



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

REPORT

CIVIL LAW ASPECTS OF MISSING PERSONS

(LRC 106-2013)

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Law Reform Commission



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COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

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

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INTRODUCTION

A Civil Law Aspects of Missing Persons

1. This Report forms part of the Commission's *Third Programme of Law Reform 2008-14*¹ and follows the publication in 2011 of the Commission's *Consultation Paper on the Civil Law Aspects of Missing Persons*.² The Consultation Paper made provisional recommendations for reform of the civil law aspects of missing persons. Following the Commission's usual consultation process, this Report contains final recommendations together with a draft Bill to implement these recommendations.

2. This Report examines aspects of the civil law that arise when a person goes missing, such as the need to manage the missing person's property (including bank accounts) on an interim basis, whether it should be presumed that the missing persons is alive or has died, and the civil status of the missing person and of those left behind (notably, their married or civil partnership status). The recommendations made in this Report do not, therefore, alter or affect the criminal law aspects of the law of missing persons.³

3. The main feature of the current civil law is that a missing person may be presumed to be alive for up to 7 years after he or she goes missing. This presumption is rebuttable rather than conclusive, so that, even where the person has been missing for less than 7 years, but where there is sufficient

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

² *Consultation Paper on the Civil Law Aspects of Missing Persons* (LRC CP 64-2011). This is referred to as the Consultation Paper in the remainder of this Report. The Consultation Paper contains additional background material to which the Commission refers as required in this Report to avoid duplication.

³ The criminal law aspects include the Child Rescue Ireland Alert (CRI Alert) system for notifying missing persons to the Garda Síochána Missing Persons Bureau: see Joint Committee on Justice, Defence and Equality, *Report on Hearings in Relation to Missing Persons* (2012), available at www.oireachtas.ie. Nor does this Report deal with international co-operation and mutual assistance between police forces: see Garda Síochána Inspectorate, *Missing Persons Review and Recommendations* (2009), available at www.garda.ie. Similarly, the Report does not deal with criminal procedure, for example, that a prosecution for murder may proceed in the absence of a body (the *corpus delicti*). In its 2005 *Report on the Establishment of a DNA Database* (LRC 78-2005), the Commission recommended that the proposed DNA database should also contain a separate component that would assist in the identification of unidentified missing persons.

evidence to indicate that the person has died, he or she may be declared “presumed dead” by the High Court. If the person has been missing for 7 years, there is a presumption that he or she is dead. Where the High Court makes an order of “presumed death,” this usually permits the distribution of the estate of the missing person or the payment of any life insurance policies. The declaration of presumed death does not have a general effect on the civil status of the missing person such as allowing their death to be registered, nor does it affect, for example, their married or civil partnership status.

4. In some circumstances, an inquest may be held under the *Coroners Act 1962* even where the body of a missing person has not been found. If the inquest concludes that the person has died, the coroner then issues a declaration of death under the 1962 Act. This means that a death certificate may be issued in respect of the missing person under the *Civil Registration Act 2004*, which permits the distribution of the estate of the missing person or the payment of any life insurance policies. Unlike the limited effect of a presumption of death order, a declaration of death under the *Coroners Act 1962* and the consequent registration of death also carries the usual consequences for the civil status of the missing person, including their married status or civil partnership status.

B Statistics on Missing Persons in Ireland

5. In Ireland, as the Table below shows, the Garda Síochána Missing Persons Bureau records that almost 20 people are reported missing every day, and there are between 7,000 and 8,000 missing person reports annually.

Table: Missing Persons in Ireland 2003-2011⁴

Year	Number of Reports	Missing at Year End
2011	8,511	28
2010	8,339	18
2009	7,749	62
2008	7,980	38
2007	7,992	49
2006	6,811	50
2005	5,997	30

⁴ Source: Garda Síochána Missing Persons Bureau, available at www.garda.ie/Controller.aspx?Page=85&Lang=1.

2004	5,060	49
2003	3,987	58
Total	62,426	382

6. In 2009, the Garda Síochána Inspectorate (GSI) noted that, of this total, young persons in contact with the Health Service Executive (HSE) accounted for 43% of all missing persons reports filed with the Garda Síochána, but represented only 8% of persons reported missing. The GSI concluded that this indicated that “many were reported missing on multiple occasions, including one child who was reported missing 169 times.”⁵ This was also reflected in the evidence given in 2012 to the Oireachtas Joint Committee on Justice, Defence and Equality by the Garda Missing Persons Bureau.⁶ Thus, the total number of missing person reports annually is greater than the actual number of people who go missing. In addition, it is important to note, 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.

7. In the 9 year period from 2003 to 2011 covered by these figures, out of a total of 62,426 missing person reports, 385 people remained missing as of November 2012, that is, 0.6% of the total. 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.”⁷ This is also reflected in similar statistics internationally.⁸ It is clear therefore that, as in other countries, the vast majority of missing persons in Ireland are located within a reasonably short period of time.

C Why People Go Missing and Scope of the Report

⁵ Report of the Garda Síochána Inspectorate, *Missing Persons Review and Recommendations* (2009), p.21, available at www.garda.ie.

⁶ Joint Committee on Justice, Defence and Equality, *Report on Hearings in Relation to Missing Persons* (May 2012) available at www.oireachtas.ie/parliament/media/Final-Report-on-Missing-Persons.pdf.

⁷ Available at www.missingpersons.ie.

⁸ For example, in Australia, 86% of missing persons are found within one week, rising to 90% within 2 weeks and 98% within 6 months of their disappearance: see Henderson and Ors, *Missing Persons: Incidence, Issues and Impacts* (Australian Institute of Criminology, 2000) at 1, and James and Ors, *Missing Persons in Australia* (Australian Institute of Criminology, 2008) at 15.

8. Persons from all ages and walks of life go missing in many different circumstances and for different reasons.⁹ As already noted, young persons in the care of the Health Service Executive (HSE) account for more than 40% of all missing persons reports filed with the Garda Síochána, but represent only 8% of persons reported missing. The reasons why children go missing are quite different from those involving adults; 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 also conscious that where children go missing this gives rise to specific issues for those left behind, including how to deal with the person who has abducted the child. Such legal issues are outside the scope of this project, which deals with the civil law aspects of missing persons only.¹⁰

9. By contrast with children, adults who go missing sometimes do so voluntarily: they may simply wish to break contact with family or friends, which can sometimes be connected with personal or emotional reasons. Another reason is financial difficulties such as personal debt, and the missing person may consider that a sudden disappearance will facilitate leaving the debt behind. 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.¹¹

10. 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. There are of course situations where individuals may choose to fake suicide, in an attempt to commit fraud. This was the position in the disappearance in 2002 of Englishman John Darwin.¹² Such examples pose clear difficulties for those

⁹ 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.

¹⁰ The *Child Abduction and Enforcement of Custody Orders Act 1991* regulates the international civil law aspect of missing children who are believed to have been abducted. The 1991 Act implemented the 1980 Convention on the Civil Aspects of International Child Abduction (the Hague Convention) and the 1980 European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children (the Luxembourg Convention), as recommended in the Commission's *Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters* (LRC 12-1985).

¹¹ See the discussion in paragraph 1.06, below.

¹² See the discussion in paragraph 1.08, below.

left behind, or for an insurance company that must decide whether to make a payment under the life policy. In some instances there is a need to determine whether a missing person has committed suicide or whether the circumstances indicate an attempt to defraud. These are high-profile but unusual cases. For example, in Scotland there are on average four to five presumption of death orders made each year since the enactment of the *Presumption of Death (Scotland) Act 1977*, that is, about 150 such orders in total, but only one person who has been declared presumed dead has, in fact, been found alive.¹³

11. Another group of missing adults are those who disappear where the circumstances indicate they have been abducted and killed.¹⁴ In Ireland, during the violence associated with Northern Ireland between the 1970s and late 1990s, a number of people known as “the Disappeared” were abducted, killed and buried in unmarked graves by paramilitary organisations operating at the time. While the number of persons involved is small,¹⁵ the Commission acknowledges that this group of missing persons merit specific recognition in any reform proposals.¹⁶

12. This Report is primarily concerned with missing adults because these cases are more likely to raise specific issues that require civil law resolution. This includes questions as 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 affairs; the civil status of the missing person; whether his or her assets are to be distributed as if he or she were dead; and the civil status of those left behind and for example, whether they are free to remarry or enter into a civil partnership.

