



Missing Persons – guardianship and presumption of death

COMMENTARY BY [MICHAEL FURNESS QC](#), 9TH SEPTEMBER 2021

This briefing is an introduction to two complementary pieces of legislation which are of relevance in circumstances where an individual has gone missing. These are the Guardianship (Missing Persons) Act 2017 and the Presumption of Death Act 2013. The former is available where it is desired to appoint a guardian to manage the assets of a missing person, and the latter is designed to enable declarations of death to be obtained in appropriate circumstances.

It has to be said that neither piece of legislation is without its challenges, and although devoted to closely linked issues, they are not designed as a unified code.

The Guardianship Act

The Guardianship Act is a very detailed and prescriptive piece of legislation. The Act itself is long, having regard to its limited subject matter. There are then the rules in CPR57.25 to 57.32 and accompanying notes, and Practice Direction PD57C,. There is then the 81 page Code of Practice published by the Ministry of Justice to consider¹. The sheer mass of material to be assimilated, and the detailed requirements placed in the way of applicants, may account for what appears to be the limited use made of this legislation. My understanding is that two applications under the Act on which I appeared earlier this year were the first applications which had been made under the Act in the Chancery Division. There may also have been one in the Family Division and maybe a few in District Registries. There are no reasoned judgments available for any of these applications.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/822418/missing-people-code-of-practice.pdf

In addition to the material referred to above, there is a guide to the legislation for the judiciary written by former Chief Master Marsh. This has not been published, which is unfortunate because it is very useful. It has a checklist of all the matters which the Court needs to consider before making an order (totalling 26 items), and a couple of draft orders. If you have an application under the Act I suggest you ask the judge if you can see the Guidance, or at the least the checklist and the draft orders.

You should watch out for the fact that the Court may require the provision of a security bond by the person being appointed guardian. In both of my recent applications the Court dispensed with that requirement, but it would be as well to have a bond lined up in case the Court decides to require one.

If successful the guardian will have authority to manage the assets of the missing person, and will be under a duty to do so to have regard to the missing person's best interests (the Act prescribes the matters which must be considered in that regard – this is a concept seemingly borrowed from the Mental Capacity Act 2005). The guardian will act under the supervision of the Public Guardian. The duration of the order must be specified, and any power to make gifts must be specifically conferred by the order.

The Presumption of Death Act

The Presumption of Death Act has been the subject of a number of decided cases – see below. The problem with this Act is the drafting of the requirements for getting a declaration. The substantive requirement for a declaration is set out in section 2(1) which reads as follows:

- (1) On an application under section 1, the court must make the declaration if it is satisfied that the missing person—
 - (a) has died, or
 - (b) has not been known to be alive for a period of at least 7 years.

Section 2 goes on to provide as follows:

- (2) [The court] must include in the declaration a finding as to the date and time of the missing person's death.

(3) Where the court—

(a) is satisfied that the missing person has died, but

(b) is uncertain at which moment during a period the missing person died,

the finding must be that the missing person is presumed to have died at the end of that period.

(4) Where the court—

(a) is satisfied that the missing person has not been known to be alive for a period of at least 7 years, but

(b) is not satisfied that the missing person has died,

the finding must be that the missing person is presumed to have died at the end of the period of 7 years beginning with the day after the day on which he or she was last known to be alive.

This rather convoluted set of provisions is intended to address the problem of the need for a date of death where someone is presumed to have died. One might have thought that the approach of taking 7 years from the date of disappearance ought to be available whenever the Court is uncertain as to the date of death, but that is not so. It is only available where the Court is "not satisfied" that the person has died. That would seem to indicate that the parties and the Court must first grapple with whether or not, on the balance of probabilities², the person has died, and only after deciding that the evidence does not justify that finding can the Court proceed to apply the seven-year presumption.

There have been a number of decided cases on these provisions:

Re Bingham [2015] EWHC 226 (Ch), in which the Court concluded that the missing person (Lord Lucan) had died on the seventh anniversary of his last being seen alive;

A v H [2016] EWHC 762 (Fam), which made a finding that the missing person was presumed to have died on the seventh anniversary of her last being seen alive;

Greathead v Greathead [2017] EWHC 1154 (Ch), which found that the "balance of probabilities" threshold of proof applies to cases such as these, and that the evidence

² See *Greathead v Greathead* at [21]

was such in this case that it enabled the Court to find that the missing person died on the day he went missing;

EA v NA [2018] EWHC 583 (Fam), which found that the missing person was presumed to have died seven years after he was last known to be alive by the applicant.

In the Matter of the Presumed death of AB [2019] EWHC 2785 (Ch) where the Court found that the missing person was dead and declared the date of death to be the date of the hearing.

In *AuH Peter Jackson J* found that it was more likely than not that the missing person had died (judgment para 16), but then proceeded to make a declaration under section 2(4), saying (para 17):

"I think it is probably safer to make the necessary declaration on the basis that she [the missing person] is not known to have been alive. I say that only because there is no particular incident (as there sometimes is) where people are specifically known to have perished as part of a group that is likely to have included the individual person."

This indicates that the Court may have some latitude in determining whether it is satisfied that a person has died, certainly where it is not clear what particular event caused the death. In Lord Lucan's case (*Re Bingham*) Asplin J did not consider it necessary to make a finding as to whether she was, or was not, satisfied that Lord Lucan was dead (see para 5 of the judgment). She, quite understandably, skipped over the thorny questions of whether Lord Lucan was actually dead, and if so when he died, and went straight to an application of the seven-year presumption of death. Asplin J's approach can only be justified on the basis that the words "where the court is not satisfied the missing person has died" are really equivalent "where the court has not made a finding that missing person has died".

Assuming that the Court is able to make a declaration of death, the next question is what date to fix for the date of death. If the declaration is made on the basis of the seven-year presumption, the date must be the expiry of the seven-year period. Otherwise, the Court is thrown back on section 2(3), and must declare the person dead at the end of the period within which in which he is thought to have died. As Chief Master Marsh observed in *In the Matter of the Presumed Death of AB* at [19]

"If the court is uncertain at which moment the missing person died, it will often be artificial for the court to reach a conclusion about a date by which uncertainty disappears, even on the balance of probabilities."

The Chief Master pointed out the date of death can be important for practical reasons, for example if the missing person has been in receipt of a pension which will come to an end on death. The case of *AB* the Court decided that where the Court was satisfied that the person had died, but it was wholly uncertain when he had died, the appropriate order was to declare them dead at the date of the Order. That avoids any inconvenience arising out of the date of death being backdated.

The interaction between the two Acts

Clearly there may be situations in which the evidence shows that on balance the missing person is dead, but the family do not wish to take the step of having him or her declared dead while there is still hope, and want a guardianship order instead. There is no reason why this should not be possible, and indeed a guardianship order was made in those circumstances in one of the two Guardianship Act applications I appeared on earlier this year. However, the Court will be astute to ensure that the Guardianship Act is not abused. If the evidence shows that there is no realistic possibility of the missing person being alive, then the Court may well refuse to make a guardianship order. Note that, under CPR 57.33(3), if the Court determines that the missing person has not been known to be alive for a period of seven years the Court may order that the claim should continue as if made under the Presumption of Death Act. In any case, it is open to a person who has an interest in obtaining a declaration of death to apply for one, and bring the guardianship order to an end.

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