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Ann Coffey MP
Chair of the APPG for Runaway and Missing Children
and Adults
House of Commons
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14 June 2011

Dear Ms Coffey,

Parliamentary Inquiry

Thank you for your e-mail of 8 June.

I am pleased to enclose replies to the questions you have asked. Please do not hesitate to ask if you think that the department can be of further assistance with matters of a factual nature.

I have copied this letter to Holly Towell at Missing People.

Yours sincerely,

Paul Hughes



All Party Parliamentary Group Inquiry into support for families of missing people

Written evidence from the Ministry of Justice in reply to questions asked by Ann Coffey MP, Chair of the APPG for Runaway and Missing Children and Adults

Presumption of death

1. In lieu of consolidated presumption of death legislation in England and Wales, what provisions are in place for families in these nations to administer the affairs of a missing relative who is believed to be dead?

A. Common law presumption of death

Under English law, when a person dies proof of their death is set out in a death certificate. This facilitates dealing with the affairs of the deceased. A death certificate will usually only be issued where there is an identifiable corpse in existence. In the case of a person who goes missing there is no corpse to prove death, and consequently no death certificate will be issued. Where this situation arises, there is a common law presumption that if a missing person has not, despite thorough enquiries, been seen or heard of for seven years, he or she is presumed to be dead. This presumption can be used generally, but it is only a presumption and not a rule and cannot be used to obtain a death certificate. The court can accept evidence of absence over a shorter period if it wishes. In other words, an interested party does not have to wait for seven years to make an application for an order relating to the presumed death.

Questions as to whether a person is still alive might arise in various types of disputes and legal proceedings. For example, the terms of a trust may make the entitlement of a beneficiary dependent on the death of another person and the trustees may wish to obtain an order from the court authorising them to proceed on the basis that that person is dead without being in breach of trust. This type of order is often referred to as a Benjamin Order. Alternatively, one of two joint owners may wish to deal with property owned jointly with the missing person and may need to prove that ownership has passed under the right of survivorship, which applies within joint tenancies. No one court has exclusive jurisdiction but it is likely that many of these cases would be heard in the Chancery Division of the High Court.

B. Specific Procedures

Where a person goes missing and there is sufficient evidence that he or she is probably dead then he or she may be presumed dead in one of four ways.

Coroner's Inquest

Where a person goes missing in suspicious circumstances the missing person's family can ask for a Coroner's inquest to be held under section 15 of the Coroners Act 1988. Section 15 provides that a coroner may report to the Secretary of State where they have reason to believe that a death has occurred in or near their district in such circumstances that an inquest ought to be held; and that the body has been destroyed by fire or cannot be recovered. On receipt of such a report the Secretary of State, if he considers it desirable, may issue a direction to the coroner to hold an inquest.

The Ministry of Justice is in liaison with the Missing Persons Bureau (MPB) on drafting guidance to be published on the MPB website, which will contain details about when coroners can apply for a section 15 direction to open an inquest. This is significant as, in these cases, it may be possible for families to obtain a death certificate following the opening of an inquest under section 15 which will enable them to undertake some administrative tasks surrounding the deceased's estate, and can help to provide some closure. In addition, more information in the public domain could aid some families, in certain circumstances where persons are missing, presumed dead and the body is believed to be irrecoverable, to become aware of the role of coroners and inquests.

Decree of Presumption of Death and Dissolution of Marriage and Presumption of Death Order

Under section 19 of the Matrimonial Causes Act 1973 and section 37 of the Civil Partnership Act 2004 where a married person or civil partner goes missing and the surviving spouse or civil partner wishes to dissolve the marriage or civil partnership, he or she can apply for a 'decree of presumed death and dissolution of marriage' in the case of a marriage or in the case of a civil partnership a 'presumption of death order'. A decree or presumption of death can be obtained at any time after the spouse or civil partner goes missing and will be granted if the court is satisfied that there are reasonable grounds that the missing person is probably dead. The decree or presumption of death order can only be used to dissolve the marriage or civil partnership. They cannot be used to obtain a death certificate. Ancillary relief will only be available if the missing person returns.