D Impact on Those Left Behind and Limits of Current Law

13. Regardless of the circumstances of a disappearance or the period of absence of the missing person, the impact on those left behind, family members

¹³ *Hansard* Parliamentary Debates, 2 November 2012, column 558, available at www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121102/debtext/121102-0002.htm#12110249000004.

¹⁴ An example was the disappearance in 1986 of the English estate agent Suzy Lamplugh: see the discussion in the Consultation Paper, at paragraph 1.08.

¹⁵ As discussed in Chapter 1, below, 7 of “the Disappeared” have not been located.

¹⁶ The *Presumption of Death Act (Northern Ireland) 2009*, discussed in detail in this Report, includes specific provision for the families of the Disappeared: see in particular Chapter 4, below.

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.”¹⁷

14. Much of the emotional impact on those left behind can be directly attributed to the lack of information when a person goes missing.¹⁸ Therefore, in place of certainty, those left behind are forced to deal with the “ambiguous loss”¹⁹ 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.²⁰

15. The Commission recognises that, as far as is practicable, the law should 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 specific law concerning the civil law of missing persons. The current law is confined to: (a) a limited provision for an inquest in respect of missing persons in the *Coroners Act 1962* and (b) the common law rule of presumption of life up to 7 years of absence and a presumption of death after 7 years’ absence, both being rebuttable presumptions.²¹

16. The Commission also notes that, regardless of whether the missing person returns, those left behind are faced with immediate practical problems,

¹⁷ *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.

¹⁸ Holmes, *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008) at 17.

¹⁹ See Boss, “Ambiguous Loss in Families of the Missing” *The Lancet* Vol 360, December 2002, at 39-40.

²⁰ 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.

²¹ See the discussion of the current law in Chapter 1, below.

such as how to deal with mortgage payments, lack of 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."²² The existing law does not facilitate immediate access to, for example, the missing person's bank accounts.²³

17. 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 considers that reform of the 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 interests and rights of a missing person who may later return.

E Outline of Report

18. The Commission now turns to outline the contents of the Report.

19. 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 civil law issues that fall within the scope of this Report. The Commission has concluded that, for the purposes of a declaration of presumed death, there are two main categories. The first category is where the circumstances of a person's disappearance indicate that death is virtually certain (such as in an airline accident or a bombing). The second category is where the circumstances of disappearance, and its length, indicate it is highly probable that the person has died (such as during a climbing expedition). The Commission also concludes, and recommends, that a statutory framework should be in place which would provide for presumption of death orders in respect of the two categories of missing persons.

20. In Chapter 2, the Commission examines arrangements to deal with the interim management of the property of a missing person. These would deal with the immediate issues already mentioned, such as the payment of bills from the missing person's bank account. 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 the adult capacity and guardianship legislation in those jurisdictions. Such an arrangement would not have an impact on the civil law status of the missing

²² Holmes, *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008) at 32.

²³ See the discussion in Chapter 2, below.

person (for example their status as living) or of those left behind (for example, their status as married).

21. 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, notably, in Northern Ireland, Scotland (and proposed for England and Wales), Australia and Canada. 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 the recording of the death in the Register of Deaths, the issuing of death certificates, and the ending of any existing marriage or civil partnership.

22. The Commission draws important distinctions between the procedures that it envisages would be involved in obtaining a declaration of presumed death, depending on the characterisation of the events surrounding the disappearance. 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 provisions already contained in the *Coroners Act 1962*, under which inquests have been held in connection with missing persons. Where the circumstances indicate that death is highly probable, the Commission considers that an application should be made to the Circuit Court, which would facilitate ease of access for those left behind.

23. 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 presumed death has been made, as discussed in Chapter 3. The Commission also analyses the international dimension, where Irish 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.

24. Chapter 5 contains a summary of the recommendations made in this Report.

25. The Appendix contains a draft *Civil Law (Missing Persons) Bill* to give effect to the recommendations in the Report.

CHAPTER 1 CURRENT CIVIL LAW ON MISSING PERSONS AND GENERAL PROPOSALS FOR REFORM

A Introduction

1.01 Part B of this Chapter examines the circumstances in which people go missing in order to arrive at a general definition of missing persons. Part C outlines the current law in Ireland concerning missing persons and the application for a declaration of presumed death where a person disappears in circumstances that indicate that he or she may have died but no body has been found. Part D discusses the international and comparative developments in this area. 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. In Part E, the Commission sets out its general conclusions and recommendations for reform.

B Defining a missing person for civil law purposes

1.02 In this Part, the Commission examines the circumstances in which people disappear, with a view to arriving at a general definition of a missing person for the purpose of civil law.

1.03 There was general support in the submissions received by the Commission that legislation to deal with the civil law aspects of missing persons would contain a general definition of missing persons. The submissions received noted that there was a need to accommodate the various circumstances in which persons go missing; and in particular that “missing” should not be equated with “presumed dead.”

1.04 As already noted in the Introduction to this Report, persons go missing in many different circumstances. Where the absence of the person is unexpected or unusual, it is often unclear precisely what has happened. Indeed, as the figures referred to in the Introduction indicate, in the 9 year period from 2003 to 2011, out of a total of 62,426 missing person reports, 385 people remained missing as of November 2012, that is, 0.6% of the total.¹ As for the remaining small number of long-term missing, those left behind will often retain

¹ See Introduction at paragraphs 5-7, above.

the hope that, even where there has been no contact for many years, the missing person is still alive and may return.

1.05 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 voluntarily disappeared and “simply drifted away”. Such persons may subsequently have “no desire to renew contact” with those left behind.² While these people may be alive, they may never return home but may have property and other assets that need to be managed.

1.06 There have also been instances where a person goes missing, is believed to have died, but who later is located alive. 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 remains had been discovered, which were incorrectly identified as his and which the family had cremated. However, John Delaney’s son subsequently discovered, while watching a TV documentary on unidentified missing persons in England, that his father had suffered a head injury which resulted in a loss of memory, and that he had ended up in a nursing home and was still alive.³

1.07 In other instances involving an adult who disappears, the circumstances indicate that he or she has committed suicide but the body has not been located. In a small number of extreme cases, of course, the missing person may wish to use his or her disappearance to personal advantage, for example, by committing insurance fraud on 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, or for an insurance company that must decide whether to make a payment under the life policy. In some instances, this includes the need to determine whether a missing person has committed suicide or whether the circumstances indicate an attempt to defraud.

1.08 For example, 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 recorded an open verdict, and a death certificate was issued.⁴ 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

² Biehal, Mitchell and Wade, *Lost from View* (The Policy Press, 2003) at 45.

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

⁴ 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.

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 convicted of conspiracy to defraud.⁵ However, as noted in the Introduction to this Report,⁶ the instances where persons who are declared “presumed dead” are subsequently located alive, are extremely rare. Thus, since the enactment of the *Presumption of Death (Scotland) Act 1977*, out of about 150 orders declaring missing persons presumed dead under its provisions, only one person was subsequently found alive.

1.09 Major civil accidents have also resulted in the disappearance of many people. The 1977 collision between two planes on the ground in Tenerife (Canary Islands) made it virtually impossible to identify some of the remains of those on board. It is reasonable in both cases to assume that the persons on board have died. The issue also arises following attacks such as the 9/11 attack on the Twin Towers of the New York World Trade Centre in 2001.⁷ 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. Nonetheless, many people who died in the attacks will never be identified, and a number have since been declared presumed dead under New York state law.⁸

1.10 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 and murdered and their bodies then hidden. At the time of writing, 7 of “the Disappeared” have yet to be found.

1.11 The Commission is of the view that the definition of a missing person should therefore be sufficiently broad to include the varying circumstances in

⁵ 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.

⁶ See Introduction at paragraph 10, above.

⁷ 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. The Working Party’s deliberations led to the Council of Europe 2009 Recommendation on Missing Persons, discussed below.

