

PRESUMPTION OF DEATH ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1: Applying for declaration

13. **Section 1** sets out when the High Court can make a declaration that a missing person is to be presumed to be dead. The term “the missing person” is defined in section 20(1) as the person who is or would be subject to the declaration.
14. The ground for making a declaration is that the missing person is thought to have died or has not been known to be alive for at least seven years (*subsection (1)*). Anyone can apply to the court for a declaration of presumed death, but if the applicant is someone other than the spouse, civil partner, parent, child or sibling of the missing person, the court must refuse to hear the application unless it considers that the applicant has a sufficient interest in the determination of the application (*subsections (2) and (5)*). It is for the court to decide whether any interest is sufficient for the purposes of this section. Sibling is defined in section 20(1) to include siblings of the full or half blood. The period of seven years may be altered by regulations under section 17. *Subsection (6)* refers to section 21(2) which provides that a declaration may not be sought in respect of the person of the Monarch.
15. The court can only hear and determine the application if one of the conditions specified in *subsections (3) and (4)* is satisfied. These conditions require a certain connection with England and Wales - either that the missing person was domiciled in England and Wales at the date on which he or she was last known to be alive or had been habitually resident there for the whole of the year ending with that date; or, if the application was made by the spouse or civil partner of the missing person, the spouse or civil partner was domiciled in England and Wales when the application was made or had been habitually resident there for the whole of the year ending with that date. Domicile is the legal concept used to connect a person to a legal jurisdiction, such as England and Wales. It defines where a person is deemed to have his or her permanent home.

Section 2: Making declaration

16. **Section 2** provides that the court must make the declaration sought if it is satisfied that the ground for the making of the application has been made out (*subsection (1)*): see also section 1(1)). The two bases for the declaration are distinct: the missing person does not have to have been missing for 7 years if the court is satisfied that the person has died.
17. Every declaration must state when the missing person is to be deemed to have died (*subsection (2)*): this is important because, property interests, for example may be differently affected according to when a person is determined to have died. If the court is satisfied that the missing person has died but is uncertain as to when, it must deem the person to have died at the end of the period in which the court thinks he or she may have died (*subsection (3)*). If on the other hand the court is satisfied that the missing person has not been known to be alive for a period of at least seven years, but is not satisfied that the person has died, the time and date of the deemed death will be the end of the period of seven years beginning with the day after the day on which he or she

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was last known to be alive (*subsection (4)*). The working of the provisions is illustrated by the following examples.

18. Example A – *subsection (3)*: if the court finds that a person must have died between 1 January and 31 March but is uncertain as to when during that period the missing person is to be presumed to have died, the declaration will state that he or she died on 31 March.
19. Example B – *subsection (4)*: if the court is not satisfied that a person is dead but is satisfied that he or she was last known to be alive on 1 May 2004, the declaration will state that the person died on 1 May 2011, being the last day of the seventh year from and including 2 May 2004.

Section 3: Effect of declaration

20. **Section 3** is about the effect of a declaration of presumed death made under the Act. A declaration is to be conclusive proof of the missing person's presumed death and the time and date of that presumed death (*subsection (1)*). *Subsection (2)* confirms that the declaration is effective for all purposes and against all persons, and that the effect of the declaration extends to matters of property ownership (*subsection (2)(a)*) and the ending of the missing person's marriage or civil partnership (*subsection (2)(b)*). However, a declaration is only conclusive and effective as described in *subsection (1)* and *(2)* if it is final in the sense of being no longer subject to appeal. Either the period for making an appeal against the decision of the court to make the declaration must have expired without an appeal being made or, if an appeal was made, the appeal (and any further appeal) must have been dismissed or withdrawn and any period for a further appeal must have expired (*subsections (3) and (4)*).
21. The period for an appeal will be specified in rules of court. See Civil Procedure Rules, part 52. The standard period for making an appeal is 21 days (CPR r 52.4(2)(b)).

Section 4: Other powers of court making declaration

22. **Section 4** enables the court making a declaration of presumed death to decide, when doing so, the domicile of the missing person (see *subsection (1)(b)* and section 1 above) at the time of presumed death, and any question relating to an interest in property arising as a result of the declaration (*subsection (1)(a)*); and also to make any order it considers reasonable in relation to any interest in property acquired as a result of the declaration (*subsection (2)*). *Subsection (3)* provides that in making an order under *subsection (2)* the court may specify (subject to conditions or generally (*subsection (4)*)) that the value of an asset acquired as a result of the declaration cannot in due course be recovered under an order made by the court when varying or revoking a declaration (see sections 5 and 7(2)).
23. The term "interest in property" is defined in section 20(1) to be an interest in property of any description, including a freehold or leasehold estate in land and a right over property. The term "an interest" is not specifically defined but refers to a right of ownership of some kind over the whole or part of the property in question.