The decree or presumption of death order will allow the spouse or civil partner left behind to marry or enter a civil partnership.

Leave to Swear Death

Where a person goes missing and in the absence of a certificate or other document establishing death or where there is no direct evidence of death but there are circumstances leading to a presumption of death and a member of the missing person's family wishes to obtain a grant of representation in order to administer the estate of the missing person then he or she can apply for an order giving leave to swear that death has occurred on or since a particular date. A leave to swear death order is made pursuant to Rule 53 of the Non-Contentious Probate Rules 1987. It is an order made solely for the purpose of allowing probate to be granted to the estate of a missing person. It is not, and will not be accepted as, conclusive proof of death. An application is made *ex parte* on affidavit, usually by the applicant for the grant of probate or letters of administration, to a District Judge of the Principal Registry of the Family Division or a District Probate Registrar. Appeals from the Probate registry are made to the Chancery Division of the High Court.

Probate is the process by which the estate of a deceased person is administered: that is gathered in, the debts paid and the net estate distributed in accordance with the will or the intestacy rules. The administration is conducted by executors named in the will under a grant of probate or administrators appointed by the court under letters of administration in the case of intestacy.

A leave to swear death order enables an application for probate or letters of administration to be made. The estate of the missing person can then be administered.

Social Security benefits

Section 8 of the Social Security Act 1998 governs the Secretary of State's power to make decisions in relation to a person's entitlement to a range of benefits, including decisions that a person's spouse may be presumed to have died. 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.

Certificate of Presumed Death

Where a person has gone missing in identifiable circumstances it may be possible to obtain a 'certificate of presumed death'. These can be made under a variety of Acts and regulations. They can apply where a member of the armed forces has gone missing in action; if a merchant seaman goes down with his ship; where someone cannot be found after a tragedy on an offshore installation; or where someone working in a particular Government department cannot be found after an incident while he or she was on duty, for example, an embassy worker who goes missing in a bomb blast.

These certificates are not usually issued by the courts but by the authority responsible for the missing person. They are issued once the authority is satisfied that the person probably died as a result of the incident. They can be used, at the discretion of the court, for probate purposes, but they cannot be used to obtain death certificates.

Emergency measure - The Asian Tsunami

In the aftermath of the Tsunami in South East Asia, the then Government agreed that the Foreign and Commonwealth Office (FCO) would register the death and issue a certified copy of the register entry for missing British nationals lost (and whose bodies could not be found) in the disaster. This would only be done at the request of the families and based on advice from the police. The service was provided free of charge. The FCO and the police agreed four criteria that would have to be satisfied before the FCO would register the death. These included:

- That evidence existed beyond reasonable doubt that the person concerned had travelled to the affected region;
- On the balance of probability they were in the area at the time the tsunami struck;
- There was no reasonable evidence of life since 26 December; and
- There was no reason on the balance of probability to believe that the person would want to disappear.

This emergency measure did not remove the requirement for a leave to swear death order to administer the estate or a decree of presumption of death to dissolve a marriage, but did make the process of obtaining these orders a lot less onerous.

Consular Death Registration

The FCO has the power to issue consular death registration documents. This type of document does not constitute a UK death certificate and does not replace a locally issued death certificate. Consular death registration is not a legal requirement but it means: an entry will be made in the death register by the British Consulate in the country concerned; an applicant will be able to obtain a British style certificate; and a record of the death will be held by the General Register Office in the UK.

Guardianship

1. What provisions are made in law for the protection of the assets of a missing person when they cease to demonstrate capacity to administer their own financial affairs due to their disappearance?

Under the law of England and Wales there is no specific provision or procedure for the protection of the assets of a person who has disappeared. However, that person remains the owner of those assets to the same degree as before his or her disappearance.

2. What provisions are made in law for the protection of the assets of a relative of a missing person where they share joint assets or liabilities with the missing person and the latter is unable to administer their own financial affairs due to their disappearance?