⁸ Article 2, Part 1, section 2-1.7 of the New York *Estates, Powers and Trusts Code*, which contains a general three year presumption of death rule. It also provides that the fact that the missing person was exposed to a specific peril of death may be a sufficient basis for determining at any time after such exposure that he or she died less than three years after the date his or her absence commenced.

which persons may go missing. It should include persons who simply choose to break contact with their family and close friends, as well as persons who go missing in circumstances which indicate that they are probably dead. The definition must also be sufficiently sensitive to those left behind. Cohen, McCormick and Plecas summarise this succinctly:⁹ “[i]n other words, missing people are those observed to be missing from their normal patterns of life.”

1.12 A second important element in the general definition is that those left behind have fears for the safety and well-being of the missing person. 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.”¹⁰

1.13 *The Commission recommends that in any legislation to deal with the civil law status of missing persons, a missing person should be defined as a person who is observed to be missing from his or her normal patterns of life, where those who are likely to have heard from the missing person are unaware of his or her whereabouts and where the circumstances of the person being missing raise concerns for the person’s safety and well-being.*

C The Current Law in Ireland on Missing Persons

1.14 In this Part, the Commission outlines the current law in Ireland concerning missing persons.¹¹ The current law is confined to: (a) a limited reference to missing persons in the *Coroners Act 1962*, and (b) the common law rebuttable presumptions that a person is alive if he or she is absent for up to 7 years, and is presumed to be dead after 7 years’ absence. As noted below, this common law 7 year rule has been recognised in legislation, such as in section 18 of the *Land and Conveyancing Law Reform Act 2009* which deals with beneficiaries of a trust of land.

(1) Coroners Act 1962

1.15 Section 17 of the *Coroners Act 1962*¹² provides that a coroner must conduct an inquest where it appears that a person’s death may have occurred

⁹ 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.

¹⁰ James, Anderson and Putt, *Missing Persons in Australia* (2007) at 4.

¹¹ See also the Consultation Paper, at paragraphs 1.18-1.44.

¹² See generally Farrell, *Coroners: Practice and Procedure* (Sweet & Maxwell, 2000).

in a violent or unnatural manner, or suddenly and from unknown causes. Section 30 of the 1962 Act provides that the function of an inquest is to ascertain the identity of the person in relation to whose death the inquest is being held and how, when, and where the death occurred. Section 23 of the *Coroners Act 1962* provides for an inquest where a body has been destroyed or irrecoverable in the following terms:

“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.”

1.16 In general, the holding of an inquest requires the presence of the deceased’s body. 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. Section 23 provides, however, that such an inquest can be held by a coroner only on the direction of the Minister for Justice.

1.17 It has been noted that section 23 of the 1962 Act applies where, although death is not certain, there are strong grounds for believing that death has, in fact, occurred.¹³ The Commission is aware that, while section 23 of the 1962 Act has not been much used, it has been used in cases where a body has been virtually completely destroyed by fire (“destruction”) or has been lost at sea, for example in a fishing boat (“irrecoverable”). It has also been used in cases of missing persons. For example, in 2011 an inquest was held under section 23 of the 1962 Act relating to the disappearance of Alice Clifford over 31 years previously when she went missing from a hospital at the age of 57.¹⁴ At the time of her disappearance she suffered from dementia. Despite extensive searches for her, she was never 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 and Equality gave the required

¹³ Farrell, *Coroners: Practice and Procedure* (Sweet & Maxwell, 2000), at paragraph 3-04.

¹⁴ See O’Halloran, “Daughter tells of pain over missing mother” *Irish Examiner* 23 February 2011, available at www.irishexaminer.com.

direction. 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.

1.18 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 the death may then be registered under the *Civil Registration Act 2004* on the Register of Deaths and a death certificate obtained. This has the effect that the distribution of the person's estate and assets, the activation of any life insurance policy and the consequential effects on any marriage or civil partnership.

1.19 The Commission notes *that the Coroners Bill 2007*, currently before the Oireachtas, proposes to repeal and replace the 1962 Act in accordance with the 2000 *Report of the Coroners Review Group*.¹⁵ 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.

1.20 The Commission notes that section 44(2) of the 2007 Bill proposes to dispense with the current requirement in section 23 of the 1962 Act for a direction of the Minister of Justice and Equality prior to the holding of such 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.”

1.21 Section 44(2) of the 2007 Bill would, therefore, continue to apply to situations currently dealt with in section 23 of the 1962 Act and would apply to missing persons, but without the current requirement in the 1962 Act of ministerial involvement.

(2) Common Law Presumption of Death after 7 years' absence

1.22 Section 23 of the *Coroners Act 1962* has been rarely invoked in practice. By contrast, the common law rule that a person may be presumed dead after 7 years absence has been more commonly used, although as the Commission points out below the declaration of presumed death does not affect

¹⁵ The 2000 *Report of the Coroners Review Group* is available at www.justice.ie/en/JELR/ReviewCoronerService.pdf/Files/ReviewCoronerService.pdf.

the civil law status of the deceased in the way that an inquest verdict under the 1962 Act does. Since the common law presumption is rebuttable, death is not automatically presumed after 7 years and, equally, death may be presumed if it is reasonable to conclude that the person has died before the end of 7 years. The current process involves an application to the High Court, but as we discuss below the Court's declaration is limited in its effect.

1.23 Typically, such an application is made to facilitate the distribution of the missing person's estate through probate under Order 79 of the *Rules of the Superior Courts 1986*.¹⁶ In the normal way, the death certificate is an essential proof to extract a grant of probate (where a person leaves a will) or letters of administration (when the person dies intestate). When a person is missing the executor or intended¹⁷ administrator may apply on foot of a sworn declaration, showing detailed proofs of the type discussed below, for an order that the missing person should be presumed dead and that a grant may issue to his or her estate.¹⁸ In a case where a beneficiary of an estate is missing, the personal representative may apply to the High Court for an order declaring that the beneficiary is to be presumed dead, which then allows the personal representative to distribute the estate to the other beneficiaries as if the missing beneficiary has predeceased the testator.¹⁹ An application to the High Court for an order of presumed death may also be required so that a life insurance policy may be paid out. The State may also be involved in such an application where goods of a person presumed dead may, in the absence of any known next-of-kin, be declared *bona vacantia* ("ownerless goods") and therefore, by default, the property of the State, as in *Re Doherty*²⁰ discussed below.

¹⁶ This application is made by notice of motion in the non-contentious probate list under Order 79 of the *Rules of the Superior Courts 1986* (SI No.15 of 1986). See generally *Keating on Probate*, 4th ed (Round Hall, 2011).

¹⁷ The executor can of course be identified from the will of the deceased. In the case of a death intestate the administrator will be appointed on the issue of the grant of probate.

¹⁸ *Keating on Probate*, 4th ed (Round Hall, 2011), at paragraph 35-14, discussing the case law referred to below.

¹⁹ This is referred to as a Benjamin Order, named after the English case *In re Benjamin* [1902] 1 Ch 723: see *Keating on Probate*, 4th ed (Round Hall, 2011), at paragraph 24-11, where the author also discusses the decision of the High Court in *In re Mieth* [1986] ILRM 175, in which Barrington J made a Benjamin Order.

²⁰ [1961] IR 219.

1.24 The Commission notes that, where the High Court on such applications issues a declaration of presumed death, the Court does not make a general declaration that the person is to be presumed dead for all purposes. The order of the court is limited to the specific purpose for which the application was made (often subject to certain conditions, such as entering into an insurance bond or, in rare instances, lodging monies in court).²¹ The Commission emphasises that such an order does not, therefore, mean that the death of the missing person is recorded in the Register of Deaths under the *Civil Registration Act 2004*, and a death certificate will not issue.

1.25 The precise origin of the rule that death may be presumed after 7 years is difficult to trace. 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 the first spouse “had been beyond the seas for seven years” or “had been absent for seven years, although not beyond the seas, were not known... to be living within that time.” The presumption in the 1603 Act operated as a presumption of law; in other words, 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 in respect of a husband or wife who has been “continually absent... for the space of seven years then last past, and shall not have been known... to be living within that time.”

