantage of section 15 of the 1988 Act and the consequent financial benefits of obtaining a death certificate by deceit. Equally clearly, in circumstances where fraud is not involved, section 15 of the 1988 Act provides an efficient method for obtaining a death certificate for those left behind. It has been reported that, in England, section 15 of the 1988 Act is employed less than 10 times annually to deal with missing persons.<sup>51</sup>

1.71 As in Ireland, in situations where the *Coroners Act 1988* is not applicable, the common law presumption of death allows for a declaration of presumed death to be issued where the person has been missing for 7 years. As already noted, the common law presumption may be rebutted so that a declaration of presumed death may be made where it can be shown that the missing person has in fact died before the end of 7 years. As also already noted, the declaration of presumed death does not result in the issuing of a

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<sup>50</sup> See *R v Darwin* [2009] EWCA 860.

<sup>51</sup> “When is a missing person declared dead?”, BBC News Magazine, 5 December 2007, available at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/7128867.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/7128867.stm).

death certificate, but usually is limited to an order allowing the administration of the missing person's estate to occur.

1.72 The general approach taken by the courts in Ireland to the common law presumption (discussed above) is also applied by the English courts. Thus, in the English High Court decision *Re Watkins*,<sup>52</sup> Harman J stated:

“there is no “magic” in the mere fact of a period of seven years elapsing without there being positive evidence of a person being alive. It is, generally speaking, a matter in each case of taking the facts as a whole and of balancing, as a jury would, the respective probabilities of life continuing and having ceased.”

1.73 This was cited with approval by Sachs J in another English High Court decision, *Chard v Chard*.<sup>53</sup> Echoing the approach of the Irish High Court in *McMahon and Ors v McElroy*,<sup>54</sup> discussed above, Sachs J held that the presumption will apply if:

- (a) there is no acceptable affirmative evidence of a person alive at some time during the 7 year period, and
- (b) persons likely to have heard from the absentee had not done so during that period, and
- (c) due enquiries were made as to the whereabouts of the missing person.

1.74 It appears therefore that, under English common law, a declaration of presumed death does not affect or alter the validity of the missing person's marriage. As already noted, if a missing person's spouse remarries after 7 years, the *Offences Against the Person Act 1861* provides a full defence to a bigamy charge even if the missing person returns. This does not, however, affect the civil law status of the marriage. It is likely that this also reflects the position in this State. Legislation has been enacted in England to deal specifically with this matter. Section 19 of the *Matrimonial Causes Act 1973* and section 37 of the *Civil Partnership Act 2004* provide, respectively, for the dissolution of a marriage or civil partnership where there are reasonable grounds for believing that the missing person is probably dead, including after 7 years absence. No equivalent provisions have been enacted in Ireland.

1.75 Similarly section 8 of the English *Social Security Act 1998* empowers the Secretary of State for Social Security to take into account that a spouse of a

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<sup>52</sup> [1953] 1 WLR 1323.

<sup>53</sup> [1956] P 259. See also *Bayes-Walker v Bayes-Walker* [2010] EWHC 3142 (Ch).

<sup>54</sup> (1869) IR 5 Eq 1.

claimant may be presumed dead in relation to a range of benefits. A specific provision is also made by section 3 of the *Social Security Administration Act 1992* which deals with late claims for bereavement benefit where it is difficult to establish death.<sup>55</sup>

1.76 It is therefore clear that English law, through a combination of the common law presumption and the legislative provisions mentioned, has some limited recognition for categories of missing persons where they disappear in circumstances that indicate their death may have occurred.

1.77 In 2011, a UK Houses of Parliament All-Party Parliamentary Group on Runaway and Missing Children and Adults began a consultative process that may lead to a more complete reform of the law on missing persons.<sup>56</sup> This has resulted in the Justice Select Committee's Inquiry into presumption of death legislation in England and Wales. At the time of writing (November 2011) this has not yet led to final recommendations, but it is anticipated that the Committee will recommend the introduction of a legislative framework along the lines of the 1977 Scottish and 2009 Northern Ireland Acts already discussed, which would permit those left behind to obtain a presumption of death certificate where it can be established that the missing person has died.

## **(6) Australia**

1.78 In Australia, the law provides for missing persons who disappear in circumstances that may indicate that they have died. As is the case in Ireland and the United Kingdom, this is provided for using the common law presumption of death after 7 years. This common law presumption allows those left behind to obtain a grant of administration concerning the missing person's estate where the person is presumed dead.

1.79 Legislation in New South Wales, Victoria and the Australian Capital Territory also makes provision for the category of persons who go missing in circumstances where no presumption of death is possible. Under these laws, those left behind may obtain an interim administration order, which permits an administrator to manage the day to day affairs of the missing person, but has no effect on the status of the missing person.

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<sup>55</sup> *Parliamentary Inquiry Session Two Resolving a Missing Person's Practical Affairs: Presumption of Death* (All-Party Parliamentary Group for Runaway and Missing Children and Adults 2011), 12.

<sup>56</sup> See *Inquiry: Support for Families of Missing People Report with Recommendations* (All-Party Parliamentary Group For Runaway and Missing Children and Adults 2011), 21.

**(a) Presumption of Death**

1.80 In Australia, there is no generally applicable legislation for missing persons who are believed to have died but the common law presumption of death also operates. In the leading decision of the High Court of Australia in *Axon v Axon*,<sup>57</sup> Dixon J stated:<sup>58</sup>

“If, at the time when the issue of whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communication from him or to have learned of his whereabouts, were he is living, then, in the absence of evidence to the contrary, it should be found that he is dead.”

1.81 As in Ireland, therefore, the position in Australia is that the presumption of life up to 7 years is rebuttable and a presumption of death may be made where death is established the balance of probabilities *before* the expiration of 7 years absence. Thus, in *Re Bennett*,<sup>59</sup> where evidence was shown that a diver disappeared after becoming disorientated during a dive off the coast of South Korea, a declaration of presumed death was made 2 years after the incident.

1.82 In circumstances where no such evidence exists, an application can be made *after* 7 years absence in order to have a person declared presumed dead. This was the case in *Re Hills*,<sup>60</sup> where the Supreme Court of South Australia declared presumed dead a man who had schizophrenia and who had been missing for 13 years. The medical evidence was that, when not on his medication, it was likely that he would have committed suicide during the 13 years.<sup>61</sup>

**(b) Administration of the assets of missing persons**

1.83 In New South Wales,<sup>62</sup> Victoria<sup>63</sup> and the Australian Capital Territory,<sup>64</sup> adult guardianship laws (which broadly correspond to the proposed

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<sup>57</sup> (1937) 59 CLR 395.

<sup>58</sup> *Ibid* at 405.

<sup>59</sup> [2006] QSC 250.

<sup>60</sup> [2009] SASC 176.

<sup>61</sup> *Ibid* at paragraphs 20 - 23.

<sup>62</sup> Section 54 of the *Trustee and Guardian Act 2009*.

<sup>63</sup> Section 5A of the *Guardianship and Administration Act 1986*.

mental capacity legislation due to be enacted in Ireland)<sup>65</sup> have been extended to include specific provision to allow those left behind to administer some assets of missing persons. In these states and territories, the legislation allows for the appointment of an administrator to manage the affairs of a person, where this person is missing and is not believed to have died. These arrangements have no effect on the civil status of the missing person, such as their married status, and do not amount to a declaration of presumed death.

1.84 The intention of these legislative provisions is to permit a limited use of property where there is a demonstrated need for decisions to be made and it is in the best interests for an administrator to be appointed to make these decisions regarding the affairs of the person while the person remains missing. The appointment of an administrator is most likely to arise in situations where the person is missing without proof of death, but it could also be used even where death is virtually certain or probable, particularly if those left behind do not wish to obtain a declaration of death or presumed death.

1.85 In this regard, the legislation treats certain missing persons in the same way as persons whose capacity may be limited in the sense that it provides for a process to manage their property. In enacting in effect an additional graft onto the existing adult guardianship legislation, Australian law allows for the appointment of administrators to the estate of missing persons, if:

- “(a) it is not known whether the person is alive; and
- (b) reasonable efforts have been made to find the person; and
- (c) for at least 90 days, the person has not contacted—
  - (i) anyone who lives at the person's last-known home address; or
  - (ii) any relative or friend of the person with whom the person is likely to communicate.”<sup>66</sup>

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<sup>64</sup> Section 8AA of the *Guardianship and Management of Property Act 1991*.

<sup>65</sup> The Government Legislation Programme Autumn Session 2011, available at [www.taoiseach.ie](http://www.taoiseach.ie), proposes to publish a Mental Capacity Bill in early 2012. This would implement the thrust of the recommendations in the Commission's *Report on Vulnerable Adults and the Law* (LRC 74-2006) which included recommendations to enact legislation comparable to the adult guardianship legislation already in place in, for example, Australia and Canada.

<sup>66</sup> Section 60(AB)(2) *Guardianship and Administration Act 1986*. A virtually identical provision is contained in section 54(2) of the *NSW Trustee and Guardianship Act 2009* and section 8AA of the *Guardianship and Management of Property Act 1991*.

1.86 The administrator is appointed initially for a 2 year period, but this may be extended for a further 2 years.<sup>67</sup> Any person may apply for an order to be appointed as an administrator, but in general the Court will appoint someone who is close to the missing person, for example, a relative or close friend. For example, in a Victorian case *Rosewall (Guardianship)*,<sup>68</sup> the father of the missing person was deemed an appropriate administrator in the circumstances. The Court will make this decision having regard to the wishes of the missing person, in so far as they can be ascertained.

1.87 The advantage of a law dealing exclusively with cases of missing persons, who are not believed to have died, is that those left behind are not required to wait for up to 7 years before obtaining an administration order to deal with the affairs of a missing person.

**(7) Canada**

**(a) General Category of Presumed Death and Common Law Presumption**

1.88 In six of Canada's provinces,<sup>69</sup> legislation provides that a person who is missing may be presumed dead if:

“[u]pon application... the court is satisfied that—

(a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named;

(b) the applicant has no reason to believe that the person is living; and

(c) reasonable grounds exist for supposing that the person is dead.”<sup>70</sup>

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<sup>67</sup> Section 60(AE) of the *Guardianship and Administration Act 1986*.

<sup>68</sup> *Rosewall (Guardianship)* [2010] VCAT 1994.

<sup>69</sup> Manitoba, Saskatchewan, Newfoundland & Labrador, New Brunswick, Nova Scotia and British Columbia.

<sup>70</sup> Section 2(1) of the *Manitoba Presumption of Death Act 1988*. This section is mirrored in: section 15(3) of the *Missing Persons and Presumption of Death Act (2009)* (Saskatchewan); section 2(1) of the *Presumption of Death Act (1974)* (New Brunswick); section 3(1) of the *Presumption of Death Act (1996)* (Newfoundland and Labrador); section 3(1) of the *Presumption of Death Act (1989)* (Nova Scotia); and section 3(1) of the *Survivorship and Presumption of Death Act* (British Columbia).

1.89 The legislation in these provinces does not expressly delineate between the categories where a missing person may be presumed dead. As the following examination of its application shows, however, the courts are conscious of the separate categories of where death is virtually certain and where death is either likely or the person is long-term missing, so that no other explanation other than the death of the person is plausible.

1.90 In *Kotai v Queen of North (The)*<sup>71</sup> the Court granted a declaration of presumed death in circumstances where a couple were last seen on board a sinking ship which had run aground. In *Re Burgess*,<sup>72</sup> the subject of the application was a member of the Hell's Angels Motorcycle Club. The Court heard evidence from the police and the wife of the presumed deceased that indicated foul play was a factor in the disappearance.<sup>73</sup> The Court, in granting the declaration, stated:

“The evidence satisfies me that no person has seen Rick Burgess since January 7, 2002... While the evidence of events after Mr. Burgess' disappearance are by their nature hearsay, they are in the circumstances the best evidence available and can only lead to the conclusion that the 'dark side' of Mr. Burgess' life caught up with him and the only reasonable inference is that his life has been ended by 'person unknown.’”<sup>74</sup>

1.91 In *Re Cyr*,<sup>75</sup> the Supreme Court of British Columbia noted, with some reluctance, that previous case law<sup>76</sup> had taken the view that any “reasonable grounds” which existed for supposing that the person was dead was to be judged on the balance of probabilities. The Court stated:

“While there is a reasonable basis for believing that Cyr [the subject of the application] is dead, there is also some basis for concluding that he has chosen to disappear. I am unable to find on a balance of probabilities that he is dead.”

1.92 In effect, this means that where the person has been missing for less than 7 years, the legislation will only apply where death is either virtually certain or, at the very least, probable. In *Re Cyr*, the Court also added that the

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<sup>71</sup> [2007] BCJ No. 1573.

<sup>72</sup> [2004] BCJ No. 73.

<sup>73</sup> *Ibid* at paragraphs 24 - 27.

<sup>74</sup> *Ibid* at paragraph 35 (Crawford J.).

<sup>75</sup> [2006] BCJ No. 2703.

<sup>76</sup> *Re Schmidt*, 12 BCLR (2d) 186 (Court of Appeal).



applicant could still wait until 7 years had passed from the time of her husband's disappearance and then bring a claim under the common law presumption of death.<sup>77</sup>

**(b) Ontario**

1.93 Section 2 of the Ontario *Declarations of Death Act 2002* explicitly provides for two categories where death can be presumed. The first category, in section 2(4) of the 2002 Act, applies to persons who disappear "in circumstances of peril":

"This subsection applies if–

- (a) the individual has disappeared in circumstances of peril;
- (b) the applicant has not heard of or from the individual since the disappearance;
- (c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance;
- (d) the applicant has no reason to believe that the individual is alive; and
- (e) there is sufficient evidence to find that the individual is dead."

1.94 This provides for situations where it is believed to be virtually certain that the missing person has died.

1.95 The second category, in section 2(5) of the 2002 Act, places the common law 7 year presumption on a statutory footing:

"(5) This subsection applies if,

- (a) the individual has been absent for at least seven years;
- (b) the applicant has not heard of or from the individual during the seven-year period;
- (c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual during the seven-year period;
- (d) the applicant has no reason to believe that the individual is alive; and
- (e) there is sufficient evidence to find that the individual is dead."<sup>78</sup>

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<sup>77</sup> Re Cyr [2006] BCJ No. 2703, at paragraph 2.

<sup>78</sup> Section 2(5) of the *Declaration of Death Act 2002*.

1.96 In *Sherman v National Life Assurance Co. of Canada*<sup>79</sup> the insurance company applied for a declaration to nullify an earlier court declaration of presumed death. The company presented evidence that the subject of the declaration, Mr Sherman, had actually gone into hiding due to investigations being carried out by the Metropolitan Toronto Fraud Squad, amongst others, into his involvement in questionable stock transactions and fraudulent banking transactions.<sup>80</sup> The insurance company also presented evidence that he had been seen in public during the alleged 7 year period of absence.<sup>81</sup> The Court also heard evidence that the police had believed that, at the time of the disappearance, one person had wanted to kill the “presumed deceased.” It was also claimed that the presumed deceased had close associations with well-known criminals and violent persons.<sup>82</sup> In affirming the original ruling, Steel J stated:

“[having] carefully considered the evidence in the context of whether Sherman was dead or in hiding... the judge was obviously satisfied that the presumption had not been rebutted. He relied on the presumption because he was satisfied that, after a careful and diligent search, Sherman had not been seen or heard of in seven years and his acceptance of the claimant's firm conviction that Sherman was dead. After reviewing the evidence I cannot say that his conclusion was erroneous.”<sup>83</sup>

1.97 It is clear, therefore, that Ontario differentiates more clearly through sections 2(4) and 2(5) of the 2002 Act between situations where death is virtually certain and where death is probable due to the circumstances in which the person disappeared, or as a result of a long-term absence.