Under the law of England and Wales there is no special specific provision or procedure for the protection of the assets of a relative of a missing person who shares assets or liabilities with that missing person. The relative's rights of ownership are not changed by the disappearance of the missing person.

General note

As there are no specific provisions or procedures in the situations described, it may be helpful to describe by reference to an example what might happen in relation to a person's property when he or she disappears under the present law in England and Wales. The effect of a husband's disappearance on the wife left behind will depend on the way in which they own their property.

A typical scenario might be a husband and wife, both of full mental capacity, who own their home jointly subject to a mortgage to a financial institution. They might also have a joint bank account. They may each have savings and life insurance policies. They own household effects, such as furniture and pictures. They will have certain ongoing contracts for the supply of utilities.

Ownership of property that belongs solely to the wife will not be affected by the husband's disappearance. Similarly, property belonging solely to the husband will not be affected and the wife will not gain any new right of access to it.

Access to the joint bank account would depend on the terms of the mandate agreed with the Bank. It may be that if joint signatures are required the bank will be prepared to re-negotiate the contract under which it operates the account but the bank cannot be required to do so.

Life insurance policies would not be affected as no one has died.

Ownership of savings policies would not be affected by the disappearance. Whether the wife could gain access to the assets in any of the policies would depend on the terms of the policy and what could be negotiated with the relevant financial institution.

Ownership of household effects would not change as a matter of law, in practice the wife would have access and use on the same terms as before the disappearance.

The jointly owned home is owned by the husband and wife on a trust of land as a matter of law. If the property is to be sold, the husband will have to execute any transfer with his wife for so long as he is a trustee of the property. He will not cease to be a trustee by virtue of his disappearance alone. However, the wife may seek the assistance of the court in appointing a new trustee in place of the husband. The most commonly exercised of the powers of the court to appoint a new trustee is probably section 41 of the Trustee Act 1925. The appointment of a new trustee will enable the property to be sold without the participation of the husband. This sale will not affect the husband's interest in the net sale proceeds.

The trustees must act in the interests of the beneficiaries and must act unanimously. If they wish, they may make an application to the court for an order relating to the exercise of their functions under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. The court could authorise the sale of the property under this very wide power. Such orders could make provision for the protection of the husband's interest.

The liabilities of the husband and wife under the mortgage, which are likely to be joint and several, will not be affected by the disappearance of the husband. However, if a re-mortgage or a further mortgage is to be effected then the situation will be the same as in relation to a sale. Once the husband has been replaced as trustee the property can be re-mortgaged.

The disappearance of the husband will not affect the rights of third parties against the husband. Debts and other liabilities will continue. These will not pass to the wife, but in many cases the husband and wife will be jointly and severally liable (as in the case of most mortgages).

Mental Capacity Act 2005

Disappearance is not evidence of loss of mental capacity. A person may, however, disappear because of loss of mental capacity.

In some cases an application may already have been made to the Court of Protection for the appointment of a deputy. However, even in this case the Court of Protection may not make an Order. The 2005 Act is all about involving the person lacking capacity in decision making and only making those decisions where the person lacking some form of mental capacity is not able to make them for him- or herself. If that person is missing he or she cannot be involved.

Where no application for the appointment of a deputy has been made at the time of the disappearance, no order appointing a deputy will be made.

Where a person who has had a deputy appointed under the 2005 Act to manage his or her property and affairs goes missing, one would expect the deputy to take steps to trace the person but other than that continue to administer the property and affairs. In due course the deputy may apply to the Court for discharge from their appointment.

Powers of Attorney

In the absence of provision to the contrary in the power, the disappearance of the donor will not, of itself, revoke or terminate the power. A power of attorney granted by a person who has disappeared may give the person left behind a means of dealing with his or her property and affairs.

Legal Advice

We would recommend that anyone whose property or affairs is affected by the disappearance of another person should take legal advice.

Ministry of Justice
14 June 2011