Section 5: Varying and revoking declaration

24. **Section 5** provides that the High Court can order the variation or revocation of a declaration of presumed death (an obvious example of circumstances in which this would be appropriate being where the missing person returns, still alive; or where there is clear evidence of the missing person having been alive at a time later than that declared as the time of death in the original declaration). Such an order can be made on the application of any person, but the court must refuse to consider an application if it considers the applicant does not have a sufficient interest in the outcome. As in relation to section 1, it is for the court to define what amounts to a sufficient interest for these purposes. Orders under section 5 are referred to in the Act as variation orders (*subsection (1)*).

Section 6: Effect of variation order

25. **Section 6** is about the effect of a variation order. A variation order does not of itself affect property acquired as a result of the declaration (*subsection (1)*): this protects those coming into possession of property in good faith (see further in section 7(2) and (6), explained below). Nor does a variation order revive any marriage or civil partnership ended by the declaration (*subsection (2)*): this ensures that subsequent marriages or civil partnerships of the missing person's spouse or civil partner are not invalidated.
26. These matters apart, the result of making a variation order is set out in *subsection (3)*. It provides that where the variation order varies a declaration, the declaration as varied will be conclusive of the missing person's presumed death and the date and time of that presumed death and will be effective for all purposes and against all persons. Where, on the other hand, the variation order revokes a declaration, the declaration will cease to be so conclusive and effective (*subsection (3)(b)*).
27. However, the consequences specified in *subsection (3)* only take effect if either the period for making an appeal against the decision of the court to make the variation order has expired without an appeal being made or, if an appeal was made, the appeal (and any further appeal) was dismissed or withdrawn and any period for a further appeal has expired (*subsection (4)*).

Section 7: Other functions of court making variation order

28. **Section 7** enables the court making a variation order to decide, when doing so, the domicile of the missing person at the time of presumed death (as to domicile, see note on section 1); and any question relating to an interest in property and arising as a result of the order (*subsection (1)*). As to "interest in property" see section 20(1) and the note to section 4 above.
29. *Subsection (2)* provides that when making a variation order the court must make such further order as it considers reasonable in relation to any interest in property acquired as a result of the declaration (*subsection (2)*). In doing this the court must have regard as far as practicable to the principles in section 8 (*subsection (4)*). However, unless the court considers that there are exceptional circumstances, the court can only make an order under *subsection (2)* if the application for the variation order was made during the period of five years beginning with the day the declaration that the application seeks to amend or revoke was made (*subsection (3)*). This is illustrated in the following example.
30. Example: if a declaration were to be made on 1 May 2015 and an application for a variation order was made in respect of that declaration on 1 May 2020, being the day after the day on which the five year period beginning on 1 May 2015 will expire, an order under section 7(2) can only be made if there are exceptional circumstances.
31. In addition to any direction contained in an order made in reliance on section 4(3) in connection with the original declaration, orders made under *subsection (2)* are subject to the following limitations.
32. They do not affect income accrued for the period from and including the date on which the declaration being revoked or varied was made to and including the date on which the variation order is made (*subsection (5)*). For example, if an order under section 7(2) directs on 1 May 2016 that a freehold subject to a lease acquired by X as a result of the original declaration made on 1 May 2015 should be transferred from X to Y, Y is not entitled to the rent that accrued in the period from 1 May 2015 to 1 May 2016 (inclusive).
33. They also do not affect or form the basis of a challenge to a related good faith transaction (defined in *subsection (7)*) or an interest acquired under such a transaction (*subsection (6)*).