**(c) Quebec and Alberta**

1.98 The legislative provisions in both Quebec and Alberta do not explicitly differentiate between the various categories of missing persons who disappear in circumstances that indicate that they may have died. For example, Article 92 of the Quebec Civil Code states that:

“A declaratory judgment of death may be pronounced on the application of any interested person, including the Public Curator or

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<sup>79</sup> [1996] 92 OAC 19.

<sup>80</sup> *Ibid* at paragraph 9.

<sup>81</sup> *Ibid* at paragraphs 8 - 10.

<sup>82</sup> *Ibid* at paragraph 11.

<sup>83</sup> *Ibid* at paragraph 14.

the Minister of Revenue as provisional administrator of property, seven years after disappearance.

It may also be pronounced before that time where the death of a person domiciled in Québec or presumed to have died there may be held to be certain although it is impossible to draw up an attestation of death.”

1.99 Article 92 allows for a general presumption of death to arise after seven years, should the person go missing without trace. This is qualified in the second part of Article 92, so that proof may be given that a person may be deemed presumed dead before the expiration of the seven year period, where death is virtually certain and where death is probable due to the circumstances in which the person disappeared, or as a result of a long-term absence.

1.100 Similarly, in Alberta, under section 94 of the Surrogate Rules:

“The court may permit a person to swear to the death of another person if there is no direct evidence of the death but there is evidence from which the death can be presumed.”<sup>84</sup>

1.101 In *Comey v Manufacturing Life Insurance Co.*<sup>85</sup> the Alberta High Court stated that there were “no preconditions” in bringing such an application, provided that there is sufficient evidence on the balance of probabilities that death occurred. In assessing this balance, the court stated it would take into account the following non-exhaustive factors:

- a. the time, location, and circumstances of the disappearance
- b. the extent and nature of post-disappearance searches
- c. a prior history of fraud
- d. the presence or absence of a motive for the missing person to remain alive but disappear
- e. the time between a life insurance policy being obtained and the subsequent disappearance
- f. facts suggesting the disappearance was a consequence of foul play
- g. abandonment of valuable property.”<sup>86</sup>

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<sup>84</sup> Section 94(1) of the *Surrogate Rules Alta Reg 130 (1995)*.

<sup>85</sup> [2010] AJ No. 1008.

<sup>86</sup> *Ibid* at paragraph 58.

1.102 In *Re Vos Estate*,<sup>87</sup> the subject of the application disappeared after going for a walk. It was shown that he had suffered from Alzheimer's disease at the time of his disappearance and had no known motive for disappearing. The Court was satisfied, taking everything into account on the balance of probabilities, that the subject of the application had disappeared in circumstances that indicated that he had most probably died. The Court therefore issued a presumption of death order.

1.103 The law in Alberta, as in Quebec, provides for categories of where the missing person may be presumed dead. Although Article 94 of the Quebec Civil Code and the legislative provisions in Alberta do not explicitly differentiate between the various categories of missing person who may disappear in circumstances that indicate that he or she may have died, the case law discussed illustrates that the Courts are aware of the need to distinguish between the different categories.

**(d) Administration of the affairs of Missing Persons**

1.104 In a number of Canadian provinces, the law provides for the category of missing persons for whom it is not believed have died. For example, in Ontario<sup>88</sup> and Quebec,<sup>89</sup> provision is made for a scheme similar to those in New South Wales, Australian Capital Territories and Victoria, discussed above. These allow for a tutor (in Quebec) or a committee (in Ontario) to be appointed to manage the affairs of a missing person or "absentee." The object of the legislation is to make sure that the estate of an absentee is administered and not left to waste.<sup>90</sup>

1.105 Section 1 of the *Absentees Act 1990* defines an absentee as:

"a person who, having had his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts is unknown and as to whom there is no knowledge as to whether he or she is alive or dead."<sup>91</sup>

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<sup>87</sup> [2008] ABQB 487.

<sup>88</sup> *Absentees Act 1990*.

<sup>89</sup> Articles 84-102 of the Quebec Civil Code and section 3(1) of the *Presumption of Death Act 1974* (New Brunswick).

<sup>90</sup> *Re Taylor* [1925] 27 OWN 497.

<sup>91</sup> Section 1 of the *Absentees Act 1990*. Article 84 of the Quebec Civil Code has a similar broad provision: "An absentee is a person who, while he had his domicile in Québec, ceased to appear there without advising anyone, and of whom it is unknown whether he is still alive."

1.106 The intention of the 1990 Act is, broadly, similar to those in the Australian states and provinces already discussed. The 1990 Act permits a limited use of property where there is a demonstrated need for decisions to be made and it is in the best interests of the missing person for an administrator to be appointed to make these decisions regarding the affairs of the missing person while the person remains missing.

## **E Conclusions and Provisional Recommendations**

### **(1) *Categorising missing persons in connection with presumed death***

1.107 The Commission's examination in this Chapter of the approach to the categorisation of missing persons illustrates that, for the purposes of making determinations of presumed death, there are two principal categories of missing person: those where death is virtually certain, and those where it is highly probable that the person will not return due to the circumstances in which the person disappeared.

1.108 The first category, where death is virtually certain, would include the following:

(a) *missing after a civil accident or natural disaster*, where a person was seen jumping from the railing of a boat while at sea or where, as in *In the Goods of Freytag*,<sup>92</sup> the person can be directly linked by circumstantial evidence to a catastrophic natural disaster; or

(b) *missing after a violent or terrorist incident*: where the circumstantial evidence clearly indicates that a person is almost certain to have died, for example, in the "9/11" attack on the New York World Trade Centre ("Twin Towers") in 2001.

1.109 The second category, where it is highly probable that the person is dead, would include the following:

(a) *missing after disappearance in dangerous circumstances*, for example, where a climber was last seen on a treacherous mountain, or in the case of "the Disappeared" where, in view of probable connection with a violent act and after a sufficient lapse of time it is probable that death has occurred;

(b) *missing for a long period in other circumstances that indicate a loss of life*, for example, where the person does not disappear in dangerous circumstances, but it can be established, on the balance of probabilities,

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<sup>92</sup> (1909) 42 ILTR 116, discussed above.

that death is likely because for example they have been missing for a considerable period (long-term missing).

1.110 The Commission considers that, in connection with both categories, any person applying for a declaration of presumed death must establish on the balance of probabilities that death should be presumed. This will involve presenting the type of information that would currently be prepared under the common law rules and case law already discussed. As the Commission has already noted, in Ireland the following detailed list of matters should be included in any application for a declaration of presumed death:<sup>93</sup>

1. The applicant should provide the court with a watershed, a date that was the last time the supposed deceased was heard from.
2. The applicant should provide evidence tending to indicate that the individual is dead, such as:
  - (a) the circumstances surrounding the disappearance,
  - (b) lack of communication with people who were likely to hear from him or her, detailing the last known correspondence or communication, and
  - (c) the length of time since disappearance.
3. In most cases, unless there are exceptional circumstances, the applicant should advertise for information concerning the whereabouts of the supposed deceased.
4. If possible, the applicant should arrange for the search-and-rescue authorities to confirm, by way of affidavit if possible, that attempts were made to locate the individual, but were fruitless.
5. The applicant should set out the full background relating to the disappearance, including the background as to the supposed deceased's age and health. This should include mental health, where relevant, such as suicidal tendencies.
6. The applicant should also arrange for the details to be corroborated as much as possible by a family member.
7. The applicant's affidavit should set out the next-of-kin entitled to distribution of his assets on his death.
8. The applicant must aver their belief that the individual is dead.

1.111 This approach is consistent with the specific factors set out in the Canadian case *Comey v Manufacturing Life Insurance Co*,<sup>94</sup> namely:

- (a) the time, location, and circumstances of the disappearance
- (b) the extent and nature of post-disappearance searches
- (c) a prior history of fraud
- (d) the presence or absence of a motive for the missing person to remain alive but disappear

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<sup>93</sup> Power "Body of Evidence," *Gazette, Law Society of Ireland*, April 2004, 18, at 21.

<sup>94</sup> [2010] AJ No. 1008.

- (e) the time between a life insurance policy being obtained and the subsequent disappearance
- (f) facts suggesting the disappearance was a consequence of foul play
- (g) abandonment of valuable property.<sup>95</sup>

1.112 The Commission considers that this two category approach to missing persons would involve a greater degree of clarity by comparison with existing law in Ireland. The Commission accepts that, to some degree, section 23 of the *Coroners Act 1962* currently provides for some aspects of those who are missing and where death is virtually certain, but it is limited to some categories only and does not expressly deal with missing persons in general terms. The Commission also acknowledges that the common law rule concerning 7 years absence provides a clear and reliable indicator of where death is either certain or is highly probable and where significant remedies can be put in place to provide for those left behind.

1.113 The Commission considers, however, that there is a strong argument for putting in place a clear statutory framework that would set out the circumstances in which such remedies may be obtained. The Commission is conscious in this respect that the State is required to implement the key elements of the 2009 Council of Europe Recommendation on Missing Persons, and that a statutory framework would meet this obligation. The Commission also notes that, in the context of the recent history of Ireland and the position of the “Disappeared,” it would be appropriate to have in place a statutory framework that is consistent with the essential elements of the *Presumption of Death (Northern Ireland) Act 2009*.

1.114 *The Commission provisionally recommends that, for the purpose of the civil law aspects of the law of missing persons, a statutory framework should be in place which would provide for a presumption of death in respect of two categories of missing persons. The first category, where the circumstances of their disappearance indicates that death is virtually certain, would deal with persons who go missing in circumstances (whether arising from a civil accident or arising from a violent incident) where their death is virtually certain given the circumstances of the disappearance. The second category, where both the circumstances and length of the disappearance indicate that it is highly probable that they have died and will not return, would apply where the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed.*

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<sup>95</sup> *Ibid* at paragraph 58.

1.115 *The Commission provisionally recommends that, where a person applies to have a presumption of death order, the following detailed list of matters should be included in a sworn affidavit:*

1. *The date when the supposed deceased was last heard from.*
2. *Specific evidence tending to indicate that the individual is dead, such as:*
  - (a) *the circumstances surrounding the disappearance,*
  - (b) *lack of communication with people who were likely to hear from him or her, including last known correspondence or communication, and*
  - (c) *the length of time since disappearance.*
3. *Except in exceptional circumstances, the applicant should advertise for information concerning the whereabouts of the supposed deceased.*
4. *Where possible, the applicant should arrange for search-and-rescue authorities to confirm, by way of affidavit if possible, that attempts were made to locate the individual, but were fruitless.*
5. *The applicant should set out the full background relating to the disappearance, including the background as to the supposed deceased's age and health (including mental health).*
6. *The applicant should also arrange for the details to be corroborated as much as possible by a family member.*
7. *The applicant's affidavit should set out the next-of-kin entitled to distribution of his assets on his death.*
8. *The applicant must aver their belief that the individual is dead.*

1.116 *The Commission also provisionally recommends that, in determining whether a presumption of death is to be ordered, all the circumstances surrounding the disappearance must be taken into account, including the following:*

- (a) *the time, location, and circumstances of the disappearance*
- (b) *the extent and nature of post-disappearance searches*
- (c) *a prior history of fraud*
- (d) *the presence or absence of a motive for the missing person to remain alive but disappear*
- (e) *the time between a life insurance policy being obtained and the subsequent disappearance*
- (f) *facts suggesting the disappearance was a consequence of foul play and*
- (g) *abandonment of valuable property.*

**(2) *Missing persons and interim administration procedures***

1.117 Under current law, there is no clear process available under which those left behind may deal with the immediate practical issues that may arise



when a person goes missing. This often means that those left behind suffer a range of financial impacts. Thus:

“Families ‘left behind’ by adults may have severe practical problems, since bank accounts of a family breadwinner may become inaccessible and it may prove difficult to claim social security benefits... Practical and financial problems also continue and may worsen as immediate resources are exhausted.”<sup>96</sup>

1.118 In this context, the Commission has had the benefit of discussions with various interested persons leading up to the preparation of this Consultation Paper. The general view expressed in these discussions is that reform of the law on missing persons should not only provide for a declaration of presumed death but also for interim remedies to deal with practical and legal problems that arise when a person goes missing. Those left behind have stated that they wish to ensure that financial matters are properly dealt with, though without having to make the difficult leap to thinking that the missing person may be dead.

1.119 For example, in the aftermath of the disappearance of Australian man Daniel Rosewall (discussed above), who had numerous credit card bills and loan repayments due, his father noted that:

“It would be a huge thing for us to apply for Daniel to be declared deceased. We think he’s out there somewhere. What if he turns up? As Daniel’s parents, we can’t do much more to find Daniel. What we can do is look after his affairs otherwise they will end up in tatters.”<sup>97</sup>

1.120 The practical difficulties expressed to the Commission in these discussions closely mirror those described in research carried out in England with families of missing persons.<sup>98</sup> The case of Englishman, Paul Read, who disappeared in July 2008 after a night out with friends, provides a similar example. Even though his remains were found in September 2010, his family encountered numerous problems in the intervening two and a half year period in their attempts to rearrange financial arrangements to reflect the fact that Paul had gone missing. His wife noted that, as she had lost Paul as a source of

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<sup>96</sup> Payne, “Understanding ‘Going Missing’: issues for social work and social services” *British Journal of Social Work* (1995) 25(3) at 343-344.

<sup>97</sup> Howard, *Protecting the Estates of Missing Persons – A submission to the Victorian Law Reform Commission’s Review and Administration Act 1986 (Vic)*, 14 May 2010, 9.

<sup>98</sup> Holmes, *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008).

income, she could not afford the mortgage and car loan repayments. She also noted that she could not sell the house or car that were held in both of their names.<sup>99</sup>

1.121 Against this backdrop, numerous submissions have been made to the UK Houses of Parliament All-Party Parliamentary Group on Runaway and Missing Children and Adults as to the need for reform. In his submission to the All-Party Committee, Peter Lawrence, the father of missing person Claudia Lawrence, noted that it was very difficult to get the relevant companies to engage with him as to his daughter's mortgage and car insurance payments. He noted that some form of administration order would be of great benefit to those left behind who find themselves in similar circumstances.<sup>100</sup>

1.122 The Commission has already noted that in a number of states, such as Australia and Canada, there is a recognition that interim remedies are needed to deal with immediate issues, such as paying utility bills or rent and mortgage payments; and that this is especially the case in circumstances where it would not be possible to establish that it is even highly probable the person is dead, let alone that he or she is virtually certainly dead.

1.123 The Commission considers that, given the importance of dealing with such immediate issues, it is necessary to have in place an appropriate framework to deal with this situation. The Commission notes that in Australia and Canada these situations have been dealt with by adding specific provisions for the limited administration of the property of the missing person into its existing legislation on adult guardianship. The equivalent of such legislation in Ireland would be the proposed mental capacity legislation which is scheduled for publication in Ireland in 2012.<sup>101</sup>

1.124 The Commission accepts that, by contrast with Australia and Canada, Ireland does not yet have a modern mental capacity and adult guardianship legislative framework but, having regard to the commitment that such legislation is well advanced and is to be published in 2012, it would be appropriate to consider this model for the purposes of dealing with this aspect of

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<sup>99</sup> Available at <http://news.bbc.co.uk/1/hi/england/hampshire/7859110.stm>.

<sup>100</sup> Available at <http://lauthmissingpersons.com/blog/2011/03/parliamentary-law-review-for-relatives-of-missing/>.

<sup>101</sup> The Government Legislation Programme Autumn Session 2011, available at [www.taoiseach.ie](http://www.taoiseach.ie), proposes to publish a Mental Capacity Bill in early 2012. This would implement the thrust of the recommendations in the Commission's *Report on Vulnerable Adults and the Law* (LRC 74-2006) which included recommendations to enact legislation comparable to the adult guardianship legislation already in place in, for example, Australia and Canada.

missing persons. The Commission has therefore concluded that it would be appropriate to include provision in the proposed mental capacity legislation for limited administration of the property of the missing person in order to pay essential bills. This would also have the advantage for those left behind of not being required to apply for a declaration of presumed death (which given the proofs required would in any event be unlikely to be granted).