1.26 A 7 year rule was also reflected 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. The *Life Estates Act 1695* was one of over 150 pre-1922 Acts repealed by the *Land and Conveyancing Law Reform Act 2009*.²² While the 2009 Act repealed the 1695 Act, and other pre-1922 Acts dealing with settled land, sections 18 to 22 of the 2009 Act enacted new provisions concerning trusts of land. Section 18(5) to (7) 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.

²¹ The Commission discusses below in Chapter 2 a similar power in the context of interim management of the assets of a missing person and, in Chapter 3, in the context of a presumption of death order.

²² Which derived from the Commission’s 2005 *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

(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.”

1.27 Thus, the Oireachtas enacted a 7 year rule for presumption of death in section 18(5) of the 2009 Act. It is notable that the Oireachtas provided that “it shall continue to be presumed that the person is dead,” thus indicating that this was not a new rule. It is also notable that section 18(6) of the 2009 Act expressly provides 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) is broad and ownership of property could be transferred back to the returned missing person where this was “just and equitable.”

1.28 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. In Ireland, 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.²³ The Guidelines state that the pension may be payable in respect of a person whose spouse or civil partner is missing. The Guidelines state that:

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

- 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)

²³ *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.

- 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.”

1.29 It is clear, therefore, that the 7 year rule has been adopted both legislatively and administratively in Ireland as involving a presumption.

1.30 Turning to the application by the courts of the common law presumption, the 7 year statutory rule in the *Life Estates Act 1695*²⁴ was drawn on by way of analogy in the 19th Century Irish decision *McMahon and Ors v McElroy*.²⁵ In this case, 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 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, his 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 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 pre-1922 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:²⁶

“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 analogy of the Statutes,²⁷ on which analogy the rule depends, is bound to consider

²⁴ Since replaced by section 18(5) to (7) of the *Land and Conveyancing Law Reform Act 2009*, discussed above.

²⁵ (1869) IR 5 Eq 1.

²⁶ *Ibid* at 12.

²⁷ 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*.

the circumstances of the particular case in order to see whether the presumption is rebutted, or rather whether it fairly arises.”

1.31 It is clear, therefore, that the common law rule is a *general but rebuttable* presumption which applies after 7 years’ absence. In *Mc Mahon*, a 7 years’ absence in itself was insufficient to obtain a declaration of presumed death, and the court required further evidence to establish, on the balance of probabilities, that death had occurred before it would make an order of presumed death. The Court also accepted, however, that where such evidence is available *before* the expiration of 7 years, the court “is bound to consider the circumstances of the particular case” as they arise.

1.32 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.

1.33 The *McMahon* case was cited as the main authority in the 1961 decision of the High Court in *Re Doherty*.²⁸ 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 requesting him or anyone who knew him to contact them. After 40 years had passed, the Minister for Finance applied to court to have Mr Doherty’s shares declared *bona vacantia* (“ownerless goods”) in accordance with section 29(2) of the *State Property Act 1954* and therefore, by default, the property of the State.²⁹ 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.”³⁰ The Court accepted, following *McMahon and Ors v McElroy*, that the legal presumption of death arose after 7 years’ absence.³¹ In the circumstances,

²⁸ [1961] IR 219.

²⁹ The Commission notes that, in addition to the doctrine of *bona vacantia*, specific legislation such as the *Dormant Accounts Acts 2001 to 2012* and the *Unclaimed Life Assurance Policies Act 2003* also now contain a separate process for dealing with unclaimed property.

³⁰ *Ibid* at 222.

³¹ *Ibid*.

and having regard to the fact that advertisements had been placed in newspapers in Ireland and Australia, Kenny J granted an order declaring Mr Doherty 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.

1.34 The Commission notes 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*³² the circumstances were that Mr Freytag had been staying in a hotel in Messina, Sicily and had arranged a business meeting for the morning of 28 December 1908, 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 and was not heard from 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 in evidence. Notwithstanding that for some reason the advertisements were not given in evidence 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*³³ the High Court declared Mr Inkerman Brown presumed dead just 2 months after the ship he was on had sunk.

1.35 In summary, at common law, where a person is missing for 7 years, and has not contacted those likely to have heard from him or her, and reasonable efforts have been made to locate the missing person, the High Court may make an order that the person be presumed dead. As the common law presumption is rebuttable, it is not always necessary to wait 7 years to make such an application so that, as in *In the Goods of Freytag*,³⁴ the Court may make a declaration of presumed death *before* 7 years has passed. The Commission notes that such a declaration of presumed death is usually made for probate purposes and does not result in the registering of the death of the

³² (1909) 42 ILTR 116.

³³ (1902) 36 ILTR 173.

³⁴ (1909) 42 ILTR 116.

missing person in the Register of Deaths under the *Civil Registration Act 2004*, and therefore does not result in the issuing of a death certificate. It is, rather, most often made to facilitate a grant of representation in the person's estate. This declaration does not, therefore, affect or alter the civil law status of the missing person, notably their marriage or civil partnership. The Commission notes that legislation has been enacted in other jurisdictions to address this.³⁵

1.36 Power sets out the following detailed list of matters which should be included in any affidavit grounding an application for a declaration of presumed death.³⁶

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.

1.37 The Commission notes that this comprehensive list of proofs reflects those required by the courts in other jurisdictions that have a similar presumption of death laws, including in Australia and 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.

³⁵ See paragraphs 1.59, 3.34-3.37 and 4.13-4.21, below, discussing such legislation and the Commission's proposals for reform.

³⁶ Power "Body of Evidence," *Gazette, Law Society of Ireland*, April 2004, 18, at 21.

D International and Comparative Analysis

1.38 In this Part, the Commission examines international and comparative developments concerning the declaring of presumed death.³⁷ As discussed above, persons disappear in many different circumstances. In approaching the categorisation of missing persons who are presumed to have died, the Commission has had regard to the recent work of the Council of Europe in this area. The Commission discusses the general scope of these provisions below, and returns to discuss them in detail in Chapters 3 and 4.

1.39 In terms of comparative analysis, the Commission also notes that both Australia and Canada have, in addition to laws on presumption of death, enacted specific legislative provisions to deal with interim financial issues for those left behind. These legislative provisions allow a limited management of the missing person's assets and they operate quite separately from the question of presumption of death. The Commission discusses the general scope of these provisions in Chapter 2.

(1) 2009 Council of Europe Recommendation on Missing Persons

1.40 In 2009, the Council of Europe adopted a *Recommendation on Principles Concerning Missing Persons and the Presumption of Death* (the 2009 Recommendation),³⁸ which provides a general framework within which the law on the presumption of death may be reformed. 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. Thus, the 1966 Convention on Establishing Death (the 1966 Athens Convention), which was developed by the International Commission on Civil Status (ICCS),³⁹ deals only with circumstances where death is virtually certain⁴⁰ but not where death is highly probable.

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

³⁷ See also the more detailed analysis in the Consultation Paper, at paragraphs 1.45-1.106.

³⁸ 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.

³⁹ ICCS Convention on Establishing Death, ICCS Convention No 10 (1966) (the 1966 Athens Convention). Ireland is not a member state of the ICCS and is not a party to the 1966 Athens Convention.

⁴⁰ Article 1 of the ICCS Convention on Establishing Death.

2001 attack on the New York “Twin Towers”.⁴¹ The Working Party also noted that the 1966 Athens 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 physical conditions in a given area.⁴² In relation to other situations where a missing person is believed to have died, which do not involve accidents, 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.”

1.42 The 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 set out 9 principles that should inform any legislation enacted in this area by the Member States. The Commission has had full regard to these principles in preparing this Report.⁴³

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

1.43 The preparation of the 2009 Recommendation was influenced by long-established legislation on missing persons in many Council of Europe member states, notably those with a Civil Law tradition. In the early 19th 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 des Français* of 1804 contained detailed provisions on the issue, which were directly related to the need to deal with the consequences of French soldiers going missing for many years in wartime. As discussed below, other Civil Law states outside Europe, such as Canada, have been influenced by this historical inheritance.

1.44 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 it is probable that they have died, or whose death may be presumed due to a 7 year absence. Scotland’s 1977 Act has been mirrored

⁴¹ 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.

⁴² *Ibid.*

⁴³ The full text of the 2009 Recommendation is set out in the Consultation Paper, at paragraph 1.54.