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34. A transaction is a related good faith transaction for the purposes of the Act if it is a transaction under which a person (A) acquired an interest in property in good faith and for value from another person (B) who had acquired an interest in the property or part of it as a result of the declaration being varied or revoked under section 5 or from another person (C) who had acquired the property in question or part of it from B or from a person deriving title from B (subsection (7)).
35. *Subsections (8) and (9)* relate to the situation where a person (D) is a beneficiary under a trust as a result of an order under subsection (2). In this situation subsection (8) states that the trustee is liable to D for any loss he or she suffers because of any breach of trust relating to the property that is the subject of the order. Subsection (9) ensures that this liability is subject to any exemptions in legislation or the trust instrument. Legislation for these purposes includes subordinate legislation made under an Act and legislation made by the National Assembly for Wales (subsection (10)).
36. Trustee is defined in section 20(1) to include an executor, administrator or personal representative
37. The working of section 7 is illustrated in the following example.
- On 1 May 2016 Z was declared to be presumed to have died on 1 May 2015. This was the last day in the period of seven years beginning with the day after Z was last known to be alive (1 May 2008). Evidence emerges in 2017 that Z was alive on 1 June 2008 but otherwise nothing has changed. The court then makes a variation order deeming Z to be presumed to have died on 1 June 2015.
 - Z's will contained a gift of a tenanted freehold property, Whiteacre, to B or if B died before Z, to C. B died on 15 May 2015. The court makes an order under section 7(2) that Whiteacre should be transferred from D, who inherited it from B, to C.
 - D can be obliged to transfer Whiteacre to C, but does not have to account for the income received up to and including the date of the variation order.
 - If, however, D had sold Whiteacre to E, who acted in good faith, E's title cannot be challenged by C.
 - Z also left property in trust for B's children if B predeceased Z, but to C's children if he did not. B is, as a result of the declaration as varied, deemed to have died before Z. B's children are ordered to be substituted as beneficiaries of the trust in place of C's children. The trustees are liable to B's children for any breach of trust, subject to any trustee exemption clause in the trust instrument (the will) or statute.

Section 8: Principles

38. As mentioned above, in considering what orders to make under section 7(2) the court must have regard as far as practicable to the two principles in section 8 (sections 7(4) and 8(1)).
39. The first principle set out in subsection (3) has two limbs and is relevant where property acquired as a result of the declaration to be varied or revoked is or has been held in trust (*subsection (2)*). The first limb is that where, but for the fact that a variation order does not affect interests in property acquired as a result of a declaration of presumed death (section 6(1)), a person (E) would have an interest in the property in question as a result of the variation order, E should be entitled to receive the property or value specified in subsection (4) in full satisfaction of the interest from the trustee (*subsection (3)(a)*). The second limb is to the same effect save that the person entitled to satisfaction is not E but a person (F) who would, but for the limitation on the effect of the variation order in section 6(1), have acquired an interest in property acquired as a result of the declaration to be varied or revoked, from E (*subsection (3)(b)*).

40. The property or value to be made over by the trustee under the first principle to E or F depends on whether the trustee still holds the interest in property acquired as a result of the declaration to be varied or revoked or an equivalent interest in property representing that property. If he does, E or F, as the case may be, is entitled to that interest. If he does not, E or F, as the case may be, is entitled to the value of the interest in the property in question (*subsection (4)*).
41. The second principle is relevant where an insurer has paid a capital sum (other than one distributed by way of an annuity or other periodical payment) as a result of a declaration varied or revoked by a variation order (*subsections (5) and (7)*). The principle is that the whole or part of the capital sum should be repaid to the insurers if repayment is justified by the facts in respect of which the variation order was made (*subsection (6)*). See also section 14 which allows insurers to require recipients of capital sums to insure against the consequences of a variation order.

Section 9 Giving notice of application

42. **Section 9** provides that an application for a declaration under section 1 or a variation order under section 5 must be notified and advertised as required by rules of court (*subsections (1) and (2)*). This will serve to enable those with an interest to consider whether they need to intervene in the proceedings. Failing compliance with this requirement the court must refuse to hear the application (*subsection (3)*). See paragraph 21 above as to rules of court.

Section 10 Attorney General

43. **Section 10** gives the court power, on application by one of the parties to the proceedings or of its own motion, to send papers relating to an application for a declaration under section 1 or a variation order under section 5 to the Attorney General (*subsections (1) and (2)*). *Subsection (3)* allows the court to make an order as to payment of the Attorney General's costs in connection with such applications by parties to the proceedings.
44. The term "party to proceedings" is defined in section 20(2) to include a person intervening under section 11.

Section 11 Right to intervene

45. **Section 11** specifies who may intervene in an application for a declaration under section 1 or a variation order under section 5 (*subsections (1) – (3)*). The following persons are entitled to intervene: the missing person's spouse, civil partner, parent, child or sibling and the Attorney General. The court may permit other persons to intervene.