1.125 The Commission is conscious that the full implementation of the proposed mental capacity legislation may take some years to occur, and that some suitable interim arrangement should be put in place in the meantime. The Commission considers in this respect that an application to appoint an interim administrator to manage the affairs of a missing person is, broadly, comparable to an application for a limited grant of administration of the estate of a person. The vast majority of such applications are currently dealt with through the Probate Office of the High Court. The Commission is aware that the Probate Office deals with many such probate applications from personal applicants and has established procedures to facilitate this in an informal and inexpensive manner. Bearing this in mind, the Commission has provisionally concluded that, pending the enactment of mental capacity legislation, an application to appoint an administrator to manage the affairs of a missing person, amounting to a limited grant of administration of the estate, could be made to the Probate Office. An applicant would furnish the necessary documentation to the Probate Office, who would then decide whether an administrator should be appointed, subject to an appeal to the High Court.

1.126 *The Commission provisionally recommends that it would be appropriate to include provision in the proposed mental capacity legislation for limited administration of the property of a missing person, in particular in circumstances in which it could not be established that a presumption of death order could be made. The Commission also provisionally recommends that, pending the enactment of mental capacity legislation, an application to appoint an administrator to manage the affairs of a missing person, amounting to a limited grant of administration of the estate, could be made to the Probate Office. An applicant would furnish the necessary documentation to the Probate Office, who would then decide whether an administrator should be appointed, subject to an appeal to the High Court.*



## CHAPTER 2 INTERIM ADMINISTRATION OF A MISSING PERSON'S PROPERTY

### A Introduction

2.01 In Chapter 1, the Commission provisionally recommended that legislation should be enacted along the lines of comparable provisions in Australia<sup>1</sup> and Canada<sup>2</sup> which would provide for an application to appoint an administrator to manage the affairs of a missing person on an interim basis. The Commission now turns to examine in this Chapter the details of such legislation. In Part B, the Commission discusses the relevant legislation in Australia and then turns in Part C to discuss the comparable legislation in Canada. In Part D, the Commission sets out its conclusions and provisional recommendations for reform.

### B Australian Legislation on Interim Administration

2.02 As already noted in Chapter 1, in New South Wales,<sup>3</sup> Victoria<sup>4</sup> and the Australian Capital Territory,<sup>5</sup> adult guardianship legislation (the equivalent of the proposed mental capacity legislation which is scheduled for publication in Ireland in 2012)<sup>6</sup> has been extended to provide for an administrator to be

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<sup>1</sup> Section 54 of the *Trustee and Guardian Act 2009* (New South Wales); Section 5A of the *Guardianship and Administration Act 1986* (Victoria); Section 8AA of the *Guardianship and Management of Property Act 1991* (Australian Capital Territory).

<sup>2</sup> Articles 84-102 of the Quebec Civil Code; *Absentees Act 1990* (Ontario); section 3(1) of the *Presumption of Death Act 1974* (New Brunswick).

<sup>3</sup> Section 54 of the *Trustee and Guardian Act 2009*.

<sup>4</sup> Section 5A of the *Guardianship and Administration Act 1986*.

<sup>5</sup> Section 8AA of the *Guardianship and Management of Property Act 1991*.

<sup>6</sup> The Government Legislation Programme Autumn Session 2011, available at [www.taoiseach.ie](http://www.taoiseach.ie), proposes to publish a Mental Capacity Bill in early 2012. This would implement the thrust of the recommendations in the Commission's *Report on Vulnerable Adults and the Law* (LRC 74-2006) which included

appointed to manage the affairs of a person where this person is missing and is not presumed dead.

**(1) When can an application be made?**

2.03 The granting of a declaration and order to have an administrator appointed to manage the affairs of a missing person is a serious matter. This was made clear by Campbell J in the New South Wales case *Re Gell*:

“The fact that the declaration and order is made when the missing person is not in a position to present evidence or tell the Court his or her views about the appointment, and that the declaration and order can irretrievably affect his or her property, means that the Court is unlikely to be satisfied by slight proofs.”<sup>7</sup>

2.04 An application for the appointment of an administrator to manage the affairs of the missing person is determined according to a two-stage process. Firstly, the person must fall into a category of a “missing person”, which is discussed below. Second, in addition to this:

“ordinarily evidence would be needed of the circumstances in which the person has disappeared, including his or her condition during the period immediately before the disappearance, and material which casts light on any motive the person may have had to disappear, or on any other possible cause there might be for his or her disappearance.”<sup>8</sup>

2.05 Thus, the mere fact that a person has not been seen by people who would ordinarily see him or her is not enough to show that that person is a “missing person” because this would also be consistent with the person being on a holiday. The Court stated that more context would be needed to conclude that the person is indeed a “missing person.”<sup>9</sup>

**(2) The detailed criteria**

2.06 Section 60AB(2) of the NSW *Guardianship and Administration Act 1986* provides in this respect, without defining what constitutes a “missing person”, that a number of criteria be met:

“(a) it is not known whether the person is alive; and

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recommendations to enact legislation comparable to the adult guardianship legislation already in place in, for example, Australia and Canada.

<sup>7</sup> *Re Gell* [2005] NSWSC 566 at paragraph 5.

<sup>8</sup> *Re Gell* [2005] NSWSC 566 at paragraph 6.

<sup>9</sup> *Ibid.*

- (b) reasonable efforts have been made to find the person; and
- (c) for at least 90 days, the person has not contacted–
  - (i) anyone who lives at the person’s last-known home address; or
  - (ii) any relative or friend of the person with whom the person is likely to communicate.”<sup>10</sup>

**(a) ‘Not known if person is alive’**

2.07 In relation to (a) above — where there is no knowledge of whether the person is alive — the courts have held that this refers to those:

“...people who ordinarily would be expected to have seen, or to have heard from, or of, the person. Given that missing people are ordinarily reported to the police, who then come under an obligation to find out what they can about the whereabouts of the person, in practice that will usually include also that part of the police force whose task it is to investigate the whereabouts of missing people.”<sup>11</sup>

2.08 The New South Wales Supreme Court has held that the results of police inquiries “go a long way and perhaps all the way” in proving this. Evidence of a physical search in the area where the person disappeared, and failure to find, or hear news of the finding of the dead body may also be appropriate in the circumstances to satisfy the requirement.<sup>12</sup>

2.09 Therefore, in order to satisfy this criterion, it must be shown that individuals such as the missing person’s close family or friends do not know if the missing person is alive. In addition, the Courts may look to evidence that the missing person’s unit of the local police force could not establish if the missing person is alive or dead.

**(b) ‘Reasonable Efforts to Locate the Missing Person’**

2.10 As to “reasonable efforts” to find the person, the courts require evidence of what efforts have been made to locate the person.<sup>13</sup> For example,

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<sup>10</sup> A similar provision is contained in the section 54(2) *NSW Trustee and Guardianship Act 2009* and section 8AA of the *Guardianship and Management of Property Act 1991* Australian Capital Territory.

<sup>11</sup> *Re Gell* [2005] NSWSC 566 at paragraph 6.

<sup>12</sup> *Ibid* at paragraph 9.

<sup>13</sup> Section 54(4) of the *Trustee and Guardian Act 2009* permits the submission of evidence by an applicant when making the application for the appointment of an administrator “in such form and in accordance with such procedures as the Court thinks fit.”

as it is the police who often have the requisite knowledge and expertise in locating missing persons, in *Re Gell*<sup>14</sup> the Court was of the opinion that “it would be a most unusual case for the Court to be satisfied that a person was missing if the police had not been informed of the disappearance.” In *Re Flint*<sup>15</sup> the Court accepted as evidence the fact that the mother of the missing person had made a report to the police, with the police following the usual procedure in tracing missing persons. The Court also took into consideration that the disappearance of the person, and the concerns of his parents, had received widespread media circulation. Finally, the Court accepted evidence that the Salvation Army (who have experience in dealing with missing person cases) were requested by the missing person’s family to search for him.<sup>16</sup>

2.11 The question of what constitutes “reasonable efforts” was also discussed in *Re Gell*,<sup>17</sup> where the Court held that, while it depends on the particular facts of the case, in general taking actions such as seeking publicity, going to places where the missing person frequented and registering with the relevant missing person organisations would be taken as “reasonable efforts.”<sup>18</sup> In providing evidence that reasonable efforts have been made to locate the missing person, the Court in *Re Gell* stated that the tender of an original letter from the missing person’s unit of the relevant police force which stated that search activities had been unsuccessful would be sufficient.<sup>19</sup>

**(c) ‘any relative or friend of the person with whom the person is likely to communicate’**

2.12 The Australian courts have noted that the purpose of this provision is to identify the people with whom the person would be likely to communicate with if he or she were indeed alive, had been missing, and had access to ordinary means of communication.<sup>20</sup> It is not meant to require an applicant prove that all relatives or friends of the missing person have not heard from the missing person since the disappearance occurred.

2.13 The court will also be conscious of situations where the person may deliberately disappear and therefore no contact would be made with those likely

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<sup>14</sup> [2005] NSWSC 566.

<sup>15</sup> [2005] NSWSC 560.

<sup>16</sup> *Ibid* at paragraph 15.

<sup>17</sup> [2005] NSWSC 566.

<sup>18</sup> *Ibid* at paragraph 10.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Re Gell* [2005] NSWSC 566 at paragraph 12.



to have heard from the missing person. If the court believes that this is the case arising from the particular facts, it acknowledges that this proof is based on the assumption that the person did not deliberately chose to disappear. Therefore, evidence to satisfy this proof may not be required by the Court before granting the appointment of an administrator.<sup>21</sup>

2.14 Secondly, once the legislative definition of “missing” is satisfied, they must also meet further criteria. For example, the following factors that must be met are outlined by the *Guardianship and Administration Act 1986* in Victoria:

“(a) [the missing person] usually resides in Victoria; and

(b) while the person is missing there is, or is likely to be, a need for a decision in relation to the person’s financial matters or property; and

(c) it is in the best interests of the missing person for a person to be appointed to administer their estate while they are missing”<sup>22</sup>

2.15 Paragraph (c) indicates that an administrator will only be appointed if it is in the best interests of the missing person; and this is also the case in New South Wales. By contrast, the corresponding provision in the Australian Capital Territory, the *Guardian and Management of Property Act 1991*, requires that the missing person’s interests would be “*significantly adversely affected*” if a guardian is not appointed.<sup>23</sup> It could be argued that the Australian Capital Territory demands a higher standard of need on behalf the missing person’s interests to be first demonstrated, than the “best interests” standard currently in place in Victoria and New South Wales.

### **(3) How is an application made?**

2.16 When an application is made for an administrator to be appointed to manage the affairs of a missing person, the relevant Court or Tribunal will then have to decide who is to be appointed as the administrator. In general, the best interests of the missing person will be taken into account, in addition to ensuring that there are no conflicts of interests between the missing person and the administrator.<sup>24</sup> For example in the *Guardian and Administration Act 1986*, the

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<sup>21</sup> *Re Gell* [2005] NSWSC 566 at paragraph 13.

<sup>22</sup> Section 60AB(1) of the *Guardianship and Administration Act 1986* Victoria. Also see section 54(2) *NSW Trustee and Guardianship Act 2009* and section 8AA(1) of the *Guardianship and Management of Property Act 1991* Australian Capital Territory.

<sup>23</sup> Section 8AA(1)(d) of the *Guardianship and Management of Property Act 1991* Australian Capital Territory.

<sup>24</sup> For example, see section 47(1) of the *Guardianship and Administration Act 1986* Victoria.

administrator must be “suitable.” Section 47(2) of the *Guardian and Administration Act 1986* provides that the Victoria Civil and Administrative Tribunal determines this on the basis of:

- “(a) the wishes of the proposed represented person, so far as they can be ascertained; and
- (b) the compatibility of the person proposed as administrator with the proposed represented person and with the guardian (if any) of the proposed represented person; and
- (c) whether the person was a member of the Tribunal as constituted for a proceeding under this Act.”

2.17 In addition, the Court or Tribunal must ensure that there are no conflicts of interest between the administrator and the missing person. Therefore, in general a person who is close to the missing person and is trusted to act in the best interests of the person, for example, a relative or close friend, is appointed as the administrator.

2.18 On the bringing of an application to have an administrator appointed, notice is generally provided to persons who may have interest in the affairs of the missing person. For example, the *Guardianship and Administration Act 1986* requires that notice is provided to the following persons:

- “(a) the nearest relative available of the person in respect of whom the application is made;
- (b) the primary carer (if any) of the person in respect of whom the application is made;
- (c) the Public Advocate;
- (d) any guardian of the person in respect of whom the application is made;
- (e) any person who has advised the Tribunal of an interest in the person in respect of whom the application is made or in his or her estate.”<sup>25</sup>

2.19 In terms of bringing an application to have an administrator appointed, a form is filled out by the applicant which specifies the need for the administrator to be appointed. In Victoria a statement of the fortnightly income and expenditure of the missing person and a list of assets and liabilities is also provided. In New South Wales, while there is no specific rule that requires that

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<sup>25</sup> Section 44 of the *Guardianship and Administration Act 1986* Victoria. See also section 72 of the *Guardianship and Management of Property Act 1991* Australian Capital Territory.

an affidavit outlines the nature and amount of the property of the missing person, or the nature of the relevant business affairs, the courts have stated that it would be:

“hard to see how the Court could be satisfied that it was in the best interests of the missing person to have a manager appointed of the estate, or whether it was more in the best interests of that person to have a manager appointed over the whole, rather than some part of the estate, without being informed of those matters in at least broad outline.”<sup>26</sup>

2.20 Therefore in presenting an application to have an administrator appointed to manage the affairs of a missing person, the Court must be satisfied that the administrator would act in the best interests of the missing person. It is also generally accepted that the administrator will provide a statement of the assets and liabilities of the missing person to the Court, so they can best assess what part, if not the whole, of the missing person’s affairs is to be managed.

#### **(4) What can an administrator do?**

2.21 The purpose of the legislation is to permit a limited use of the property of a missing person after 90 days absence. Under the legislation, an administrator is appointed to manage the affairs of the missing person. In the Victoria and the Australian Capital Territory, the administrator is appointed initially for a two year period, but this may be extended for a further two years.<sup>27</sup> The powers given to the administrator are the same as the powers as if it is the missing person making the decisions.<sup>28</sup>

2.22 In granting the order to appoint an administrator, the relevant authority must specify the exact powers given to the administrator. It must also state whether all, or part only, of the interests of the missing person’s interests are to be managed.<sup>29</sup> The kind of decisions that the administrator may make must be in the best interests of the missing person. In the Australian Capital

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<sup>26</sup> *Re Gell* [2005] NSWSC 566 at paragraph 30.

<sup>27</sup> Section 60AE of the *Guardianship and Administration Act 1986* Victoria; section 8AC(4) of the *Guardianship and Management of Property Act 1991* Australian Capital Territory.

<sup>28</sup> Section 8AC(1) of the *Guardian and Management of Property Act 1991* Australian Capital Territory; sections 57 and 67 of the *NSW Trustee and Guardian Act 2009*.

<sup>29</sup> Section 56 of the *NSW Trustee and Guardian Act 2009*; section 8AA(4) of the *Guardian and Management of Property Act 1991* Australian Capital Territory; section 48(1) of the *Guardian and Administration Act 1986* Victoria.