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 Report, the Commission is aware that the legacy of that conflict has also affected the State, since a number of people either went missing in the State or are presumed to have been killed in Northern Ireland or the State and were later buried in this State.

(3) Northern Ireland and Scotland

1.45 In Northern Ireland, section 16 of the *Coroners Act (Northern Ireland) 1959* provides for the holding of a coroner’s inquest in respect of a missing person who is believed to have died:

“Where a coroner is satisfied that the death of any person has occurred within the district for which he is appointed but, either from the nature of the event causing the death or for some other reason, neither the body nor any part thereof can be found or recovered, he may proceed to hold an inquest.”

1.46 It is worth noting that, while section 16 of the 1959 Act broadly mirrors section 23 of the *Coroners Act 1962*, it is not confined to cases where the body has been “destroyed” or is “irrecoverable.” Nonetheless, it appears that section 16 of the 1959 Act has not been used in connection with the “Disappeared” and inquests into the deaths of such persons have been held only where the bodies have been recovered.⁴⁴

1.47 In Scotland, there is no direct equivalent to the coroner’s inquest. The Scottish procedure for investigating sudden, suspicious, accidental, unexpected and unexplained deaths involves a doctor reporting such deaths to the local Procurator Fiscal, who is also the local public prosecutor. The Procurator Fiscal may then direct that a sheriff conduct a fatal accident inquiry under the *Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976*. Unlike a coroner’s inquest, the inquiry under the 1976 Act does not result in a declaration of death, nor does it include any provision that may be applied to missing persons.

⁴⁴ 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).

1.48 In its 1974 *Report on Presumption of Death*⁴⁵ the Scottish Law Commission recommended the enactment of presumption of death legislation that would permit both the registration of death and the issuing of a death certificate in respect of a missing person who may be presumed dead, and this was implemented in the *Presumption of Death (Scotland) Act 1977*. In Northern Ireland, the Department of Finance and Personnel published a Report in 2008⁴⁶ that also recommended the enactment of presumption of death legislation, to be modelled on the Scottish 1977 Act. The absence of a suitable process for obtaining a declaration of presumed death for the “Disappeared” was one of the key reasons given for this proposal⁴⁷ and the 2008 Report led to the enactment of the *Presumption of Death Act (Northern Ireland) 2009*.

1.49 The Northern Ireland 2009 Act and the Scottish 1977 Act permit both the registration of death and the issuing of a death certificate where it is established that a missing person may be presumed dead. From this the legal effects of death follow, such as the possibility of the distribution of assets, the passing of jointly held property by survivorship, the activating of relevant life insurance policies and the entitlement to social welfare benefits of the surviving spouse or surviving civil partners.

1.50 Section 1 of the Northern Ireland 2009 Act 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.” Similarly in Scotland, section 1(1) of the Scottish 1977 Act 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.”

1.51 Section 1(a) of the Northern Ireland 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 made.

⁴⁵ Scottish Law Commission, *Report on Presumption of Death* (Scot. Law Com. No.34).

⁴⁶ Department of Finance and Personnel, *Presumption of Death Bill (Northern Ireland) 2008 Report on Consultation* (May 2008).

⁴⁷ 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.

1.52 The Northern Ireland 2009 Act was applied for the first time in *Re O’Flaherty*.⁴⁸ The case involved the disappearance of the applicant’s wife who went missing in 2009 while on a family holiday in County Donegal (the applicant and the missing person were both domiciled in County Tyrone). The Northern Ireland High Court heard evidence presented in the form of sworn affidavits from the missing person’s husband and the Garda Síochána as to the circumstances of the missing person’s disappearance. Having considered the evidence, the Court held that, on the balance of probabilities, the missing woman had committed suicide by drowning, and granted a presumption of death order under section 1(a) of the Northern Ireland 2009 Act. This presumption of death order was issued after two years’ absence.

(4) England and Wales

1.53 The current 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. There is currently no specific legislation dealing with missing persons in England and Wales, although as discussed below a *Presumption of Death Bill* along the lines of the Scottish 1977 Act and the Northern Ireland 2009 Act is currently before the UK Parliament.

1.54 Section 15 of the English *Coroners Act 1988*⁴⁹ which allows for the issuing of a death certificate in situations where the body of the missing person is either destroyed by fire or otherwise 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

⁴⁸ [2012] NICH 2.

⁴⁹ The *Coroners Act 1988* is to be repealed and replaced by the *Criminal Justice and Coroners Act 2009*. Section 1(4)-(6) of the *Criminal Justice and Coroners Act 2009* contains a similar provision for the holding of an inquest where the body is believed to be destroyed by fire or otherwise not recoverable.

(whether the coroner making the report or another) to hold an inquest into the death.”

1.55 This provision corresponds closely to section 23 of the *Coroners Act 1962*, discussed above but is narrower in scope than section 14 of the *Coroners Act (Northern Ireland) 1959*. Section 15 of the *Coroners Act 1988* has been used in the context of missing persons in the same way as section 23 of the *Coroners Act 1962*. On average, 12 missing persons are declared dead under section 15 of the *Coroners Act 1988* each year in England.⁵⁰

1.56 As in Ireland, in situations where section 15 of 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.⁵¹ As already noted, this common law presumption is rebuttable 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 expiration of 7 years. The declaration of presumed death does not result in registration of the death or issue of a death certificate. Instead it is usually limited to an order allowing a grant of representation to administer the missing person’s estate. Statistics show that on average 15 presumption of death orders were granted each year during the period from April 2008 to March 2011.⁵²

1.57 The same general approach to the common law presumption is taken by the courts in Ireland, and discussed above, as in England. Thus, in the English High Court decision *Re Watkins*,⁵³ 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.”

1.58 This was cited with approval by Sachs J in another English High Court decision, *Chard v Chard*.⁵⁴ Echoing the approach of the Irish High Court

⁵⁰ *Presumption of Death* (House of Commons Justice Committee, 2012) at paragraphs 12 and 13 (evidence of UK Missing Persons Bureau and Ministry of Justice).

⁵¹ An application for a presumption of death order which permits a grant of representation is made under Rule 53 of the English *Non-Contentious Probate Rules 1987*.

⁵² *Presumption of Death* (House of Commons Justice Committee, 2012) at paragraph 8 (evidence of UK Missing Persons Bureau).

⁵³ [1953] 1 WLR 1323.

in *McMahon and Ors v McElroy*,⁵⁵ 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.

1.59 As in Ireland, under English common law a declaration of presumed death does not affect or alter the status of the missing person's marriage. As already noted, if a missing person's spouse remarries, and his or her spouse has been absent for 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. Legislation has, however, been enacted in England to deal specifically with circumstances where one spouse or civil partner is missing in circumstances that indicate that they have died. 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 dead (including after 7 years absence). No equivalent provisions have been enacted in Ireland.⁵⁶

1.60 Also mirroring the position in Ireland, 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 claimant may be presumed dead for the purpose of 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.

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

⁵⁴ [1956] P 259. See also *Bayes-Walker v Bayes-Walker* [2010] EWHC 3142 (Ch).

⁵⁵ (1869) IR 5 Eq 1.

⁵⁶ See paragraphs 3.34-3.37 and 4.13-4.21, below, discussing the English legislation and the Commission's proposals for reform.

1.62 In 2011, a UK All-Party Parliamentary Group (APPG) published a Report⁵⁷ which recommended that the UK Government should engage in a consultation process on presumption of death legislation and which would also provide for the appointment of an interim guardian under an extension to the relevant English *Mental Capacity Act 2005*.⁵⁸ In response to the APPG Report, the Home Office published a report⁵⁹ which recognised that, when a person goes missing, those left behind often experience both financial and legal difficulties, due to loss of income or the inability to gain access to the missing person's assets.⁶⁰ The report stated that the Ministry of Justice was considering the feasibility of introducing both presumption of death legislation and guardianship legislation for missing persons, pending its consideration of a separate inquiry of the Select Justice Committee into presumption of death law.⁶¹ It also stated that, in collaboration with the Missing Persons Bureau, it would draw up guidance to assist families in bringing a claim for a declaration of death under section 15 of the *Coroners Act 1988*.⁶²

1.63 In February 2012, the Select Justice Committee published its Report into presumption of death law.⁶³ The Report recommended that there should be improved policy guidance for industry and institutions providing for situations where a missing person is presumed dead. It also recommended that, in line with the Ministry of Justice's initiative, families of those left behind should be provided with more guidance on the use of section 15 of the *Coroners Act 1988* where applicable. The Report noted that, while improvements in policy guidance were necessary, this would not be sufficient to deal with the legal issues that arise when a missing person disappears in circumstances that indicate that they may have died.