Section 12 Information

46. **Section 12** gives the court power in proceedings for a declaration under section 1 or a variation order under section 5, where the court considers it necessary to dispose of the proceedings, to order the provision of information by persons who are not party to the proceedings. The information sought must be relevant to the question of whether a missing person is alive or dead and must be specified in the order (*subsections (1), (2) and (7)*). The court can make such an order on application by a party or of its own motion (*subsection (3)*) but must give prior notice of its intention to make the order to anyone likely to be affected by it (*subsection (5)*). A person whom the court considers is affected by an order under section 12 can apply for it to be discharged or varied (*subsection (6)*). The order may not require the provision of information mentioned in *subsection (4)*.
47. The term "party to proceedings" is defined in section 20(2) to include a person intervening under section 11.

Section 13 Insurance against claims: trustees

48. **Section 13** applies where a trust arises as a result of a declaration of presumed death or where trust property is affected by such a declaration (*subsection (2)*). In these circumstances and if directed by the court so to do, the trustee must as soon as reasonably practicable take out insurance against claims that could arise as a result of an order under section 7(2) following the making of a variation order (*subsection (1)*). The cost of the premium may be paid by the trust (*subsection (3)*).

Section 14 Insurance against claims: insurers paying capital sums

49. **Section 14** applies where an insurer has to pay a capital sum (other than in respect of an annuity or periodical payment) as a result of a declaration of presumed death. It entitles the insurer to require the prospective recipient to insure in his or her own name and for the benefit of the insurer against any claim that the insurer may make following a variation order under section 5 (*subsections (1) and (2)*). An insurer for these purposes is anyone who provides for the payment of a benefit on death (*subsection (4)*).

Section 15 Register of Presumed Deaths

50. **Section 15** provides for the creation and maintenance by the Registrar General for England and Wales (section 20(1)) of the Register of Presumed Deaths. Further detail is provided in Schedule 1.

Section 16 Other determinations about death of missing person

51. **Section 16** defines the relationship of the Act and other legislation dealing with presumed deaths. *Subsection (1)* states that declarations that may be applied for under section 1 can only be made under the Act. *Subsection (2)* provides that where a court or tribunal makes a declaration that a person is to be presumed dead under other legislation, it must specify the time and date of death in the declaration and the requirements in section 2(3) and (4) apply. *Subsection (3)* gives effect to Schedule 2, which amends other legislation dealing with presumptions of death. *Subsection (4)* specifies that apart from the provisions of Schedule 2 and section 16(1) to (3), nothing in sections 1 to 16 of the Act affects any other court or tribunal procedures relating to the death of a missing person. Such procedures are therefore preserved to that extent.

Section 17 Power to amend periods of time

52. **Section 17** enables the Secretary of State to change the length of the following periods specified in the Act: the length of time for which it has not been known whether a person is alive or dead (see sections 1(1)(b) and 2(1)(b) and (4)(b)), currently seven years; and the period after which an order under section 7(3) can only be made in exceptional circumstances (see section 7(3)), currently five years. This power is to be exercised by making regulations by statutory instrument and the regulations will be subject to affirmative resolution procedure (section 19(1) and (2)(a)).

Section 18 Consequential and supplementary etc. provision

53. **Section 18** gives the Secretary of State power by regulations to make consequential, supplementary, incidental, transitional, transitory or saving provision in relation to any provision in the Act.
54. Such regulations may amend, repeal or revoke an enactment which was passed before the Act or was passed in the same Session of Parliament as the Act (*subsection (2)*), including an enactment contained in an Act of Parliament or an Act or Measure of the National Assembly for Wales.

Section 19 Regulations

55. **Section 19** provides for regulations made under the Act (see sections 17 and 18 and paragraphs 1, 2 and 6 of Schedule 1) to be made by statutory instrument. With the exception of instruments containing regulations under section 17 or any regulations under section 18 which amend or repeal an Act (including an Act or Measure of the National Assembly for Wales), which are subject to an affirmative resolution procedure, all regulations under the Act which are made by the Secretary of State are made subject to the negative resolution procedure. Regulations made by the Registrar General in relation to the detailed operation of the Register of Presumed Deaths under paragraphs 1 and 2 of Schedule 1, however, are not subject to Parliamentary procedure.

Section 20 Interpretation

56. **Section 20** defines some of the terms used in the Act.