Territory, the *Guardianship and Management of Property Act 1991* outlines a number of key decision making principles that the administrator must adhere to:

“(a) the protected person’s wishes, as far as they can be worked out, must be given effect to, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person’s interests;

(b) if giving effect to the protected person’s wishes is likely to significantly adversely affect the person’s interests—the decision-maker must give effect to the protected person’s wishes as far as possible without significantly adversely affecting the protected person’s interests;

(c) if the protected person’s wishes cannot be given effect to at all — the interests of the protected person must be promoted;

(d) the protected person’s life (including the person’s lifestyle) must be interfered with to the smallest extent necessary”.<sup>30</sup>

2.23 These general principles, while explicitly stated in the relevant legislation of the Australian Capital Territory, are also provided for by the legal obligation placed on the administrator to act in the best interests of the missing person in New South Wales and Victoria.<sup>31</sup> The Australian courts have held that the best interests can be interpreted as:

“[the] preservation and maintenance of the property of the missing person, and dealing with the business affairs of the missing person in a way best calculated to preserve, maintain, or possibly enhance the assets of the missing person.”<sup>32</sup>

2.24 In more specific terms, the administrator will be granted the power to make the decisions, which may include the following:

- The execution of documents other than a will.
- Collect, receive and recover income
- Pay any debts and settle any demand against the estate

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<sup>30</sup> Section 4(2) of the *Guardianship and Management of Property Act 1991* Australian Capital Territory.

<sup>31</sup> Section 60AB *Guardian and Administration Act 1986* Victoria. Also see section 56(a) of the *NSW Trustee and Guardian Act 2009* which states that the guardian must exercise “all functions necessary and incidental to its [the estate’s] management and care.”

<sup>32</sup> *Re Gell* [2005] NSWSC at paragraph 16.

- With consent, sell, exchange, partition or convert property
- Pay a sum for maintenance of the missing person's dependants<sup>33</sup>

2.25 Should it be discovered that the missing person is alive, dead, or presumed dead, the relevant court is under an obligation to remove the administration order on the property.<sup>34</sup>

**(5) Case study: Re Rosewall**

2.26 In *Re Rosewall (Guardianship)*<sup>35</sup> Mr Rosewall, who disappeared in January 2010 after failing to attend an appointment,<sup>36</sup> was declared a missing person in December 2010 under Part 5A of the *Victoria Guardianship and Administration Act 1986 Act*.

2.27 In the aftermath of Mr. Rosewall's disappearance a number of practical problems arose. Firstly, his parents were aware of a number of debts that had fallen due, in particular one debt which would accrue substantial interest if not paid in the near future.<sup>37</sup> Secondly, Mr. Rosewall had rented an apartment with his girlfriend. However, after his disappearance, his girlfriend could not afford to pay the rent on her own. She had since terminated the lease on the property. In light of this, Mr. Rosewall's parents made numerous unsuccessful attempts to redirect their son's post from the property, so that they could remain aware of any outstanding debts. However, without proof of their son's death, Australia Post would not redirect the post, due to its privacy policy.<sup>38</sup> In summary, as the Court noted:

“Understandably, his family is concerned that there may be outstanding debts that they are not aware of. They are anxious to

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<sup>33</sup> Section 60AB *Guardian and Administration Act 1986* Victoria. Also see sections 59 and 65 of the *NSW Trustee and Guardian Act 2009*.

<sup>34</sup> Section 60AD(1) of the *Guardianship and Administration Act 1986* Victoria; sections 91 and 93 of the *NSW Trustee and Guardianship Act 2009*; sections 29 and 30(A) of the *Guardianship and Management of Property Act 1991* Australian Capital Territory.

<sup>35</sup> *Rosewall (Guardianship)* [2010] VCAT 1994.

<sup>36</sup> Mr. Rosewall's car was subsequently found abandoned and despite an extensive search, he had not been located at the time of the hearing.

<sup>37</sup> *Ibid* at paragraph 30.

<sup>38</sup> *Rosewall (Guardianship)* [2010] VCAT 1994 at paragraph 9.

ensure that all Daniel's financial affairs are kept in order while he is missing."<sup>39</sup>

2.28 In the hearing at the Victorian Civil and Administrative Tribunal, Mr. Rosewall's parents submitted evidence that a number of bills had become overdue, with substantial interest about to accrue on one in particular. They also demonstrated the difficulty in attempting to redirect their son's post. In accepting this evidence, the Tribunal also considered the family solicitor's evidence that addressed the efforts that had been made by the police, combined with numerous police media releases.<sup>40</sup>

2.29 The Tribunal, taking this into consideration, held that it was in the best interests of the missing person to appoint an administrator and appointed Mr. Rosewall's father. The Tribunal permitted the following kind of decisions to be made with regard to Mr. Rosewall's assets:

(a) accessing represented person's bank accounts and applying funds for the purposes of payment of represented person's debts

(b) authorising the deposit of any monies owed to the represented person (including any tax refund payable for the year 2009-10) into the represented person's bank account/s

(c) effecting a mail redirection with Australia Post of the represented person's mail to the administrator's address

(d) arranging the sale of the represented person's motor vehicle, a Ford Falcon BAXR6 sedan, 2003, and depositing the proceeds into the represented person's account

(e) arranging the sale of the represented person's washing machine and depositing the proceeds into the represented person's account."<sup>41</sup>

2.30 The Tribunal also ordered that Mr. Rosewall's father submit a Financial Statement and Plan and the annual examination of the accounts of the missing person.<sup>42</sup>

2.31 The *Rosewall* case provides a clear example of the detailed elements of the Australian approach to the appointment of administrators to manage the affairs of a missing person. The order is only granted where, due to a present or

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* at paragraphs 30 – 31.

<sup>41</sup> *Rosewall (Guardianship)* [2010] VCAT 1994.

<sup>42</sup> *Ibid* at paragraph 40.

likely need for a decision to be made in relation to a missing person's financial matters, it is in their best interests to appoint an administrator. The case also highlights that it is usually close family members or friends who bring the application, and are subsequently appointed as administrators to act in the best interests of the missing person.

## **C Canadian Legislation on Interim Administration**

2.32 In Ontario<sup>43</sup> and Quebec,<sup>44</sup> provision is made for a similar scheme under which a tutor (in Quebec) or a committee (in Ontario) is appointed to manage the affairs of a missing person or "absentee." The object of the legislation is to ensure that the estate of an absentee is administered and not left to waste.<sup>45</sup>

2.33 Under the Quebec Civil Code, "any interested person," including the Public Curator or a creditor of the absentee, may apply for the institution of tutorship to the absentee.<sup>46</sup> By contrast with this broad provision, the *Absentees Act* in Ontario provides for a more specific list of persons:

- "(a) the Attorney General;
- (b) any one or more of the next of kin of the alleged absentee;
- (c) the person to whom the alleged absentee is married;
- (d) the person with whom the alleged absentee was living in a conjugal relationship outside marriage immediately before the absentee's disappearance;
- (e) a creditor; or
- (f) any other person."<sup>47</sup>

2.34 The Ontario courts have interpreted the term "next of kin" to mean the mother, father, children, brothers, sisters, spouse or common law spouse of the missing person. In the absence of any of them, "next of kin" would also comprise those entitled to share in the estate of the missing person were he or

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<sup>43</sup> *Absentees Act 1990*.

<sup>44</sup> Articles 84-102 of the Quebec Civil Code. See also section 3(1) of the *Presumption of Death Act 1974* (New Brunswick).

<sup>45</sup> *Re Taylor* [1925] 27 OWN 497.

<sup>46</sup> Article 87 of the Quebec Civil Code.

<sup>47</sup> Section 2 of the *Absentees Act 1990*. See also Graham, "The Absentees Act: It Could Happen to You" 12(4) (2008) *The Probater*.

she to die intestate.<sup>48</sup> Pursuant to section 1 of the *Absentee Act 1990* an absentee is defined as:

“a person who, having had his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts is unknown and as to whom there is no knowledge as to whether he or she is alive or dead.”<sup>49</sup>

2.35 Unlike the position in Australia, this is a broader definition of missing person, with no minimum time period of 90 days absence before an application can be brought. However, the courts have interpreted this definition by setting a number of limits, including that the Act is not intended to cover cases in which a person, for his or her own purpose, conceals him or herself by faking suicide.<sup>50</sup>

2.36 The legislation also requires that a due and satisfactory inquiry be carried out into the disappearance of the person if they are to be deemed an absentee. The courts assess whether this has been satisfied by asking a number of questions, such as those posed by Quinn J in *Kamboj v Kamboj*,<sup>51</sup> where a man called Ashwani Kamboj disappeared:

“(a) Does Ashwani have next of kin or other relatives or friends in India? If so, do they have relevant information?

(b) Are the applicants the only children of Ashwani?

(c) Does Ashwani have other next of kin or relatives in Ontario or in the United States? If so, do they have relevant information?

(d) Does Ashwani have friends or acquaintances in Ontario or in the United States? If so, do they have relevant information?

(e) Are there restaurants, bars or other establishments in Niagara Falls or elsewhere in Ontario that Ashwani frequented? If so, have inquiries been made for relevant information?

(f) Did he belong to any clubs, religious, community or social organizations? If so, have inquiries been made for relevant information?

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<sup>48</sup> *Kamboj v Kamboj* (2007) CanLII 14932 (Ontario SC) at paragraph 20.

<sup>49</sup> Section 1 of the *Absentees Act 1990*. Article 84 of the Quebec Civil Code has a similar broad provision: “An absentee is a person who, while he had his domicile in Québec, ceased to appear there without advising anyone, and of whom it is unknown whether he is still alive.”

<sup>50</sup> *McCarthy* (1923) OLR 482 at paragraph [10].

<sup>51</sup> (2007) CanLII 14932 (Ontario SC).



(g) Did he have a family doctor? If so, have inquiries been made for relevant information?

(h) Has a notice been published in a local newspaper, containing his picture and soliciting information in respect of his whereabouts?

(i) Did his disappearance attract media attention?

(j) Did Ashwani have a will?

(k) Did he have any creditors? If so, do they have relevant information?"<sup>52</sup>

2.37 In assessing whether a due and adequate inquiry was made into the disappearance of Mr. Kamboj, the Court noted that the affidavit filed by the applicants was a mere "regurgitation" of the police report, and that little inquiries had been made as to ascertain the whereabouts of Mr. Kamboj.<sup>53</sup> The Court therefore rejected the claim for an appointment of an administrator to manage the affairs of the missing man.

2.38 In addition to satisfying the Court as to due and satisfactory inquiries, the applicant must also prepare and deliver to the Court a management plan for the property of the missing person. This plan details the income, expenditure, assets and liabilities of the missing person and how the committee plans the property will be used to pay maintenance, bills, and other outgoings arising from the estate. In considering this, the Court will assess the applicant's ability to manage the property in line with the proposed management plan. For example in *Re Quang Lu*,<sup>54</sup> the Court held that:

"While the applicant's evidence does not disclose her experience in managing property, the value of Mr. Lu's known property is modest and the property consists of assets typically managed by families. The applicant's plan to manage the property to pay for their daughter's living and educational expenses reflects the evidence that historically Mr. Lu fully provided for his daughter's financial needs. Consequently, I am satisfied that an order should go appointing the applicant as committee of the property of Mr. Lu for the purpose of securing its custody, and ensuring its due care and management in accordance with the terms of the management plan filed with the application."<sup>55</sup>

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<sup>52</sup> *Ibid* at paragraph 35.

<sup>53</sup> *Kamboj v Kamboj* (2007) CanLII 14932 (Ontario SC) at paragraph 37.

<sup>54</sup> (2008) Ontario Superior Court of Justice, Ct. File No. 05-42/0.

<sup>55</sup> *Ibid* at paragraph 6.

2.39 As under the Australian law discussed above, if the absentee is found to be dead, presumed dead or alive subsequent to the tutor or committee being appointed, the Court must then revoke the administration order on the estate.<sup>56</sup> However, unlike in Australia (where there the administrator is appointed for an initial two year period, and may be reappointed for up to two years after that)<sup>57</sup> in both Quebec and Ontario the relevant legislation does not provide for a maximum appointment period for the administrator.

## **D Conclusions and Provisional Recommendations**

### **(1) *When can an application be made?***

2.40 As discussed above, there are two approaches to providing a definition of missing persons. In Australian legislation, a more specific definition is provided, while in Quebec and Ontario, a broader definition is provided for in the relevant legislation. The Commission is of the opinion that, while both approaches have a similar result, the Australian approach is more desirable as it provides more clarity in terms of those applying for orders under the proposed law.

2.41 The Commission also considers that the appointment of an administrator to manage the affairs of a missing person should not be granted easily. The Commission agrees in this respect with the need to meet the type of criteria set out by Quinn J in the Canadian case *Kamboj v Kamboj*<sup>58</sup>

- (a) Does the missing person have next of kin or other relatives or friends in his home place? If so, do they have relevant information?
- (b) Are the applicants the only relatives of the missing person?
- (c) Does the missing person have other next of kin or relatives abroad? If so, do they have relevant information?
- (d) Does the missing person have other close friends or acquaintances? If so, do they have relevant information?
- (e) Are there restaurants, bars or other establishments in the locality or elsewhere that the missing person frequented? If so, have inquiries been made for relevant information?

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<sup>56</sup> Section 3 of the *Absentees Act 1990* and article 90 of the Quebec Civil Code.

<sup>57</sup> Section 60(AE) *Guardianship and Administration Act 1986*.

<sup>58</sup> (2007) CanLII 14932 (Ontario SC).

(f) Did the missing person belong to any clubs, religious, community or social organizations? If so, have inquiries been made for relevant information?

(g) Did the missing person have a family doctor? If so, have inquiries been made for relevant information?

(h) Has a notice been published in a local newspaper, containing the missing person's picture and soliciting information in respect of his or her whereabouts?

(i) Did the disappearance attract media attention?

(j) Did the missing person have a will?

(k) Did the missing person have any creditors? If so, do they have relevant information?

2.42 The Commission has accordingly concluded, and provisionally recommends, that an order to appoint an administrator to administer a missing person's property may only be made where: (a) it is not known whether the person is alive; (b) reasonable efforts have been made to find the person; and (c) for at least 90 days, the person has not contacted (i) anyone who lives at the person's last-known home address or (ii) any relative or friend of the person with whom the person is likely to communicate.

2.43 *The Commission provisionally recommends that an order to appoint an administrator to administer a missing person's property may only be made where: (a) it is not known whether the person is alive; (b) reasonable efforts have been made to find the person; and (c) for at least 90 days, the person has not contacted (i) anyone who lives at the person's last-known home address or (ii) any relative or friend of the person with whom the person is likely to communicate.*

**(2) Who can make an application to be appointed as an administrator?**

2.44 In Australian law any person may apply to be an administrator,<sup>59</sup> but in general the Court will appoint someone who is close to the missing person, for example, a relative or close friend. The courts will make this decision with regard to the wishes of the missing person, so far as they can be ascertained. A similar broad provision is provided for in the Quebec Civil Code, where "any interested person, including the Public Curator or a creditor" may apply to obtain an administration on the affairs of the missing person.<sup>60</sup>

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<sup>59</sup> Section 60(AE) *Guardianship and Administration Act 1986*.

<sup>60</sup> Article 87 of the Quebec Civil Code.

2.45 The Commission notes that the persons who are most likely to apply are spouses, civil partners, children, parents, or even close friends of the missing person. Other parties such as insurance companies, employees, or the State may also have a legitimate interest in bringing an application to have the missing person's estate administered. Indeed, it is clear that this group of people are also likely to be involved in any application to have a person declared presumed dead. In that respect, the Commission's discussion in this section also deals with that part of the reform proposals (which are discussed in Chapter 3, below).

2.46 Under current law, the common law presumption of 7 years absence requires that there has been no communication by the missing person with those who are likely to have heard from them. This would include family members and close friends, but has also been interpreted broadly by the courts to include a missing person's stockbrokers.<sup>61</sup>

2.47 The Council of Europe 2009 Recommendation on Missing Persons states that "any person demonstrating a legitimate interest" should be permitted to bring an application for a presumption of death order and that this would include "the spouse or registered partner, persons with an inheritance-related interest, or another financial interest, in the declaration of legal presumption of death, such as creditors."<sup>62</sup>

2.48 The comparable term "interested persons" has been adopted by many countries. This focuses on the "interest" of the party bringing the application in the matters of the missing person who is alleged to have died. For example, in Northern Ireland, a spouse or civil partner<sup>63</sup> or a person with "sufficient interest"<sup>64</sup> may bring an application.<sup>65</sup> A similar provision for spouses is provided for in Scotland, supplemented by a provision for "any interested

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<sup>61</sup> *Re Doherty* [1961] IR 219 at 222.