1.64 The Justice Committee also recommended that presumption of death legislation, allowing for the registration of death and issuing of a presumption of

⁵⁷ *Inquiry: Support for Families of Missing People Report with Recommendations* (All-Party Parliamentary Group For Runaway and Missing Children and Adults 2011), 21.

⁵⁸ *Ibid.*

⁵⁹ Home Office, *Missing Children and Adults A Cross Government Strategy*. Available at www.homeoffice.gov.uk/publications/police/missing-persons-strategy?view=Binary.

⁶⁰ *Ibid* at paragraph 4.30.

⁶¹ *Ibid* at paragraphs 4.32-4.34.

⁶² *Ibid* at paragraph 4.35.

⁶³ *Presumption of Death* (House of Commons Justice Committee 2012).

death certificate, should be introduced along the lines of the *Presumption of Death Act (Northern Ireland) 2009* and the *Presumption of Death (Scotland) Act 1977*.⁶⁴

1.65 In July 2012, the UK Government stated that it would enact legislation to create a certificate of presumed death, subject to parliamentary time being available. At the time of writing, the *Presumption of Death Bill*, a Private Members' Bill presented by a member of the APPG, is before the UK House of Commons. As recommended by the APPG, the Bill is modelled on the Scottish 1977 Act and Northern Ireland 2009 Act. In the course of the parliamentary debates, the Parliamentary Under-Secretary of State for Justice stated that the UK Government supported the Bill.⁶⁵ The Bill must be enacted before May 2013 (the end of the parliamentary session) if it is not to fall; but, in any event, given the stated commitment of the UK Government, it appears likely that presumption of death legislation will be enacted in the foreseeable future.

(5) Australia

1.66 In Australia, while there is no generally applicable legislation for missing persons who are believed to have died, the common law presumption of death which may arise after 7 years' absence permits the High Court to declare a missing person as "presumed deceased." As in Ireland, and the UK, the position in Australia is that if the person has not been heard from for a period of 7 years, and reasonable efforts have been made to locate them, a presumption of death order may be granted.

(6) Canada

1.67 In six of Canada's provinces,⁶⁶ 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

⁶⁴ *Ibid* at paragraph 47.

⁶⁵ *Hansard* Parliamentary Debates, 2 November 2012, column 558, available at <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121102/debtext/121102-0002.htm#12110249000004>.

⁶⁶ Manitoba, Saskatchewan, Newfoundland & Labrador, New Brunswick, Nova Scotia and British Columbia.

(c) reasonable grounds exist for supposing that the person is dead.”⁶⁷

1.68 The legislation in these provinces does not expressly differentiate between the categories of situations where a missing person may be presumed dead. The Canadian case law shows, nonetheless, that they fall into separate categories, where death is virtually certain and where death is either likely or the person missing for so long that no other explanation other than the death of the person is plausible.

1.69 In *Re Cyr*,⁶⁸ the Supreme Court of British Columbia 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.”

1.70 In effect, this means that where the person has been missing for less than 7 years, the Canadian legislation will only apply where death is either virtually certain or, at the very least, probable. In *Re Cyr*, the Court added that the applicant could after 7 years had passed from the time of her husband’s disappearance bring a claim under the common law presumption of death.⁶⁹

1.71 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. Thus, 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.”⁷⁰

1.72 In *Comey v Manufacturing Life Insurance Co.*⁷¹ the Alberta High Court stated that there were “no preconditions” in bringing such an application,

⁶⁷ 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).

⁶⁸ [2006] BCJ No. 2703.

⁶⁹ [2006] BCJ No. 2703, at paragraph 2.

⁷⁰ Section 94(1) of the *Surrogate Rules* Alta Reg 130 (1995).

⁷¹ [2010] AJ No. 1008.

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.”⁷²

1.73 The Commission notes that these factors also broadly reflect those already applied in practice in Ireland in such cases.

E Conclusions and Recommendations

1.74 In this Part, the Commission sets out its general conclusions and recommendations on presumption of death legislation. The Commission’s consequent detailed analysis of these matters and related conclusions and recommendations are set out in later chapters.

1.75 In the Consultation Paper, the Commission considered that there are two principal categories of missing person: those whose death is virtually certain, and those where it is highly probable that the person is dead due to the circumstances in which the person disappeared.

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

- (a) *where a person is missing after a civil accident or natural disaster*, such as where a person was seen jumping from the railing of a boat while at sea or where, as in *In the Goods of Freytag*,⁷³ the person can be directly linked by circumstantial evidence to a catastrophic natural disaster; or

⁷² *Ibid* at paragraph 58.

⁷³ (1909) 42 ILTR 116, discussed at paragraph 1.34, above.

(b) *where a person is 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.

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

(a) *where a person is 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) *where a person is 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, that death is likely because they have been missing for a considerable period.

1.78 The Commission confirms that view in this Report, and also notes that the submissions received by the Commission were in support of giving statutory recognition to both of these categories.

1.79 The Commission also considers that this two-category approach to missing persons would involve a greater degree of clarity than existing law in Ireland. The Commission accepts that section 23 of the *Coroners Act 1962* currently provides for the holding of an inquest in certain circumstances when a person is missing and where death is virtually certain. The Commission also acknowledges that the common law 7 years presumption provides a clear and reliable means of establishing by court application that the person’s death is probable.

1.80 The Commission remains of the view, as expressed in the Consultation Paper, that there is a strong argument for putting in place a clear statutory framework that would set out the circumstances in which a declaration of death or presumed death may be obtained. The Commission is conscious in this respect that it should pay particular attention to the key elements of the 2009 Council of Europe Recommendation on Missing Persons, which contains the essential elements of a possible legislative framework which many Council of Europe member states are likely to adopt. The Commission also reiterates 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 Act (Northern Ireland) 2009*.

1.81 The Commission also 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.⁷⁴ This approach is consistent with the specific factors taken into account in other jurisdictions, such as those set out in the Canadian case *Comey v Manufacturing Life Insurance Co.*⁷⁵ The submissions received also favoured this approach, with one submission stating that the requirement of a “search-and-rescue” activity should be expanded to include “searching organisations”. The Commission accepts that this suggestion would take into account non-physical methods of searching (for example, media appeals or tracing services) that may otherwise fall outside a strict interpretation of “search-and-rescue” activities.

1.82 *The Commission 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 the making of a presumption of death order in respect of two categories of missing persons. The first category is where the circumstances of the disappearance indicate that death is virtually certain. The second category is where both the circumstances and length of the disappearance indicate that it is highly probable that the missing person has died and will not return, such as where the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed.*

1.83 *The Commission recommends that, where a person applies to have a presumption of death order, the following detailed list of matters should be proved to the satisfaction of the court:*

1. *Specific evidence tending to indicate that the missing person is dead, including the circumstances surrounding the disappearance of the missing person, absence of communication with people who would be likely to hear from the missing person, including last known correspondence or communication, and the length of time since the disappearance.*
2. *The date when the missing person was last heard from.*
3. *Evidence of advertising for information concerning the whereabouts of the missing person, including where relevant by using the internet and social media (unless there are exceptional reasons for not doing so, explained by the applicant).*

⁷⁴ See paragraph 1.36, above, referring to Power “Body of Evidence,” *Gazette, Law Society of Ireland*, April 2004, 18, at 21.

⁷⁵ [2010] AJ No. 1008, discussed at paragraph 1.72, above.