Section 21 Crown

57. The Act binds the Crown but a declaration under section 1 cannot be obtained in respect of the Monarch.

Section 22 Commencement

58. **Section 22** prescribes when the provisions of the Act will come into force. Some provisions will come into force on enactment but the majority of the provisions will only come into force on a date to be specified in an order made by statutory instrument by the Secretary of State.

Section 23 Extent

59. The Act extends only to England and Wales.

Schedule 1 Register of Presumed Deaths

Entries in register of presumed death

60. **Paragraph 1** provides that when the time for appeal against a declaration has expired without an appeal being made or any appeal has been dismissed or withdrawn (section 3(3)) the High Court must send a copy of the declaration to the Registrar General for England and Wales (see definition in section 20(1)) together with any information prescribed in regulations made by her (paragraph 1(1) and (3)). On receipt of the declaration the Registrar General will enter in the register the name of the missing person (defined in section 20(1)) and the other information specified in regulations made by the Registrar General (paragraph 1(2) and (3)). The Registrar General will also ensure that the entry so made is included in the index of registers of deaths (defined in **paragraph 7**) so that the entry can be found on a search of the index. Regulations made by the Registrar General under paragraph 1 require the approval of the Secretary of State and are to be made by statutory instrument (see section 19).

Amendment and cancellation of entries in the Register

61. **Paragraph 2** makes similar provision for changes to the register and the index consequent on the making of a variation order.

Searches and certified copies (paragraph 3**) and Proof of death (**paragraph 4**)**

62. **Paragraph 3(1)** extends the right to search the index of registers of deaths to include the entries made in it in relation to presumed deaths in accordance with paragraph 1(2) (b). **Paragraph 3(2)** confers a general entitlement to a certified copy of an entry in the Register of Presumed Deaths, but the Registrar General can (other than in circumstances

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prescribed in regulations made by the Secretary of State) refuse to provide a certified copy until the prescribed fee is paid (*paragraph 6(2) and (3)*). *Paragraph 3(3) and (4)* ensure that certified copies must be sealed or stamped with the seal of the General Register Office and that they will otherwise have no force or effect. If they purport to be so sealed or stamped they are to be accepted as proof of death (*paragraph 4*).

63. *Paragraph 3(5)* applies section 34(5) of the Births and Deaths Registration Act 1953 in relation to a copy of an entry in the Register of Presumed Deaths as it applies in relation to a copy of an entry in a register made under the 1953 Act. Section 34(5) of the 1953 Act provides that:
- (5) A certified copy of an entry in a register or in a certified copy of a register shall be deemed to be a true copy notwithstanding that it is made on a form different from that on which the original entry was made if any differences in the column headings under which the particulars appear in the original entry and the copy respectively are differences of form only and not of substance.

Correction and annotation of the Register

64. *Paragraph 5* makes provision for the correction of clerical errors in the register. Substantive correction will only follow the order of the court, but clerical errors may be corrected on the authority of the Registrar General.
65. *Paragraph 5(3)* enables the Registrar General to annotate the register. *Paragraph 5(4) and (5)* require the Registrar General to annotate the register where the death of a person who is presumed to have died is actually registered under the Births and Deaths Registration Act 1953 or under equivalent legislation in another jurisdiction.

Fees

66. *Paragraph 6(1)* specifies that such fee as the Secretary of State may provide in regulations (*paragraph 6(3)*) is payable for a certified copy of an entry in the Register of Presumed Deaths. See generally as to regulations, section 19.

Schedule 2

67. *Paragraph 1* repeals section 19 of the Matrimonial Causes Act 1973. Section 19 provides that a spouse who reasonably believes the other spouse to be dead can petition the court to have the missing spouse presumed to be dead and the marriage dissolved. In such proceedings 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. These proceedings will be unnecessary when a declaration of presumed death can be obtained under the Act.
68. *Paragraphs 2 and 4* consequentially repeal references to section 19 of the Matrimonial Causes Act 1973 in section 5 of the Domicile and Matrimonial Proceedings Act 1973 and paragraph 7 of Schedule 8 to the Family Law Act 1996.
69. *Paragraph 3* amends section 222 of the Civil Partnership Act 2004 so that the court will only have jurisdiction to issue a presumption of death order under section 178 of that Act if the High Court does not have jurisdiction to hear and determine an application for a declaration under section 1 of the Act and (which is already provided in section 222(c)) the two people concerned are registered as civil partners of each other in England and Wales and it appears to the court to be in the interests of justice to assume jurisdiction in the case.
70. Section 178 of the Civil Partnership Act 2004 provides:

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- (1) The High 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.