<sup>62</sup> Committee of Experts on Family Law, *Study On Missing Persons, Presumption of Death and Commorientes Following, In particular, terrorist attacks and natural disasters*(Strasbourg 20<sup>th</sup> November 2007) at 12 – 13.

<sup>63</sup> Section 1(2)(b)(i) of the *Presumption of Death (Northern Ireland) Act 2009*.

<sup>64</sup> Section 1(3) of the *Presumption of Death (Northern Ireland) Act 2009*.

<sup>65</sup> Section 1(2)(b)(ii) of the *Presumption of Death (Northern Ireland) Act 2009* also allows a "close relative" of the a member of the 'Disappeared' to bring a presumption of death application.

person” to bring an application.<sup>66</sup> This approach is also reflected in New Brunswick,<sup>67</sup> while in Quebec, the Civil Code provides:

“A declaratory judgment of death may be pronounced on the application of any interested person, including the Public Curator or the Minister of Revenue as provisional administrator of property, seven years after disappearance”<sup>68</sup>

2.49 Thus the Quebec civil code explicitly acknowledges that the State, through the Public Curator or Minister for Revenue, may have a legitimate interest in bringing a presumption of death order against a missing person. This can also be seen in the Irish case *Re Doherty*. Here the State, through the Minister for Finance, was found to have a legitimate interest under the doctrine of *bona vacantia*,<sup>69</sup> which comes into effect when a person dies intestate. This allowed the State sufficient interest to bring a presumption of death application concerning Mr. Doherty.

2.50 In Ontario, the *Declaration of Death Act 2002* provides for a non-exhaustive list of “interested persons” who can apply for a presumption of death order, including:

- “(a) a person named as executor or estate trustee in the individual’s will,
- (b) a person who may be entitled to apply to be appointed administrator of the individual’s estate on intestacy,
- (c) the individual’s spouse,
- (d) the individual’s next of kin,
- (e) the individual’s guardian or attorney for personal care or property... ,
- (f) a person who is in possession of property owned by the individual,
- (g) if there is a contract of life insurance or group insurance insuring the individual’s life,
  - (i) the insurer, and
  - (ii) any potential claimant under the contract, and

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<sup>66</sup> Sections 1(3)(i) and 1(5) of the *Presumption of Death (Scotland) Act 1977*.

<sup>67</sup> Section 2(1)(d) of the *Presumption of Death Act (New Brunswick) 1974*.

<sup>68</sup> Article 92 of the Quebec Civil Code.

<sup>69</sup> See section 29(2) of the *State Property Act 1954*.

(h) if the individual has been declared an absentee under the *Absentees Act*, the committee of his or her estate”<sup>70</sup>

2.51 In conclusion, there are two approaches to defining “interested persons”. In Northern Ireland, Scotland and New Brunswick, legislation provides for a broad provision allowing “any interested persons” to apply for a declaration of presumed death order. In Quebec, a detailed description of “interested persons” who may make an application for a presumption of death order has been enacted.

2.52 The Commission has concluded that an approach which provides a detailed, non-exhaustive list of persons who may bring an application is more desirable. This is because it provides a level of clarity for those left behind who may wish to bring a claim.

2.53 The Commission considers that it would be appropriate to set out a non-prescriptive list that matches the actual experience in the jurisdictions already discussed (close family being the most usual persons appointed), but allowing sufficient flexibility to provide for unusual cases. The Commission has accordingly concluded, and provisionally recommends, that the following persons may apply to be appointed as the administrator of the affairs of a missing person: (a) the missing person’s spouse or civil partner; (b) the missing person’s cohabitant; (c) any other next of kin of the missing person; (d) a creditor or (e) any other person (including, where relevant, the State) with a sufficient interest. As already discussed, the Commission has also concluded that this should also be the list of persons who may apply for a declaration of presumed death (discussed in detail in Chapter 3, below).

2.54 *The Commission provisionally recommends that the following persons may apply to be appointed as the administrator of the estate or property of a missing person: (a) the missing person’s spouse or civil partner; (b) the missing person’s cohabitant; (c) any other next of kin of the missing person; (d) a creditor; or (e) any other person (including, where relevant, the State) with a sufficient interest. The Commission provisionally recommends that this should also be the list of persons who may apply for a declaration of presumed death.*

### **(3) What can an administrator do?**

2.55 In Australia, the administrator must act in the best interests of the missing person, taking into account as far as possible the wishes of the represented person. The legislation in New South Wales, Victoria and the Australian Capital Territories all permit a limited and specific use of the property

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<sup>70</sup> Section 1 of the *Declaration of Death Act 2002* (Ontario).

of the missing person for a two year period, but this may be extended for a further two years.<sup>71</sup> The specific uses apply to:

- The payment of the debts and engagements of, and otherwise for the benefit of, the missing person
- The maintenance and benefit of dependents of the missing person
- The care and management of the estate of the missing person<sup>72</sup>

2.56 This is similar to the situation in Quebec where its legislation provides for the court to fix the amounts that it is expedient to allocate to the expenses of the marriage or civil union, to the maintenance of the family or to the payment of the obligation of support of the absentee.<sup>73</sup> Similarly, in Ontario, the *Absentees Act 1990* provides for the administrator to act for the incapable person's benefit.<sup>74</sup>

2.57 The Commission notes that both the Australian and Canadian approaches are similar in that they provide for a limited and specified use of property of the missing person for the benefit of that person. The Commission has therefore provisionally concluded that an administrator would have limited and specified powers to administer the affairs of the missing person for a period of up to two years, which can be extended for a further two years.

2.58 *The Commission provisionally recommends that an administrator have limited and specified powers to administer the affairs of the missing person for a period of up to two years, which can be extended for a further two years.*

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<sup>71</sup> Section 60(AE) *Guardianship and Administration Act 1986*.

<sup>72</sup> Section 65 of the *NSW Trustees and Guardianship Act 2009* (NSW). Similar provisions are contained in section 8(AA) of the *Guardianship and Management of Property Act 1991* (ACT), and section 49 of the *Guardianship and Administration Act 1986* (Victoria).

<sup>73</sup> Article 88 of the Quebec Civil Code.

<sup>74</sup> Section 6 of the *Absentees Act 1990*. Also see section 32(1) of the *Substitute Decisions Act 1992*.





## CHAPTER 3      PRESUMPTION OF DEATH LEGISLATION

### A            Introduction

3.01        In Chapter 1, the Commission provisionally recommended that legislation should be enacted along the lines of comparable presumption of death legislation in other countries, such as the *Presumption of Death (Northern Ireland) Act 2009*. The Commission now turns to examine in this Chapter the details of such legislation. In Part B, the Commission discusses the limited nature of existing presumed death orders made by the High Court. In Part C, the Commission sets out its conclusions and provisional recommendations for reform, including the key elements of the presumption of death legislation.

### B            The Limited Nature of Existing Law

3.02        When a person dies and they are not missing, their assets become subject to the law of succession which permits the distribution of their assets in accordance with the *Succession Act 1965*. The 1965 Act provides for the estate of the deceased to devolve on and vest in the appointed personal representatives.<sup>1</sup> A grant of administration is then obtained, which allows for the distribution of the assets, if any, to the relevant beneficiaries. The registration of death also allows for those left behind to obtain a death certificate for the deceased. This enables those left behind to deal with practical matters such as the closure of relevant bank accounts, or the transfer of any jointly owned assets (for example, a house or car).

3.03        Under the current law, in cases where a missing person is believed to have died, a declaration of presumed death may be made by the High Court.<sup>2</sup> The Court does not pronounce on the death of the person to the estate of whom it declares presumed dead, unlike where a coroner's declaration of death in effect inquest authorises the General Registrar for Births, Deaths and Marriages to register the death of the missing person (in accordance with the *Civil*

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<sup>1</sup>        Section 10(1) of the *Succession Act 1965*. See Keating, *Keating on Probate* 3<sup>rd</sup>ed (Thomson Round Hall 2007) at page 225 at paragraph [15-01].

<sup>2</sup>        That is, unless section 23 of the *Coroners Act 1962*, discussed in Chapter 1, applies.

*Registration Act 2004*). Instead, if the High Court is satisfied that the evidence points to a reasonable presumption of death, it makes an order declaring presumed death.<sup>3</sup> This order permits the grant of administration for the estate of the missing person only. The making of an order for presumed death does not permit the death to be registered. This means that no death certificate can be obtained. It is therefore unclear how the practical issues such as the closing of bank accounts of the missing person who is presumed dead, maintenance of dependents and the payment of creditors are resolved. Similarly, as discussed below, the status of any pre-existing marriage or civil partnership is unclear.

3.04 It is therefore clear that a gap in the legal consequences exists between situations where a person dies in normal circumstances and where a missing person is believed to have died. As discussed below, the Commission is of the view that if the facts surrounding the disappearance of a person indicate that the missing person may have died, those left behind should be permitted to obtain a registration of death. In the first category of cases described in Chapter 2, where it is proved that the missing person is virtually certain to have died, those left behind should be permitted to obtain a registration of death. In second category of cases described in Chapter 2, where death is highly probable due to the circumstances in which the person disappeared or as a result of a long-term absence, those left behind should be permitted to obtain a registration of presumed death. This would permit those left behind to obtain a death certificate or presumption of death certificate for the missing person.

3.05 The second issue concerns the waiting period before an application can be made. As discussed above, a number of practical and legal issues arise after the death of a person. These are resolved by the issuing of a death certificate in a short period after the person's death. Under the current law in Ireland, while the common law rule concerning presumption of death suggests that persons may have to wait up to 7 years for a presumed death order in the High Court, this is in fact not always the case. Thus, in cases where death is virtually certain, such as in the Irish case *In the Goods of Freytag*,<sup>4</sup> an order of presumed death may be made in a short period of time after their disappearance. The 7 year rule thus applies primarily to other cases of missing persons, where death is highly probable. In these categories, those left behind must wait for 7 years absence before bringing a claim before the High Court to have a person declared presumed dead.

3.06 The Commission notes that the 7 year rule is long-established and, indeed, is extremely well-known among those who deal with the issue of

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<sup>3</sup> See the discussion in Chapter 1, above.

<sup>4</sup> (1909) 42 ILTR 116, discussed in Chapter 1, above.

missing persons in Ireland, which was confirmed in the discussions the Commission held with individuals and groups leading to the publication of this Consultation Paper. The 7 year rule has also been used by the Oireachtas, albeit in a limited context, in section 18 of the *Land and Conveyancing Law Reform Act 2009* and been used as a reference point for social welfare purposes.<sup>5</sup> Similarly, it has in effect been placed on a statutory footing in Scotland<sup>6</sup> and Northern Ireland.<sup>7</sup>

3.07 The Commission notes that, in a number of other countries, the waiting period before missing persons may be declared presumed dead has been reduced or gradated according to the probability of the death of the missing person. For example, under the German *Verschollenheitsgesetz 1939* (the *Disappearance Act*), a number of periods are set depending on the circumstances of the disappearance. They range from three months for a disappearance during a war to six months for a disappearance while at sea.<sup>8</sup> The German legislation also makes provision for a waiting period of 25 years for persons who were under 25 at the time of their disappearance, in circumstances that were not dangerous to their lives.<sup>9</sup> Similarly, some states in the United States of America operate a much lower time period; New York<sup>10</sup> has a 3 year waiting period and Georgia<sup>11</sup> a four year waiting period.<sup>12</sup>

3.08 The Council of Europe 2009 Recommendation on Missing Persons also takes account of the circumstances of the disappearance and the related probability of the death of the missing person. The Recommendation states:<sup>13</sup>

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<sup>5</sup> See the discussion in Chapter 1, above, of the 2009 Act and of the guidelines published by the Department of Social Protection concerning the widow's and widower's benefit.

<sup>6</sup> *Presumption of Death (Scotland) Act 1977*.

<sup>7</sup> *Presumption of Death (Northern Ireland) Act 2009*.

<sup>8</sup> Sections 4-7 of the *Verschollenheitsgesetz 1939*.

<sup>9</sup> Sections 3(1)-(2) of the *Verschollenheitsgesetz 1939*.

<sup>10</sup> Section 2(1.7)(a) of the New York State Code.

<sup>11</sup> Section 53(9)(1) of the Georgia State Code.

<sup>12</sup> Department of Finance and Personnel, *Missing Persons A Consultation by the Department of Finance and Personnel on the Draft Presumption of Death Bill (Northern Ireland) 2008*, (January 2008) at paragraph 40.

<sup>13</sup> Principle 4 of the Council of Europe Recommendation CM/Rec (2009) 12 of the Committee of Ministers to Member States on Principles Concerning Missing Persons and the Presumption of Death (9 December 2009).

“(1). Where, in the light of all the circumstances, the death of the missing person can be taken as certain, the lodging of the request [for a declaration of presumed death] should preferably be possible without a waiting period.

4(2). Where the circumstances of disappearance of the missing person are such that it is reasonable to conclude that his or her death is likely, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be one year at the most.

4(3). Where the death of the missing person is uncertain, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be seven years at the most.”

3.09 This gradated approach is consistent with the actual application of the existing common law rule. As already discussed, this can lead to a declaration of presumed death within months where the death is virtually certain, as in *In the Goods of Freytag*<sup>14</sup> (3 months after disappearance). The Commission also notes that the 2009 Recommendation also refers to a 7 year rule, albeit “preferably... seven years at the most.” While the 2009 Recommendation indicates, therefore, a preference to regard the 7 year rule as an outward limit, the Commission considers that there is merit in retaining the well-known reference point of the 7 year rule, bearing in mind always that it does not *require* in all cases that 7 years have passed since disappearance. The Commission also notes in this respect that the 2009 Recommendation also requires member states to have regard to maintaining a fair balance between the interests of those concerned, including the person whose presumed death is declared. Thus, the maintenance of a long-established rule can be seen as respecting this general principle.

3.10 The Commission’s categorisation of missing persons into two, namely, where death is virtually certain and, where death is highly probable due to the circumstances in which the person disappeared, are based on a sliding scale of probability of death, which reflects the likelihood of the missing person being located alive. These categorisations allow for the separation of application processes and the gradating of time periods, from a shorter period where death is virtually certain, to a longer period where the person is missing for a number of years. It also allows for the separation of legal and practical consequences according to the probability of locating the person alive. This also reflects the essential elements of the 2009 Council of Europe Recommendation.

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<sup>14</sup> (1909) 42 ILTR 116, discussed in Chapter 1, above.

## **C Conclusions and Provisional Recommendations**

### **(1) *Where death is virtually certain.***

3.11 As the law currently stands, in cases where death is virtually certain and the body of the missing person is believed to have been either lost at sea or destroyed in a fire, section 23 of the *Coroners Act 1962* allows for a coroner, after conducting an inquest, to issue a declaration of death. This in turn allows the Registrar of Births, Deaths and Marriages to issue a death certificate for the missing person. The Commission's provisional recommendations in Chapter 1 propose that the category of where death is virtually certain would be wider than the limited situations recognised in section 23 of the *Coroners Act 1962*

3.12 The Council of Europe 2009 Recommendation on Missing Persons recommends that there should, in effect, be no waiting period required where death is virtually certain. This approach is, in effect, already in place under existing practice in Ireland, as indicated by the decision in *In the Goods of Freytag*<sup>15</sup> (declaration made 3 months after disappearance). It is also mirrored in legislation in numerous countries; for example, the Netherlands,<sup>16</sup> Northern Ireland<sup>17</sup> and those countries who have implemented the 1966 ICCS *Athens Convention* allow for the immediate declaration of presumed death in situations where death of the missing person is virtually certain.

