Neutral Citation Number: [2023] EWHC 979 (Ch)

Case No: PT-2022-BRS-000127

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 28 April 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

KERRY TOLLEY	**Claimant**
- and -	
NO DEFENDANT **RE CAROLINE FISHER**	**Defendant**

- -
- -

James Fuller (instructed by **Chubb Bulleid**) for the **Claimant**
There was no other attendance or representation

Hearing date: 24 April 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12 noon on 28 April 2023

HHJ Paul Matthews :

Introduction

1. On 24 April 2023 I heard a claim under CPR Part 8 for a declaration of presumption of death in relation to a missing person, Caroline Fay Fisher. The claim arose under the Presumption of Death Act 2013. At the end of the hearing I made the order sought. I was satisfied on the evidence before the court that Ms Fisher was dead, having driven down to and entered the sea in Cornwall on 29 January 2022, and not having been heard of since. For the purposes of this short judgment, it is unnecessary to go into the evidence that so persuaded me.

2. Instead, I am concerned here with the self-contained, but logically prior, question of the standing of the claimant to make the claim at all. As is apparent from the fact that I made the order requested, I was satisfied that the claimant did have the necessary standing. My purpose here is to explain that part of my decision.

The law

3. Section 1 of the 2013 Act relevantly provides:

> "(1) This section applies where 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.
>
> (2) Any person may apply to the High Court for a declaration that the missing person is presumed to be dead.
>
> […]
>
> (5) The court must refuse to hear an application under this section if—
>
> (a) the application is made by someone other than the missing person's spouse, civil partner, parent, child or sibling, and
>
> (b) the court considers that the applicant does not have a sufficient interest in the determination of the application."

4. Section 2 relevantly provides:

> "(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."

This case

5. The claimant in the present case was not related to Ms Fisher, but was a close friend for many years. When Ms Fisher made a will in September 2020, she appointed the claimant one of her executors. Ms Fisher was an only child, and both her parents died some years ago. Her closest living relatives appear to be two cousins. It appears from the evidence filed that the claimant alone intends to prove the will, and that the two cousins are content with that course. It also appears that they are aware of these proceedings, and indeed support them.

6. However, the claimant is not a "spouse, civil partner, parent, child or sibling" of Ms Fisher under section 1(5)(a) of the 2013 Act. Neither of course is either of Ms Fisher's cousins. Indeed, in *Re P (Presumption of Death)* [2021] EWHC 3099 (Fam), [7], Poole J pointed out that a long-term partner was not included either. So the question arises whether the claimant has a "sufficient interest in the determination of the application". If she does not, then the court must refuse to hear the application. It is accordingly a threshold question.

Discussion

7. "Any mans *death* diminishes *me*," wrote John Donne in his *Meditation XVII*, in 1624, "because I am involved in *Mankinde*; and therefore never send to know for whom the *bell* tolls. It tolls for *thee*." The 2013 Act is however less extravagant in its reach. It does not confer rights on all of mankind to raise the question of the possible death of a missing person. Instead it restricts those rights to certain applicants only. Those applicants who fall within section 1(5) do not have to show a "sufficient interest". Their close relationship with the missing person is enough. Those who do not fall within that paragraph must however show that they have such an interest.

8. But the term "sufficient interest" is not defined. Nor is there any authority of which I am aware bearing on the question of what it means in this Act. Other Acts do however use similar tests. One such is section 31 of the Senior Courts Act 1981, dealing with applications for permission to apply for judicial review. It relevantly provides by sub-s (3) that:

> "the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates".

The test there is formulated in terms very similar to that in the 2013 Act. And there are a great many cases using and explaining this test. However, as is well known, in construing a statute, context is all important: see *eg Argentum Exploration Ltd v The Silver* [2023] 2 WLR 209, [92], per Popplewell LJ.

9. The 1981 Act is concerned with a person's standing to challenge the decision of a public body. By contrast, the 2013 Act is concerned with asking the court to declare that a person is presumed dead. There are a number of aspects to this. One is the very real emotional interest that members of a family, and indeed close friends, have in each other's lives simply as such. Some of those family members (though by no means all) are covered by section 1(5)(a), but others are not. A second is the financial interest that some people have in the *continued* lives of others, such as minors living with the missing person and

indeed other dependants. A third is the financial interest that some have in the *deaths* of others, such as heirs, beneficiaries under insurance policies and the like. A fourth interest is that of the public itself, in relation to aspects of government such as civil registration, taxation and social security. There may be other interests too.

10. How far the term "sufficient interest" in the 2013 Act extends to these various interests, and indeed others, is a matter which should be decided on the usual casuistic basis. Here I am concerned only with that of the person who claims to be the executor of the missing person's will. Although the title of an executor, unlike that of an administrator, relates back to the death (*Chetty v Chetty* [1916] 1 AC 603, 608-09), in practice third parties will not deal with the executor until probate is obtained, for only then can they deal safely with the named executor: Administration of Estates Act 1925, ss 27, 37. But in the present case the claimant has not yet obtained probate.

11. Perhaps surprisingly, the executor who applies for a grant *by solicitor* is not required actually to produce a death certificate, though he or she still must swear as to the exact date of death. A *personal* applicant must however produce a death certificate: Non-Contentious Probate Rules 1987, rule 5(5). But where, as in the present case, the applicant cannot swear to the exact date of death, *eg* because the person is missing and no body has been found, it is possible, under what is now rule 53 of the 1987 Rules, to obtain leave to swear to or give evidence as to the death. (I shall come back to this.)