4. *Where relevant and practicable, evidence from a searching organisation that confirms that attempts were made to locate the missing person but were fruitless (whether by affidavit, statutory declaration or, in the case of searches outside the State, in accordance with the 1961 Hague Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities).*

5. *The full background relating to the disappearance of the missing person, including the missing person's age and health (including mental health),*

6. *Where relevant and practicable, evidence of corroboration from a family member of the missing person (if the applicant is not a family member),*

7. *Where relevant, the next-of-kin entitled to distribution of the assets of the missing person on his or her death, and*

8. *A declaration by the applicant of his or her belief that the missing person is dead.*

1.84 *The Commission also 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) where relevant, the abandonment of valuable property,

(c) where relevant and practicable, the extent and nature of post-disappearance searches,

(d) the presence or absence of a motive for the missing person to remain alive but disappear,

(e) where relevant, evidence suggesting that the disappearance was a consequence of foul play,

(f) where relevant, the time between a life assurance policy being obtained on the life of the missing person and his or her disappearance, and

(g) where relevant, any prior history of fraud involving the missing person.

CHAPTER 2 INTERIM MANAGEMENT OF A MISSING PERSON'S PROPERTY

A Introduction

2.01 The Commission has had the benefit of submissions from and discussions with various interested parties leading up to the preparation of this Report. The general view expressed to the Commission is that reform of the law on missing persons should not only provide for a declaration of death or presumed death but also for interim remedies to deal with practical and legal problems that arise when a person goes missing. Such legislation has been enacted in Australia¹ and Canada² and provides for an application to appoint a person to manage the assets of a missing person on an interim basis. The Commission notes that, in those jurisdictions, such persons have been variously described as administrators, committees, guardians, managers, tutors or trustees. In this Chapter, the Commission prefers to use the term “manager,” as this would avoid any confusion with the more extensive role of the administrator of an estate in existing Irish law. In Part B, the Commission discusses the context for this proposal, including the general scope of the legislation enacted in Australia and Canada, and concludes with a recommendation that a comparable regime should be introduced in Ireland. In Part C, the Commission sets out its detailed conclusions and recommendations for reform.

B Recognition of the need for an interim manager

2.02 Under the current law, there is no process by which those left behind may deal with the immediate practical and legal issues that may arise when a person goes missing. This often means that those left behind suffer a range of financial consequences. Bank accounts of a family breadwinner may become

¹ 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).

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

inaccessible and it may prove difficult to claim social welfare benefits; and these practical and financial problems will continue and may worsen as immediate resources are exhausted.³

2.03 In the discussions with interested parties, it became clear that those left behind often wish to have available to them a procedure to allow them to ensure that financial matters are properly dealt with, without first being required to declare a missing person dead or presumed dead. The practical difficulties expressed to the Commission in these discussions closely mirror those described in other jurisdictions.

2.04 Thus, in the aftermath of the disappearance of Australian man Daniel Rosewall, who had numerous credit card bills and loan repayments due, his father stated that, whereas it would have been “a huge thing” for him to apply to have his son to be declared deceased (because he hoped his son would return at some stage), his father was anxious to “look after his affairs otherwise they [would] end up in tatters.”⁴ This view is also reflected in extensive research carried out in England with families of missing persons.⁵ The case of Paul Read, who disappeared in July 2008 after a night out with friends, exemplifies the difficulties that arise. His remains were found in September 2010, but his family encountered numerous problems in the intervening two and a half years in their attempts to reorganise financial arrangements to reflect the fact that he had gone missing. His wife noted that, after his disappearance, she could not afford to make the existing mortgage and car loan repayments. She also noted that she could not sell the house or car that were held in their joint names.⁶

2.05 Against this backdrop, numerous submissions were made to the UK Houses of Parliament All-Party Parliamentary Group (APPG) on Runaway and Missing Children and Adults as to the need for reform. In his submission to the APPG, Peter Lawrence, the father of missing person Claudia Lawrence, noted that it was very difficult to get the relevant companies to engage with him in relation to his daughter’s mortgage and car insurance payments. He noted that

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

⁴ 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, at 9. See also *Rosewall (Guardianship)* [2010] VCAT 1994, discussed at paragraph 2.10, below.

⁵ Holmes, *Living in Limbo: The Experiences of, and Impacts on, the Families of Missing People* (London: Missing People, 2008).

⁶ See <http://news.bbc.co.uk/1/hi/england/hampshire/7859110.stm>.

some form of management order would be of great benefit to those left behind who find themselves in similar circumstances. Having considered the findings of the APPG, in February 2012 the Select Justice Committee published its Report into the reform of presumption of death law.⁷ It recommended that the English *Mental Capacity Act 2005* should be widened, in line with that already in place in Australia, to allow the limited management of a missing person's affairs to deal with the day-to-day practical issues that arise when a person is missing in the short term, but is not presumed dead.⁸

2.06 In 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 a declaration of death or presumed dead is not established, either due to a lack of probability of the death of the missing person or because those left behind do not wish to obtain a declaration of death or presumed death.

(1) General scope of interim management legislation in Australia

2.07 In New South Wales,⁹ Victoria¹⁰ and the Australian Capital Territory,¹¹ adult guardianship laws have been extended to include specific provision to allow those left behind to manage some assets of missing persons. These laws broadly correspond to the English *Mental Capacity Act 2005* and to the proposed adult capacity legislation due to be enacted in Ireland.¹² In these states and territories, the legislation allows for the appointment of a person to manage the affairs of a missing person in circumstances where there may be insufficient evidence to establish presumed death. These arrangements have no effect on the civil status of the missing person (for example, married or civil partnership status) and do not amount to a declaration of death.

⁷ *Presumption of Death* (House of Commons Justice Committee 2012).

⁸ *Ibid* at paragraph 55.

⁹ Section 54 of the *Trustee and Guardian Act 2009*.

¹⁰ Section 5A of the *Guardianship and Administration Act 1986*.

¹¹ Section 8AA of the *Guardianship and Management of Property Act 1991*.

¹² At the time of writing, it is expected that the Government will publish an *Assisted Decision-Making (Capacity) Bill* in early 2013. This would implement the key elements of the Commission's *Report on Vulnerable Adults and the Law* (LRC 74-2006), including recommendations to enact legislation comparable to the adult capacity and guardianship legislation in place in England as well as, for example, Australia and Canada.

2.08 The clear 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 of the missing person that a manager be appointed to make these decisions regarding the affairs of the missing person. The appointment of such a person is most likely to arise in situations where the person is missing without proof of presumed death, but it could also be used even where death is virtually certain or highly probable, particularly if those left behind do not wish to obtain a declaration of death or presumed death.

2.09 In this regard, the legislation treats 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 extending existing adult guardianship legislation to include missing persons, Australian law allows for the appointment of 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.”¹³

2.10 The manager is appointed initially for a 2 year period, but this may be extended for a further 2 years.¹⁴ Any person may apply for an order to be appointed, but the Court will usually appoint a relative or close friend. For example, in the case already mentioned concerning Daniel Rosewall, his father was deemed an appropriate person to appoint.¹⁵ The Court will, in making its decision have regard to the wishes of the missing person, in so far as they can be ascertained.

2.11 The advantage of having a statutory scheme dealing exclusively with cases of missing persons who are not declared presumed dead is that those left behind can, in a short space of time after the disappearance, deal with the practical day-to-day issues that arise when a person goes missing, such as payment of bills or access to post. The appointment of a manager with limited

¹³ 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*.

¹⁴ Section 60(AE) of the *Guardianship and Administration Act 1986*.

¹⁵ *Rosewall (Guardianship)* [2010] VCAT 1994.

powers can therefore be made without first having to declare a missing person presumed dead.

(2) General scope of interim management legislation in Canada

2.12 In a number of Canadian provinces such as Ontario¹⁶ and Quebec,¹⁷ provision is made for a scheme similar to those in Australia, discussed above.¹⁸ These allow for a committee (in Ontario) or a tutor (in Quebec) to be appointed to manage the affairs of a missing person or “absentee.” The object of such legislation is to make sure that the estate of an absentee is managed and not left to waste.¹⁹

2.13 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.”

2.14 The intention of the 1990 Act is, broadly, similar to those in the Australian states and territories 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.

2.15 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 the management of a missing person’s property. The Commission notes that, in Australia and Canada, these situations have been dealt with by adding specific provisions for the limited management of the property of the missing person into its existing legislation on adult guardianship,

¹⁶ *Absentees Act 1990* (Ontario).