3.13 Therefore, in cases where death is virtually certain, the Commission considers that there is no reason to require those left behind to wait any longer than is necessary before the missing person's death can be registered. Similarly, the Commission also considers that such an application could be made to a coroner, which would involve, in effect, an extension of section 23 of the *Coroners Act 1962*, which already envisages an inquest involving a missing person, albeit in limited circumstances. Under this proposed reform, where the coroner is satisfied that death is virtually certain, a declaration of death can be made and this would allow the Registrar of Births, Deaths and Marriages to issue a death certificate. The Commission emphasises that the coroner would be acting on relevant proofs that establish that death is virtually certain. In this respect, an applicant would be required to bring to the coroner the detailed material which the Commission has already recommended is required before a presumption of death order may be made;<sup>18</sup> and that the coroner would also be

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<sup>15</sup> (1909) 42 ILTR 116, discussed in Chapter 1, above.

<sup>16</sup> Article 1:426 Dutch Civil Code. See also Chorus et al, *Introduction to Dutch Law* (Kluwer Law International 2006), at 101.

<sup>17</sup> Section 2(1)(a) of the *Presumption of Death (Northern Ireland) Act 2009*.

<sup>18</sup> See paragraph 1.115, above.

required to have regard to the factors which the Commission has also recommended should be involved in any such decision.<sup>19</sup> Once the coroner makes the finding that death has occurred, this, in turn, would authorise the applicant to register the death in the Register of Deaths provided for under the *Civil Registration Act 2004*. This would also allow for the standard legal consequences of death to arise within a short time period after the disappearance of the person, while also helping those left behind deal with the practical issues that arise.

3.14 *The Commission provisionally recommends that, in situations where death is virtually certain, there should be no minimum waiting period before an application can be made to obtain a declaration of presumed death. The Commission also provisionally recommends that this declaration could be made by a coroner and would be identical to a standard declaration of death; that it would authorise the applicant to register the death in the Register of Deaths provided for under the Civil Registration Act 2004; and that it would have the identical legal consequences that arise on the death of a person.*

## **(2) Where death is highly probable**

3.15 The Commission considers that in the category of missing persons where death is highly probable a declaration of “presumed death” would be more appropriate and that a separate register of presumed deaths should be established in line with the approach in comparable legislation such as the *Presumption of Death (Scotland) Act 1977* and the *Presumption of Death (Northern Ireland) Act 2009*. This is because there is a greater possibility that the person may return in some cases, and it is therefore preferable that the record of such presumed deaths be separate from the standard register of deaths.

3.16 The Commission is of the view that, to facilitate such orders, a register of presumed deaths, distinct from the register of deaths, should be established by the Registrar of Births, Deaths and Marriages under the *Civil Registration Act 2004*. This would be comparable to the position in Northern Ireland where, under section 15 of the *Presumption of Death Act (Northern Ireland) Act 2009*, a separate register of Presumed Deaths has been established.<sup>20</sup> This declaration of presumed death would have the same effects as a standard declaration of death.

3.17 The Commission accepts that it may be difficult to differentiate clearly in all instances, at least initially, between cases where death is certain and

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<sup>19</sup> See paragraph 1.116, above.

<sup>20</sup> The Commission notes that, in Scotland, all declarations of presumed death are entered on the Register for Births, Deaths and Marriages.

where death is highly probable. It may be that, under the Commission's proposed reforms, an application might be made initially at least to a coroner claiming that the circumstances suggest that death is certain. Whether the coroner accepts such an application would, of course, be a matter for the coroner to determine. The Commission considers that, in any event, this does not create an insurmountable problem. This is because the coroner would have available to him or her the detailed material which the Commission has already recommended is required before a presumption of death order may be made;<sup>21</sup> and that the coroner would also be required to have regard to the factors which the Commission has also recommended should be involved in any such decision.<sup>22</sup> In this respect, a coroner might, in some instances, come to the conclusion that the application does not come within the category of missing person where death is certain.

3.18 The Commission has concluded that, where death is highly probable, but not certain, it is preferable that a declaration of presumed death be made by High Court. The Court will, of course, be acting on the same essential proofs and would have regard to the same factors, but would be entitled to conclude that death may nonetheless be presumed. Once these proofs are satisfied, the High Court will issue a declaration of presumed death which would then allow the applicant to apply for an entry on the Register of Presumed Deaths and the issuing of a certificate of presumed death. The Commission has also concluded that this certificate of presumed death would have the same effect as a standard death certificate and would allow for the standard consequences of death to arise, such as the grant of administration of the estate, and it would have the same effect on any marriage or civil partnership.

3.19 *The Commission provisionally recommends that, in situations where death is highly probable, a declaration of presumed death may be made in the High Court; that the declaration would authorise the applicant to register the death in a Register of Presumed Deaths to be established for this purpose under the Civil Registration Act 2004; and that it would have the identical legal consequences that arise on the death of a person.*

**(3) *Retaining the 7 year reference period where death is highly probable***

3.20 The remaining issue to be considered in this aspect of the Commission's proposals is whether the common law 7 year rule should remain the relevant reference period for determining whether it should be presumed that a person has died. The Commission notes that the 7 year rule is long-

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<sup>21</sup> See paragraph 1.115, above.

<sup>22</sup> See paragraph 1.116, above.

established and, indeed, is extremely well-known among those who deal with the issue of missing persons in Ireland, which was confirmed in the discussions the Commission held with individuals and groups leading to the publication of this Consultation Paper. The 7 year rule has also been used by the Oireachtas, albeit in a limited context, in section 18 of the *Land and Conveyancing Law Reform Act 2009* and been used as a reference point for social welfare purposes.<sup>23</sup> Similarly, it has, in effect, been placed on a statutory footing in Scotland<sup>24</sup> and Northern Ireland.<sup>25</sup>

3.21 The Council of Europe 2009 Recommendation on Missing Persons suggests that a waiting period where death of the missing person is uncertain should be 7 years “at the most.” This was clearly an attempt to recognise that the existing laws in the Member States of the Council of Europe contained a range of waiting times. These range from a fixed term of 5 years in Holland,<sup>26</sup> Turkey,<sup>27</sup> and Switzerland,<sup>28</sup> through the presumptive 7 year rule in Ireland and the United Kingdom and up to 10 years in other countries. The intention of the 2009 Recommendation was that some median point between these would be appropriate.

3.22 In a number of Council of Europe Member States, the waiting period is adjusted according to the age of the missing person. For example, in Germany a declaration of presumed death can be issued after 10 years, or 5 years if that person is aged 80 or more. This period is extended to 25 years where the missing person is under the age of 25 at the time of disappearance.<sup>29</sup> Spain has a similar law which has a standard 10 year waiting period that is reduced to 5 years if the missing person is 75 or more.<sup>30</sup>

3.23 The Commission acknowledges that the position in Europe in terms of the waiting periods varies considerably and that there is no universal or uniform rule in place. Outside Europe, the position also varies, but in many

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<sup>23</sup> See the discussion in Chapter 1, above, of the 2009 Act and of the guidelines published by the Department of Social Protection concerning the widow’s and widower’s benefit.

<sup>24</sup> *Presumption of Death (Scotland) Act 1977*.

<sup>25</sup> *Presumption of Death (Northern Ireland) Act 2009*.

<sup>26</sup> Dutch Civil Code, Article 1:413 (1) and (2).

<sup>27</sup> Turkish Civil Code, Article 32.

<sup>28</sup> Swiss Civil Code, Article 35.

<sup>29</sup> *Verschollenheitsgesetz* (1939), Article 3:1-2.

<sup>30</sup> Spanish Civil Code, Articles 193-198.



Common Law states, such as Australia, the presumptive 7 year rule continues to be applied both by courts applying the traditional common law rule and also where there has been legislative intervention. The Commission notes that there is no evidence in the literature to suggest that this has given rise to injustice; but the Commission also considers that this result has been achieved in a number of states by a more flexible approach to waiting periods where death is virtually certain and can also be attributed to the introduction of legislation to ensure that interim measures are also put in place almost immediately, such as the appointment within months of an administrator with limited powers to deal with the missing persons assets.

3.24 The Commission has also taken into account that the 7 year presumptive rule has been in place for many years. Indeed, in the discussion with interested groups leading to the preparation of this Consultation Paper, the Commission was conscious that the 7 year rule was well-known to those affected by the disappearance of their loved ones, and is referred to, for example, in the websites of groups working in this area<sup>31</sup> and of the Citizens Information Board.<sup>32</sup> The Commission also notes that the 7 year rule was also recognised by the Oireachtas in section 18 of the *Land and Conveyancing Law Reform Act 2009*, albeit in the limited context of trusts of land.

3.25 The Commission is conscious that the Council of Europe 2009 Recommendation on Missing Persons refers to a waiting period of 7 years “at the most” in connection with declarations of presumed dead. The Commission notes, in this respect that, in cases where death is virtually certain, the Commission’s provisional recommendations for reform provide for a very short waiting period falling well short of the 7 year period. Where death is highly probable, the Commission considers that the 7 year period is not unnecessarily lengthy, although as already noted, the Commission concurs with the approach taken in a number of other countries, notably Australia and Canada, that any potential unfairness can be avoided by a more flexible approach to waiting periods where death is virtually certain. In parallel with this, the Commission also agrees – and has so recommended already – that, separately from the issue of presumed death, legislation should be enacted to ensure that interim measures are also put in place almost immediately, such as the appointment within months of an administrator with limited powers to deal with the missing persons assets. The Commission considers that this additional reform would also reflect the principles in the 2009 Council of Europe Recommendation.

3.26 The Commission has therefore concluded that the common law 7 year rule be retained as the key reference point for cases involving a missing

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<sup>31</sup> See [www.missingpersons.ie](http://www.missingpersons.ie).

<sup>32</sup> See [www.citizensinformation.ie](http://www.citizensinformation.ie).

person where death is highly probable. The Commission considers in this respect that the wording used in section 18(5) of the *Land and Conveyancing Law Reform Act 2009* is an appropriate model in this respect, namely that where, by reason of absence from the State or otherwise, it remains uncertain for a period of at least 7 years as to whether a person is alive, it shall continue to be presumed that the person is dead.

3.27 *The Commission provisionally recommends that, in respect of a person whose disappearance indicates that death is highly probable, and where, by reason of absence from the State or otherwise, it remains uncertain for a period of at least 7 years as to whether a person is alive, it shall continue to be presumed that the person is dead.*

#### **(4) Persons who may apply for a declaration of presumed death**

3.28 It is clear that those left behind, and who are therefore affected by the person's absence, are most likely to want to bring an application where the missing person disappears in circumstances that indicate that they may have died. This includes spouses, civil partners, children, parents, or even close friends of the missing person. Other parties such as insurance companies, employees, or the State may also have a legitimate interest in bringing an application to have the missing person's estate administered or to have the person declared presumed dead.

3.29 The Commission has already discussed, in the context of its recommendations concerning the interim administration of the estate and property of a missing person, who may apply for such an order. The Commission has also already recommended that the same persons should also be eligible to apply for a declaration of presumed death. For the sake of completeness, the Commission sets out here the thrust of that provisional recommendation as it applies to a declaration of presumed death.

3.30 *The Commission provisionally recommends that the following persons may apply for a declaration of presumed death: (a) the missing person's spouse or civil partner; (b) the missing person's cohabitant; (c) any other next of kin of the missing person; (d) a creditor; or (e) any other person (including, where relevant, the State) with a sufficient interest.*

#### **(5) The status of marriage or civil partnership**

3.31 The death of one of the parties to a marriage has the effect of bringing an end to the marriage, and the surviving spouse may lawfully remarry.<sup>33</sup> The same occurs on the death of one party to a civil partnership. Where, however, a missing person who is declared presumed dead is married

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<sup>33</sup> Cretney, *Principles of Family Law* 4<sup>th</sup> ed (Sweet & Maxwell 1984) at 223.

or in a civil partnership at the time of their disappearance, the status of the other party left behind is more problematic.

3.32 In cases other than where a coroner issues a declaration of death under section 23 of the *Coroners Act 1962*, the remaining spouse or civil partner who wishes to remarry or form a civil partnership will face a number of problems. In accordance with the statutory version of the 7 year rule in section 57 of the *Offences Against the Person Act 1861*, if the remaining person wishes to enter into a second marriage, they will not be prosecuted for bigamy where this is done 7 years after the disappearance, but within that 7 year period a question might arise. More significantly, whatever about the defence in criminal law after 7 years absence, it appears that so far as the civil law is concerned if it is later discovered that the missing spouse was in fact alive at the time of the second marriage, even where the spouse disappeared in circumstances which led to a reasonable inference that he or she was dead, the second marriage is completely void and the marriage to the returned missing person remains in place.<sup>34</sup> The same problem arises where a person who is either married or already in a civil partnership to a missing person enters into a civil partnership with another person.

3.33 Under the current law, it might be argued that the remaining party could obtain a divorce on grounds of separation after four years' absence of the other party.<sup>35</sup> It is unclear, however, whether this applies in circumstances where one party is missing and is believed to have died. In any event, the Commission is of the view that, given the sensitivities of those left behind in the context of missing persons, it would not be appropriate to use this mechanism.<sup>36</sup> Similarly, it would not be appropriate to use the mechanism for dissolution of a civil partnership in the context of a missing person.<sup>37</sup>

3.34 The law in the England and Wales has been reformed in light of these problems.<sup>38</sup> Section 19(3) of the *Matrimonial Causes Act 1973* provides

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<sup>34</sup> See Lowe and Douglas, *Bromley's Family Law* 10<sup>th</sup> ed (Oxford 2007) at 1087, and Breslauer, "Foreign Presumptions and Declarations of Death and English Private International Law", 10 MLR 122, at 135-136.

<sup>35</sup> Section 5 of the *Family Law (Divorce) Act 1995*.

<sup>36</sup> The Commission notes that section 4(1)(c) of the Canadian *Divorce Act 1985* allows for one party to obtain a divorce if they have no knowledge of the whereabouts of the other party for three years.

<sup>37</sup> Section 110 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.

<sup>38</sup> See Lowe and Douglas, *Bromley's Family Law* 10<sup>th</sup> ed (Oxford 2007) at 1087.

that any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved “and the court may, if satisfied that such reasonable grounds exist, grant a decree of presumption of death and dissolution of the marriage.” Section 19(3) of the 1973 Act enacted a statutory version of the 7 year rule by providing that:

“In any proceedings under this section the fact that for a period of seven years or more the other party to the marriage has been continually absent from the petitioner and the petitioner has no reason to believe that the other party has been living within that time shall be evidence that the other party is dead until the contrary is proved.”

3.35 While the statutory presumption appears to be somewhat different from the common law presumption, as it is the spouse’s belief which must be reasonable, the usual forms of proofs must be established to show that the missing spouse had probably died.<sup>39</sup>

3.36 In the case of civil partnerships, section 55 of the English *Civil Partnership Act 2004* allows for a presumption of death order which has the effect of dissolving the civil partnership.<sup>40</sup> As with section 19(3) of the *Matrimonial Causes Act 1973*, the order provided for in section 55 relates only to the dissolution of the civil partnership.

3.37 In most other countries which, unlike England and Wales, have legislation providing exclusively for presumption of death orders, the making of the order is sufficient to bring to an end any marriage or civil partnership. For example, this is the case in Northern Ireland,<sup>41</sup> Scotland<sup>42</sup> and France.<sup>43</sup> This

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<sup>39</sup> See Lowe and Douglas, *Bromley’s Family Law* 10<sup>th</sup> ed (Oxford 2007) at 1088. See *Parkinson v Parkinson* [1939] P 414, where it was held that the petitioner must provide evidence to show that the missing spouse had died, and *Tweney v Tweney* [1946] P 180, in which both the spouse and her second husband had carried out extensive enquiries as to the whereabouts of the spouse’s first husband.

<sup>40</sup> Section 68 of the English *Civil Partnership Act 2004* states that the order is conditional at first. The waiting period before this order is made conclusive is six weeks, unless otherwise provided for by the Lord Chancellor.

<sup>41</sup> Section 3 of the *Presumption of Death (Northern Ireland) Act 2009*.

<sup>42</sup> Section 3(1) of the *Presumption of Death (Scotland) Act 1977*.