12. In the circumstances of the present case, therefore, the court does not at this stage know that what the claimant puts forward is a valid will at all, or that, if it is, it is the last such will. It is simply an unproved piece of paper naming the claimant as executor. Ultimately, it may turn out not to entitle the claimant to administer the estate, nor to entitle the claimant to any benefit that she may appear to take under it. It is all highly conditional. By contrast, where there is an intestacy, there are rules of law providing for who benefits (Administration of Estates Act 1925, section 46), and also who – and in what order of priority – is entitled to ask for a grant of letters of administration, right down (if need be) to a creditor: rule 22(1), (3) of the 1987 Rules.

13. But it seems counter-intuitive to say that an applicant for the latter has a sufficient interest in obtaining a declaration of presumption of death, and yet the applicant for a grant of probate has not. It certainly would not make any sense to hold that a putative executor could not apply, though a putative administrator could do so and obtain a presumption declaration, so that then the putative executor, on the back of that, could apply for and obtain probate.

14. In my judgment, the key point in the context of a putative executor is that, if, as the claimant says, she wishes to prove the will, but cannot give an exact date of death, she must either obtain the presumption declaration or (as mentioned earlier) seek leave to swear to or give evidence as to the death. The latter was done in the past in relation to missing persons when there was no statutory presumption jurisdiction. Leave was given usually on the basis that seven years had elapsed since the disappearance (*eg Re How's Goods* (1858) 1 Sw & Tr 53). However, the court was prepared to give leave sooner in clear

cases or where there was otherwise good reason: see *eg In the goods of Matthews* [1898] P 17 (three years).

15. Since the 2013 Act came into force, standard practitioner works such as *Tristram and Coote's Probate Practice* (32nd ed, 2020, [25.19] ff) and *Williams, Mortimer and Sunnucks, on Executors, Administrators and Probate* (21st ed 2018, [21-30]), have treated the statutory jurisdiction as the primary one to employ where no body or exact date of death is available. Indeed, the latter suggests that, in light of the statutory jurisdiction, the rule 53 procedure will have to be amended or abrogated.

16. It may be noted that there is a significant difference between the two jurisdictions. Granting leave to swear to the death does not at that stage involve *the court* in reaching any conclusion as to death having taken place: *In the goods of Walker* (1902) 67 LT 747. The burden is thrown forward entirely onto the belief of the applicant for the grant.

17. But making a declaration of presumption of death follows a decision by the court, on the evidence before it, that *either* the missing person is in fact dead, *or* that person has not been heard of for at least 7 years: section 2(1). That decision is made on the usual civil standard, that is, the balance of probabilities: see *Greathead v Greathead* [2017] EWHC 1154 (Ch), [2017] WTLR 939, [21]. In some cases the court will not be satisfied of the former, but will be satisfied of the latter: see *eg Re P (Presumption of Death)* [2021] EWHC 3099 (Fam), [12]. Here, as I have said, the evidence satisfied me that Ms Fisher was indeed dead.

18. It is also important to bear in mind that the executor who obtains probate owes fiduciary duties to the creditors and beneficiaries of the estate. An executor does not act out of pure self-interest, except in the rare case where there are no actual or potential creditors (including claimants under the Inheritance (Provision for Family and Dependants) Act 1975) and the executor is also universal legatee. In considering the position of the putative executor, therefore, the court is necessarily also considering the position of those who will benefit from the estate.

19. An applicant for a presumption declaration cannot obtain any rights (whether personal or fiduciary for others) in relation to the missing person's estate merely by obtaining the declaration. There must still be a successful probate application, in which the testamentary paper may be challenged if appropriate. So there should be no risk to the estate in allowing the application to be made. Moreover, such a declaration will be useful even if it turns out subsequently that the paper is not a valid will at all, or that it was but there is a later valid will. This is because, if the applicant for a grant is not going to apply for leave to swear to death, it still needs to be shown that the missing person is at least presumed to be dead.

20. The interest of a person in succeeding to the property of another on the death of that other is a well-known interest, prized by ordinary people, and protected by law. Not for nothing did King William I grant to the citizens of the City of

London (in early 1067, before he had been able to enter that city) in part as follows:

> "I grant that every child shall be his father's heir, after his father's day".

This was calculated to enhance his acceptability to the people, or at any rate to minimise opposition.

21. Blackstone regarded the right of inheritance as a product of "civilized governments" and as "a wise and effectual, but clearly a political, establishment": see 2 Bl Comm 10, 11). And, in more modern times, it is a right protected by the European Convention on Human Rights, art 1 of protocol 1 (see *Inze v Austria* (1986) 8 EHRR 498, [78], 10 EHRR 394, [38]), and, at least in relation to children and parents, also by art 8 (see *eg Brauer v Germany* (2010) 51 EHRR 23, [30]).

22. In my judgment, for the reasons given above, a person who intends to prove a testamentary paper *does* have a sufficient interest in applying for a declaration of presumption of death, even though the paper has not yet been proved. For the purposes of this case, it is unnecessary for me to decide whether the same is true of any other interest.

Conclusion

23. It was for these reasons that I announced at the hearing that I considered that the claimant had standing to bring this claim.