<sup>43</sup> Article 88 of the French Civil Code.

means that once the declaration of presumed death is obtained, the missing person is treated as deceased, and the marriage or civil partnership is at an end.

3.38 The Commission, as provisionally recommended in Chapter 2, is of the opinion that a presumption of death order should have all the effects as a standard death certificate. This would entitle any spouse or civil partner to the widowed or surviving civil partner social welfare benefit. It would also allow the remaining party to remarry or enter into a civil partnership should they wish to do so.

3.39 *The Commission provisionally recommends that a declaration of presumed death should have the effect that a marriage or civil partnership has come to an end.*



## **CHAPTER 4      WHEN THE MISSING PERSON RETURNS AND INTERNATIONAL ASPECTS OF MISSING PERSONS**

### **A            Introduction**

4.01        In this Chapter, the Commission discusses how the law should deal with the situation where a missing person, in respect of whom an administrator has been appointed to manage their affairs or in respect of whom a declaration of presumed death has been made, is in fact alive and returns. This could arise in the settings in which the missing person had simply wanted to break contact with his or her family and was unaware that the disappearance had resulted in the appointment of an administrator or a declaration of presumed death. It could also arise where fraud was involved, as in the case of John Darwin, the English man who faked his own death while out canoeing. The Commission also discusses some of the specific international aspects of the proposed legal framework.

4.02        In Part B, the Commission discusses how the missing person's property can be dealt with through a variation order. In Part C, the Commission discusses the effect on a marriage or civil partnership. In Part D, the Commission turns to the specific international aspects of the proposed legal framework.

### **B            Property of the Missing Person Who Returns: Variation Order**

4.03        When a person who is declared presumed dead is subsequently found to be alive, they will usually wish to regain control of their property. If this property is subject to an administration order, this would clearly require the removal of the administration order. However, if the missing person is declared dead or presumed dead, then as recommended, their assets are subject to the *Succession Act 1965*. This provides for the distribution of the assets of the missing person in accordance with succession law.

4.04        Under the current law, section 49(3) of the *Succession Act 1965* provides that:

“nothing in this section shall prejudice the right of any creditor or claimant to follow any such assets into the hands of any person who may have received them.”

4.05 This has the effect of allowing a claimant to acquire property that has been transferred to third parties, even where the initial transfer was done in accordance with succession law. The Commission is of the opinion that, as far as possible, any recommendations regarding the return of property to a missing person be made in line with section 49(3) of the *Succession Act 1965*. The Commission has examined in this respect relevant provisions in Northern Ireland, Scotland and Canada.

4.06 In Northern Ireland, section 5 of the *Presumption of Death (Northern Ireland) Act 2009* provides that a declaration of presumed death may be varied or revoked by a variation order made by the High Court. Section 6(1) of the 2009 Act provides that, subject to the specific provisions of the section itself “a variation order shall have no effect on rights to or in any property acquired as a result of a declaration [of presumed death].” Section 6(2) provides that where a variation order has been made the Court making the order “must make such further order, if any, in relation to any rights to or in any property acquired as a result of that declaration as it considers reasonable in all the circumstances of the case.” Section 6(3) of the 2009 Act further states that the variation order will have no effect on any income accrued between the time of the issuing of the declaration of presumed death and the variation order. Section 6(6) provides that if a third party acquires rights to or in the property, in good faith and for value, the returning person may not bring a claim for the property against him or her. Finally, section 7 of the 2009 Act provides that the trustee of the estate is required to take out an insurance policy in order to provide an indemnity against claims that may arise after the distribution of the missing person’s assets has occurred.

4.07 These provisions are virtually identical to the Scottish *Presumption of Death (Scotland) Act 1977*,<sup>1</sup> with the exception that section 7 of the *Presumption of Death (Scotland) Act 1977* allows for close family members (parents, children, grandparents and grandchildren) to make a claim to be exempted from any variation orders.

4.08 The legislation in Northern Ireland and Scotland is also similar to that in a number of Canadian provinces. For example in British Columbia, section 5(2) of the *Survivorship and Presumption of Death Act 1996*, provides that:

“if a person who is presumed to be dead is found by the court to be alive, the court may, on the application of any interested person, by

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<sup>1</sup> Sections 5 and 6 of the *Presumption of Death (Scotland) Act 1977*.



order, give directions the court considers appropriate respecting the property of the person found to be alive and its preservation and return.”<sup>2</sup>

4.09 This provision grants the Court discretion to order the reconveyance of the property to the missing person, which is similar to the variation order procedure in the Northern Ireland 2009 Act and the Scottish 1977 Act.

4.10 This approach is also seen in New Brunswick, which provides for a method where the property may be reconveyed:

“to the owner the whole or a specified portion of the estate in his possession at the time of the order, or to pay to the owner a specified amount representing the value of the estate distributed to him or a portion thereof if, in the opinion of the Court, having regard to the circumstances of the case, including any inconvenience or hardship that would be imposed upon the person subject to the order, the making of such an order would be just.”<sup>3</sup>

4.11 The Commission has concluded that it is appropriate to provide for a procedure whereby a variation order regarding property may be brought after the initial declaration of the missing person as dead or presumed dead. The variation order may be brought by any person with sufficient interest. This is in line with the current position in Northern Ireland,<sup>4</sup> Scotland,<sup>5</sup> New Brunswick<sup>6</sup> and British Columbia.<sup>7</sup>

4.12 The Commission has concluded that the general approach taken in the legislation in Northern Ireland and Scotland should be adopted. This would grant the Court wide discretion should the returning missing person bring a claim for a variation order. The Commission is also of the view that the Court, in considering any applications for a variation order, should have regard to the circumstances of the case, including any inconvenience or hardship that would be imposed upon the person subject to the order and whether the making of such an order would be just in the circumstances. The variation order would not affect any income accrued from the date of the declaration of presumed death to that of the variation order. It would also protect third parties who acquire the

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<sup>2</sup> Section 5(2) of the *Survivorship and Presumption of Death Act 1996*.

<sup>3</sup> Section 6(2) of the *Presumption of Death Act (New Brunswick) 1974*.

<sup>4</sup> Section 5(1)-(2) of the *Presumption of Death (Northern Ireland) Act 2009*.

<sup>5</sup> Section 4(1) of the *Presumption of Death (Scotland) Act 1977*.

<sup>6</sup> Section 5(2) of the *Survivorship and Presumption of Death Act 1996*.

<sup>7</sup> Section 6(2) of the *Presumption of Death Act (New Brunswick) 1974*.

property in good faith and for value from potential claims brought against the property.

4.13 *The Commission provisionally recommends that a missing person who has been declared presumed dead but who returns may apply to have a variation order made by the High Court concerning his or her estate. The Commission provisionally recommends that, subject to the specific provisions concerning the making of such a variation order, it should not, in general have any effect on rights to or in any property acquired as a result of a declaration of presumed death. The Commission provisionally recommends that where a variation order has been made, the Court must make such further order, if any, in relation to any rights to or in any property acquired as a result of the declaration of presumed death as it considers reasonable in all the circumstances. The Commission also provisionally recommends that: (a) the variation order will have no effect on any income accrued between the time of the issuing of the declaration of presumed death and the variation order; and (b) that if a third party acquires rights to or in the property, in good faith and for value, the returning person may not bring a claim for the property against him or her.*

## **C Marriage or Civil Partnership of the Missing Person Who Returns**

4.14 As already discussed in Chapter 3, when a spouse or civil partner dies, their marriage or civil partnership comes to an end. The other party left behind is then free to enter into a second marriage or civil partnership, and also becomes entitled, for example, to the widowed or surviving civil partner social welfare payment. The provisional recommendation made in Chapter 3 provides that when a missing person is declared dead or presumed dead all the legal effects of a standard death arise. This includes that any marriage or civil partnership has come to an end.<sup>8</sup> Where the remaining spouse has remarried or entered into a civil partnership in the incorrect belief that the missing person was declared dead or presumed dead, the missing person's return creates a clear difficulty. This Part discusses the consequences where the marriage or civil partnership of a missing person who is declared presumed dead is dissolved, and that missing person is subsequently found to be alive.

### **(1) Marriage**

4.15 In situations where a standard death has occurred, there is no question of the spouse being found to be alive. In such circumstances, the marriage has come to an end, and the remaining spouse is free to remarry or

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<sup>8</sup> See paragraph 3.39, above.

enter into a civil partnership. Under the provisional recommendations made in Chapter 3, a declaration of presumed death ends any pre-existing marriage or civil partnership. However, the recommendation does not deal with the situation where the missing person is subsequently found to be alive after the making of the declaration.

4.16 The position in Northern Ireland where a missing person who is presumed dead and subsequently returns is that if no appeal is brought within the time allowed or an appeal is dismissed, the ending of the marriage or civil partnership is final. Section 3 of the *Presumption of Death (Northern Ireland) Act 2009* states:

“the declaration shall be conclusive of the matters contained in it and shall, without any special form of words, be effective against any person and for all purposes including the ending of a marriage or civil partnership...”

4.17 In Scotland, section 3(3) of the *Presumption of Death (Scotland) Act 1977* provides that in situations where a spouse is declared presumed dead the marriage cannot be reinstated:

“Where a marriage to which the missing person is a party has been dissolved by virtue of decree in an action of declarator, the dissolution of the marriage shall not be invalidated by the circumstance that the missing person was in fact alive at the date specified in the decree as the date of death.”

4.18 Therefore the legislation in Scotland explicitly forbids any re-opening of the dissolution of a marriage, even in circumstances where the missing person who was presumed dead was, in fact, alive. The corresponding provision in Northern Ireland allows, however, for an appeal to be made concerning the dissolution of the marriage or civil partnership, if made within the time period allowed.<sup>9</sup>

4.19 In considering the different approaches to this issue, the Commission has provisionally concluded that the question of whether a marriage or civil partnership remains valid if the missing person returns must have regard to the specific circumstances arising. Given the complexity that this gives rise to, and having regard to the relevant provisions of Article 41 of the Constitution, it invites submission as to the precise basis for a determination in such cases.

4.20 *The Commission provisionally recommends that the question of whether a marriage remains valid if the missing person returns must have*

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<sup>9</sup> Section 3 of the *Presumption of Death (Northern Ireland) Act 2009*.

regard to the specific circumstances arising and invites submissions as to the precise basis for a determination in such cases.

## **(2) Civil Partnership**

4.21 Broadly similar factors arise in the context of civil partnership in that under the provisional recommendations made in Chapter 3 above, a declaration of presumed death brings to an end any pre-existing civil partnership but does not deal with the situation where the missing person is subsequently found to be alive.

4.22 As stated, the position in Northern Ireland where a missing person who is presumed dead and subsequently returns is that if no appeal is brought within the time allowed or an appeal is dismissed, the dissolution of the civil partnership is final:

“the declaration shall be conclusive of the matters contained in it and shall, without any special form of words, be effective against any person and for all purposes including the ending of a marriage or civil partnership...”<sup>10</sup>

4.23 This is similar to the position in England, where section 55 of the *Civil Partnership Act 2004* makes provision for the dissolution of a civil partnership where one party has been presumed dead:

“(1) The court may, on an application made by a civil partner, make a presumption of death order if it is satisfied that reasonable grounds exist for supposing that the other civil partner is dead.

(2) In any proceedings under this section the fact that—

(a) for a period of 7 years or more the other civil partner has been continually absent from the applicant, and

(b) the applicant has no reason to believe that the other civil partner has been living within that time,

is evidence that the other civil partner is dead until the contrary is proved.”<sup>11</sup>

4.24 This presumption of death order has the limited effect of dissolving the civil partnership only,<sup>12</sup> and does not permit a grant of administration. It is also generally not deemed final until 6 weeks have passed from the date of the

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<sup>10</sup> Section 3 of the *Presumption of Death (Northern Ireland) Act 2009*.

<sup>11</sup> Section 55 of the *Civil Partnership Act 2004*.

<sup>12</sup> Section 161(c)(1) of the *Civil Partnership Act 2004*.

declaration of presumed death,<sup>13</sup> after which the civil partnership cannot be reinstated at the request of one party.

4.25 Under the current law in Ireland, unlike in the case of marriage, there is no specific constitutional reference to civil partnerships. Nonetheless, the Commission has provisionally concluded that the question of whether a civil partnership remains valid if the missing person returns must have regard to the specific circumstances arising and invites submissions as to the precise basis for a determination in such cases.

4.26 *The Commission provisionally recommends that the question of whether a civil partnership remains valid if the missing person returns must have regard to the specific circumstances arising and invites submissions as to the precise basis for a determination in such cases.*

## **D International Aspects of Missing Persons**

4.27 As already noted, missing persons often disappear where their last known sighting was in a foreign country. In the past, events such as World War II (1939-1945) have provided examples whereby due to the nature of the events, a number of declarations of presumed death were required for individuals who disappeared while abroad.<sup>14</sup> In the context of increased international travel and patterns of emigration and immigration in a globalised setting, there is an even more pressing need to ensure that reform in this area reflects the international nature of some missing persons cases.<sup>15</sup>

4.28 Similarly in Ireland, the category of missing persons known as “the Disappeared” provides another element to the international aspect of missing persons. As already discussed, the Disappeared are a category of missing persons who were abducted and buried in unmarked secret locations by paramilitary groups operating in Northern Ireland during the period of violence between the 1970s and late 1990s in particular. At the time of writing (November 2011), 9 of 16 of the remains of the Disappeared have been found.

4.29 Against this particular background in Ireland, it is clear that the provisions of the *Presumption of Death (Northern Ireland) Act 2009* were tailored to take account of the need to provide for declarations of presumed

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<sup>13</sup> Section 161(2) of the *Civil Partnership Act 2004*. This may, however, be shortened by the Court in its discretion.

<sup>14</sup> Freidmann “Declarations of Death – A New International Convention” (1950-51) 25 St. John’s Law Review 18.

<sup>15</sup> Council of Europe, Meeting of the Committee of Experts on Family Law Working Party on Missing Persons (26-28 September 2007) at paragraphs 10-11.

death in respect of those of the Disappeared whose bodies have not been found (and, given the passage of time, may never be found). The Commission also notes that this involves a very specific international dimension to missing persons in Ireland, because it is generally accepted that at least some of the Disappeared may have been abducted in Northern Ireland but were buried (and possibly killed) in this State. To date, 7 of the bodies actually recovered had been buried in this State.

4.30 The international law aspect of missing persons was recognised in the 1966 ICCS Convention on Establishing Death (the Athens Convention). As already noted, the 1966 Convention provided for the limited situations in which the person went missing in a natural disaster or terrorist attack and where death was certain. The 2009 Council of Europe Recommendation on Missing Persons has also recognised the need to deal with the international dimension to missing persons.

**(1) *Where an Irish citizen disappears abroad***

4.31 In Ireland, it is clear that if a person goes missing abroad in circumstances that indicate that death is virtually certain, a grant of administration may be obtained in the courts virtually immediately. Thus, in *In the Goods of Freytag*,<sup>16</sup> a declaration of presumed death was made 3 months after Mr Freytag's disappearance in the 1908 earthquake in Messina in Italy. A similar recent example is of the Irish citizen Brendan Donegan who disappeared while attempting to climb the Peruvian Andes in South America. His wife successfully applied to the High Court for an order for administration of his estate on the basis that, although his body had not been found, the evidence in this case was sufficient to establish that his death was, in the language of the terminology used in this Consultation Paper, virtually certain.<sup>17</sup>

4.32 The current law is, however, unclear as to the position where a foreign court issues a declaration of death or presumed death for an Irish citizen who disappears while abroad. The Commission is of the view that, in such a case, those left behind should not be at a disadvantage by virtue of the location of the disappearance.

4.33 The Commission has, therefore, concluded that where an Irish citizen disappears while abroad an application may be made to the High Court for any of the orders already provided for in this Consultation Paper, namely (a) an order for the administration of the missing person's estate or (b) a declaration of presumed death. The Commission also provisionally recommends that any such application should be subject to the same criteria as apply where the

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<sup>16</sup> (1909) 42 ILTR 116, discussed in Chapter 1, above.

<sup>17</sup> "Wife of dead climber granted probate order" *The Irish Times* 5 May 2000.

person is presumed to have died in Ireland, and that the High Court may also recognise any orders made in any other State in connection with the disappearance abroad, subject to relevant rules concerning proof of foreign documents, including in accordance with the 1961 Hague Apostille Convention.<sup>18</sup>

4.34 *The Commission provisionally recommends that where an Irish citizen disappears while abroad an application may be made to the High Court for (a) an order for the administration of the missing person's estate or (b) a declaration of presumed death. The Commission also provisionally recommends that any such application should be subject to the same criteria as apply where the person is presumed to have died in Ireland, and that the High Court may also recognise any orders made in any other State in connection with the disappearance abroad, subject to relevant rules concerning proof of foreign documents, including in accordance with the 1961 Hague Apostille Convention.*

**(2) *Where a person from abroad disappears in Ireland***

4.35 Comparable, though somewhat different, considerations arise in the context of a person from abroad who goes missing in this State. In effect, this involves seeing the case of Mr Freytag or Mr Donegan in reverse. The question arises as to whether the Italian, or Peruvian, authorities would require, as a matter of Italian or Peruvian law, that the usual laws that arise after a death, or presumed death, should be applied to a person who has been in Italy or Peru for a short time and has disappeared. It is likely that certain aspects of Italian or Peruvian law would be applicable, notably as to whether an inquest is required where the person's body has not been found.

4.36 The frequency and ease with which persons may now travel across the world means that the problem of persons disappearing while abroad is a real issue. The prevalence of terrorist attacks and frequency of natural disasters has also increased in recent times. For example, the 1985 terrorist attack on a plane flying from Delhi to Montreal, which involved a detonation and explosion off the coast of Cork, involved the death of people of many different nationalities (none of whom were Irish), and led to inquests being held in Ireland. Some of the victims' bodies were never recovered from the sea.

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<sup>18</sup> The Commission discussed the 1961 Hague Convention, commonly known as the Apostille Convention, in detail in its *Report on the Hague Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents* (LRC 48-1995) and more generally in its *Report on Aspects of Intercountry Adoption* (LRC 89-2008), at paragraphs 4.18-4.20.

4.37 The Commission is aware that, against this backdrop, non-Irish nationals may disappear while in Ireland, and thus those left behind may wish to obtain a declaration of presumed death in Ireland. The Council of Europe 2009 Recommendation on Missing Persons provides that a presumption of death law should take account of the following circumstances:

“where the disappearance occurred in the territory of the State...

where the disappearance occurred during a voyage of a vessel or aircraft registered in that State;

where the missing person was a national of that State or was domiciled or resident in its territory;

where the missing person had property or other financial interest (or obligations) in that State.”<sup>19</sup>

4.38 The relevant legislation in a number of countries reflects a more narrow approach than suggested in the Council of Europe 12009 Recommendations. For example, the legislation in Northern Ireland<sup>20</sup> and Scotland<sup>21</sup> requires that the person, in respect of whom the declaration of presumed death is sought, must be habitually resident or domiciled in the country at the time of the disappearance. These provisions are widened by permitting a spouse (or civil partner in Northern Ireland) to make an application if they themselves are domiciled or habitually resident in the State.<sup>22</sup>

4.39 The Commission considers that the spouse or civil partner should be able to make an application for a presumption of death for their respective spouse or civil partner. This would allow for a situation where a person who relocated to Ireland after their spouse or civil partner disappeared would have the same recognition had their spouse or civil partner died.

4.40 The Commission also considers that (apart from the issue as to whether an inquest is to be held) it is appropriate that there be some degree of connection with the State beyond a short-term visit before the question would arise as to whether an application should be made to the authorities in that State for the type of orders already discussed in this Consultation Paper.

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<sup>19</sup> Principle 2 of the Council of Europe Recommendation CM/Rec (2009) 12 of the Committee of Ministers to Member States on Principles Concerning Missing Persons and the Presumption of Death (9 December 2009).

<sup>20</sup> Section 1(2)(a) *The Presumption of Death (Northern Ireland) Act 2009*.

<sup>21</sup> Section 1(3)(a) *The Presumption of Death (Scotland) Act 1977*.

<sup>22</sup> Section 1(2)(b) of the *Presumption of Death (Northern Ireland) Act 2009* and section 1(3)(b) of *the Presumption of Death (Scotland) Act 1977*.



4.41 In this respect, the Commission considers that the model adopted in the *Presumption of Death (Northern Ireland) Act 2009* provides a suitable template for this State. Section 1(2)(a) of the 2009 Act provides that an application may be made where the missing person was habitually resident in Northern Ireland for one year prior to their disappearance and section 1(2)(b) of the 2009 Act provides that the applicant be habitually resident in Northern Ireland for one year prior to the application.

4.42 Separately, section 1(2)(c) of the 2009 Act provides that an application may be made by a close relative of a missing person where that missing person is a victim of violence within the meaning of section 1(4) of the *Northern Ireland (Location of Victims' Remains) Act 1999*. The 1999 Act is the Act that established the Independent Commission for the Location of Victims' Remains pursuant to the 1998 Belfast (Good Friday) Agreement in order to locate the bodies of the Disappeared. The equivalent legislation in this State is the *Criminal Justice (Location of Victims' Remains) Act 1999*.

4.43 The Commission considers that, bearing this specific historical background in mind, and also that the circumstances in which such applications are likely to arise would include those connected with the Disappeared, it would be especially important to ensure that the relevant legislative provisions should, to the greatest extent possible, be consistent with each other.

4.44 The Commission has, therefore, concluded that in respect of a person who is ordinarily resident or habitually resident in Northern Ireland for 12 months or who has been habitually resident or ordinarily resident in this State for 12 months and who disappears while in the State, or is believed to have disappeared in the State, an application may be made to the High Court by any interested person who has been habitually resident in the State for 12 months for any of the orders already provided for in this Consultation Paper, namely: (a) a declaration of presumed death or (b) an order for the administration of the missing person's estate.

4.45 The Commission has also concluded that separate provision should be included to deal with those described as the Disappeared, and that an application may also be made for the orders already provided for in this Consultation Paper by a close relative of a missing person where that missing person is a victim of violence within the meaning of the *Criminal Justice (Location of Victims' Remains) Act 1999*.

4.46 The Commission also provisionally recommends that the High Court may recognise any orders made in any other State in connection with any disappearance, subject to relevant rules concerning proof of foreign documents, including in accordance with the 1961 Hague Apostille Convention.

4.47 *The Commission provisionally recommends that, in respect of a person who is ordinarily resident or habitually resident in Northern Ireland for 12 months or who has been habitually resident or ordinarily resident in this State for 12 months and who disappears while in the State, or is believed to have disappeared in the State, an application may be made to the High Court by any interested person who has been habitually resident in the State for 12 months for any of the orders already provided for in this Consultation Paper, namely: (a) a declaration of presumed death or (b) an order for the administration of the missing person's estate. The Commission provisionally recommends that an application may also be made for the orders already provided for in this Consultation Paper by a close relative of a missing person where that missing person is a victim of violence within the meaning of the Criminal Justice (Location of Victims' Remains) Act 1999. The Commission also provisionally recommends that the High Court may recognise any orders made in any other State in connection with the disappearance, subject to relevant rules concerning proof of foreign documents, including in accordance with the 1961 Hague Apostille Convention.*

## CHAPTER 5      SUMMARY OF PROVISIONAL RECOMMENDATIONS

The provisional recommendations made by the Commission in this Consultation Paper are as follows:

5.01      The Commission provisionally recommends that, in the context of any legislative framework concerning the civil law status of missing persons, a missing person should be defined as a person who is observed to be missing from their normal patterns of life, that those who are likely to have heard from them are unaware of their whereabouts and that the circumstances of their being missing raises concerns for their safety and well-being. [paragraph 1.17]

5.02      The Commission provisionally recommends that, for the purpose of the civil law aspects of the law of missing persons, a statutory framework should be in place which would provide for a presumption of death in respect of two categories of missing persons. The first category, where the circumstances of their disappearance indicates that death is virtually certain, would deal with persons who go missing in circumstances (whether arising from a civil accident or arising from a violent incident) where their death is virtually certain given the circumstances of the disappearance. The second category, where both the circumstances and length of the disappearance indicate that it is highly probable that they have died and will not return, would apply where the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed. [paragraph 1.114]

5.03      The Commission provisionally recommends that, where a person applies to have a presumption of death order, the following detailed list of matters should be included in a sworn affidavit:

1. The date when the supposed deceased was last heard from.
2. Specific evidence tending to indicate that the individual is dead, such as:
  - (a) the circumstances surrounding the disappearance,
  - (b) lack of communication with people who were likely to hear from him or her, including last known correspondence or communication, and
  - (c) the length of time since disappearance.
3. Except in exceptional circumstances, the applicant should advertise for information concerning the whereabouts of the supposed deceased.

4. Where possible, the applicant should arrange for search-and-rescue authorities to confirm, by way of affidavit if possible, that attempts were made to locate the individual, but were fruitless.

5. The applicant should set out the full background relating to the disappearance, including the background as to the supposed deceased's age and health (including mental health).

6. The applicant should also arrange for the details to be corroborated as much as possible by a family member.

7. The applicant's affidavit should set out the next-of-kin entitled to distribution of his assets on his death. 8. The applicant must aver their belief that the individual is dead. [paragraph 1.115]

5.04 The Commission also provisionally recommends that, in determining whether a presumption of death is to be ordered, all the circumstances surrounding the disappearance must be taken into account, including the following:

(a) the time, location, and circumstances of the disappearance

(b) the extent and nature of post-disappearance searches

(c) a prior history of fraud

(d) the presence or absence of a motive for the missing person to remain alive but disappear

(e) the time between a life insurance policy being obtained and the subsequent disappearance

(f) facts suggesting the disappearance was a consequence of foul play and

(g) abandonment of valuable property. [paragraph 1.116]

5.05 The Commission provisionally recommends that it would be appropriate to include provision in the proposed mental capacity legislation for limited administration of the property of a missing person, in particular in circumstances in which it could not be established that a presumption of death order could be made. The Commission also provisionally recommends that, pending the enactment of mental capacity legislation, an application to appoint an administrator to manage the affairs of a missing person, amounting to a limited grant of administration of the estate, could be made to the Probate Office. An applicant would furnish the necessary documentation to the Probate Office, who would then decide whether an administrator should be appointed, subject to an appeal to the High Court. [paragraph 1.126]

5.06 The Commission provisionally recommends that an order to appoint an administrator to administer a missing person's property may only be made where: (a) it is not known whether the person is alive; (b) reasonable efforts have been made to find the person; and (c) for at least 90 days, the person has

not contacted (i) anyone who lives at the person's last-known home address or (ii) any relative or friend of the person with whom the person is likely to communicate. [paragraph 2.43]

5.07 The Commission provisionally recommends that the following persons may apply to be appointed as the administrator of the estate or property of a missing person: (a) the missing person's spouse or civil partner; (b) the missing person's cohabitant; (c) any other next of kin of the missing person; (d) a creditor or (e) any other person (including, where relevant, the State) with a sufficient interest. The Commission provisionally recommends that this should also be the list of persons who may apply for a declaration of presumed death. [paragraph 2.54]

5.08 The Commission provisionally recommends that an administrator have limited and specified powers to administer the affairs of the missing person for a period of up to two years, which can be extended for a further two years. [paragraph 2.58]

5.09 The Commission provisionally recommends that, in situations where death is virtually certain, there should be no minimum waiting period before an application can be made to obtain a declaration of presumed death. The Commission also provisionally recommends that this declaration could be made by a coroner and would be identical to a standard declaration of death; that it would authorise the applicant to register the death in the Register of Deaths provided for under the *Civil Registration Act 2004*; and that it would have the identical legal consequences that arise on the death of a person. [paragraph 3.14]

5.10 The Commission provisionally recommends that, in situations where death is highly probable, a declaration of presumed death may be made in the High Court; that the declaration would authorise the applicant to register the death in a Register of Presumed Deaths to be established for this purpose under the *Civil Registration Act 2004*; and that it would have the identical legal consequences that arise on the death of a person. [paragraph 3.19]

5.11 The Commission provisionally recommends that, in respect of a person whose disappearance indicates that death is highly probable, and where, by reason of absence from the State or otherwise, it remains uncertain for a period of at least 7 years as to whether a person is alive, it shall continue to be presumed that the person is dead. [paragraph 3.27]

5.12 The Commission provisionally recommends that the following persons may apply for a declaration of presumed death: (a) the missing person's spouse or civil partner; (b) the missing person's cohabitant; (c) any other next of kin of the missing person; (d) a creditor; or (e) any other person (including, where relevant, the State) with a sufficient interest. [paragraph 3.30]

5.13 The Commission provisionally recommends that a declaration of presumed death should have the effect that a marriage or civil partnership has come to an end. [paragraph 3.39]

5.14 The Commission provisionally recommends that a missing person who has been declared presumed dead but who returns may apply to have a variation order made by the High Court concerning his or her estate. The Commission provisionally recommends that, subject to the specific provisions concerning the making of such a variation order, it should not, in general have any effect on rights to or in any property acquired as a result of a declaration of presumed death. The Commission provisionally recommends that where a variation order has been made, the Court must make such further order, if any, in relation to any rights to or in any property acquired as a result of the declaration of presumed death as it considers reasonable in all the circumstances. The Commission also provisionally recommends that: (a) the variation order will have no effect on any income accrued between the time of the issuing of the declaration of presumed death and the variation order; and (b) that if a third party acquires rights to or in the property, in good faith and for value, the returning person may not bring a claim for the property against him or her. [paragraph 4.13]

5.15 The Commission provisionally recommends that the question of whether a marriage remains valid if the missing person returns must have regard to the specific circumstances arising and invites submissions as to the precise basis for a determination in such cases. [paragraph 4.20]

5.16 The Commission provisionally recommends that the question of whether a civil partnership remains valid if the missing person returns must have regard to the specific circumstances arising and invites submissions as to the precise basis for a determination in such cases. [paragraph 4.26]

5.17 The Commission provisionally recommends that where an Irish citizen disappears while abroad an application may be made to the High Court for (a) an order for the administration of the missing person's estate or (b) a declaration of presumed death. The Commission also provisionally recommends that any such application should be subject to the same criteria as apply where the person is presumed to have died in Ireland, and that the High Court may also recognise any orders made in any other State in connection with the disappearance abroad, subject to relevant rules concerning proof of foreign documents, including in accordance with the 1961 Hague Apostille Convention. [paragraph 4.34]

5.18 The Commission provisionally recommends that, in respect of a person who is ordinarily resident or habitually resident in Northern Ireland for 12 months or who has been habitually resident or ordinarily resident in this State for 12 months and who disappears while in the State, or is believed to have

disappeared in the State, an application may be made to the High Court by any interested person who has been habitually resident in the State for 12 months for any of the orders already provided for in this Consultation Paper, namely: (a) a declaration of presumed death or (b) an order for the administration of the missing person's estate. The Commission provisionally recommends that an application may also be made for the orders already provided for in this Consultation Paper by a close relative of a missing person where that missing person is a victim of violence within the meaning of the Criminal Justice (Location of Victims' Remains) Act 1999. The Commission also provisionally recommends that the High Court may also recognise any orders made in any other State in connection with the disappearance, subject to relevant rules concerning proof of foreign documents, including in accordance with the 1961 Hague Apostille Convention. [paragraph 4.47]







The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify, modernise and consolidate the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. The Commission is also involved in making legislation more accessible through Statute Law Restatement, the Legislation Directory and the Classified List of Legislation in Ireland. Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single accessible text. The Legislation Directory is a searchable annotated guide to legislative changes. The Classified List of Legislation in Ireland comprises all Acts of the Oireachtas that are in force, organised under 36 major subject-matter headings.

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