¹⁷ Articles 84-102 of the Quebec Civil Code.

¹⁸ See also sections 5-7 of the *Public Trustee Act 2009* (Labrador and Newfoundland); section 3(1) of the *Presumption of Death Act 1974* (New Brunswick); sections 8-10 of the *Public Trustee Act 1988* (Northwest Territories); sections 1 1-14 of the *Public Trustee Act 1989* (Nova Scotia); sections 8-10 of the *Public Trustee Act 1988* (Nunavut); sections 19-20 of the *Decision-Making, Support and Protection to Adults Act 2003* and sections 19-20 of the *Public Guardian Trustee Act 2003* (Yukon).

¹⁹ *Re Taylor* (1925) 27 OWN 497 (Riddell J).

the equivalent of the proposed adult capacity legislation due to be enacted in Ireland.²⁰

2.16 The Commission accepts that, by contrast with Australia and Canada, Ireland does not yet have a modern adult capacity legislative framework but, having regard to the commitment that such legislation is to be enacted, it would be appropriate to consider this model for the purposes of dealing with this aspect of missing persons. In the Consultation Paper, the Commission concluded that provision could be made in the proposed capacity legislation for limited management 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.

2.17 The Commission was nonetheless conscious that, pending the enactment and implementation of the proposed adult capacity legislation, some suitable arrangements should be put in place in the meantime. The Commission was of the opinion that, in this respect, an application to appoint an interim manager 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 Commission was aware that the Probate Office dealt with many such probate applications from personal applicants and had established procedures to facilitate this in an informal and inexpensive manner. Bearing this in mind, in the Consultation Paper the Commission provisionally concluded that pending the enactment of adult capacity legislation an application to appoint a person to manage the affairs of a missing person could be made to the Probate Office. Thus, an applicant would furnish the necessary documentation to the Probate Office, who would then decide whether a manager should be appointed, subject to an appeal to the High Court.

2.18 The Commission invited submissions on whether it would be appropriate to include provision in the proposed mental capacity legislation for the limited management of the property of a missing person. There was general support for this provisional recommendation, and it was noted that such a process would be beneficial to both families and financial institutions such as banks or insurance companies who were due payments from the missing person's bank account.

2.19 In light of the submissions received, the Commission confirms the view expressed in the Consultation Paper that it would be appropriate to include provision in the proposed adult capacity legislation for limited management 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.

²⁰ See paragraph 2.07, above.

2.20 Pending the enactment and implementation of adult capacity legislation, the Commission also affirms the view in the Consultation Paper that a separate statutory procedure, using existing mechanisms, should be put in place to provide for the appointment of an interim manager. In preparing this Report, the Commission has reflected further on the provisional recommendation in the Consultation Paper that an application to appoint an interim manager could be made to the Probate Office of the High Court.

2.21 The Commission accepts in this respect that, if an interim manager was limited to relatively minor matters such as accessing back accounts in order to pay utility bills, it would be suitable if he or she were appointed by means of an administrative application through, for example, the Probate Office. The Commission is conscious, however, that an interim manager may need to be involved in more wide-ranging functions and decisions, such as whether property should be sold to preserve the missing person's assets, or whether to initiate or defend court proceedings on behalf of the missing person. In that context, the Commission considers that such powers would require the permission of a court. This would have a number of benefits: it would provide for judicial consideration of the extent to which the interests and rights of the missing person would be best protected, which could include imposition of such conditions as the court considered appropriate (for example, the filing of accounts or taking out insurance bonds, which are discussed below); and it would provide the interim manager with the comfort of court authorisation for any actions he or she took.

2.22 The Commission has also concluded that it would be appropriate that such applications be made to the Circuit Court rather than the High Court. This would facilitate easier, local, access to the court for those left behind; it is also likely that it would involve less expense than a High Court application. The Commission considers that, while current applications concerning missing persons for presumption of death orders using the common law 7 year rule are made to the High Court, there is no constitutional impediment to conferring jurisdiction on the Circuit Court.²¹ The Commission also considers in this respect that it may be appropriate to confer concurrent jurisdiction on the High Court, in particular where property above a certain rateable valuation is involved. This is the approach taken in family law legislation, including section 31 of the *Judicial Separation and Family Law Reform Act 1989*, section 38 of the *Family Law (Divorce) Act 1996* and section 140 of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. These Acts give the Circuit Court jurisdiction concurrently with the High Court and provide that

²¹ See *Tormey v Ireland* [1985] IR 289 and Hogan and Whyte, *Kelly: The Irish Constitution* 4th ed (LexisNexis Butterworths, 2003) at paragraphs 6.2.20-6.2.22.

where the rateable valuation of any land to which an application relates exceeds €254 the Circuit Court shall transfer the proceedings to the High Court, but any decision made before the transfer shall be valid unless discharged or varied by the High Court. The Commission also considers that jurisdiction conferred on the Circuit Court may be exercised by the judge of the Circuit in which the missing person was ordinarily resident or carried on any business, profession or occupation before he or she went missing.

2.23 The Commission has also concluded that where those left behind wish, at least initially, to limit the scope of the interim management to matters such as accessing a bank account in order to pay utility bills or to make a repayment on a loan or mortgage, such an order could be made by a County Registrar. This is consistent with the current functions of County Registrars, which include provision for making interim orders in civil proceedings,²² subject to an appeal to the Circuit Court.²³

2.24 *The Commission recommends that it would be appropriate to include provision in the proposed adult capacity legislation for limited management 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 recommends that, pending the enactment of adult capacity legislation, an application to appoint an interim manager to manage the affairs of a missing person should be made to the Circuit Court. The Commission also recommends that, if such an application is limited to matters such as accessing a bank account in order to pay utility bills or to make a repayment on a loan or mortgage, it may be made to and granted by a County Registrar, subject to appeal to the Circuit Court. The Commission also recommends that the jurisdiction of the Circuit Court should be concurrent with the High Court; that, where the rateable valuation of any land to which an application relates exceeds €254, the Circuit Court should, on the application of an applicant, transfer the proceedings to the High Court, but any declaration or decision made in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court; and that the jurisdiction conferred on the Circuit Court should be exercised by the judge of the Circuit in which the missing*

²² For a list of the current powers of a County Registrar, see Schedule 14, Part 2, paras 23 and 24, of the draft *Courts (Consolidation and Reform) Bill* in *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010), at pp.428-431 of the Report.

²³ See section 322 of the draft *Courts (Consolidation and Reform) Bill* in *Report on the Consolidation and Reform of the Courts Acts* (LRC 97-2010), at p.249 of the Report.

person was ordinarily resident or carried on any business, profession or occupation before he or she went missing.

C Detailed Recommendations Concerning the Interim Manager

2.25 In the Consultation Paper, the Commission examined in detail the Australian and Canadian legislation on interim management of the assets of a missing person.²⁴ In this Part, the Commission sets out its conclusions and recommendations on the details of the proposed scheme for interim management, including, where necessary, references to the relevant provisions in the Australian and Canadian legislative schemes.

(1) When can an application be made?

2.26 In the Consultation Paper, the Commission noted that there were two approaches to providing a definition of missing persons. In Australian legislation, a more specific definition is provided, while in Quebec and Ontario the legislation provides a broader definition. The Commission therefore provisionally recommended that, while both approaches might provide broadly similar practical effects, the Australian approach is more desirable as it provides more clarity for those applying for orders under the proposed law.

2.27 The Commission was also of the opinion that the decision to appoint a person to manage the affairs of a missing person should not be granted easily. The Commission therefore provisionally recommended that reform in this respect should be in accordance with the need to meet the type of criteria set out by Quinn J in the Canadian case of *Kamboj v Kamboj*.²⁵

- (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?

²⁴ See the Consultation Paper, paragraphs 2.02-2.39.

²⁵ (2007) CanLII 14932 (Ontario SC).

- (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?
- (f) Did the missing person belong to any clubs, religious, community or social organisations? 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?

2.28 The Commission concluded, and provisionally recommended, that an order to appoint a person to manage the property of a missing person should 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 anyone who lives at the person's last-known home address or any relative or friend of the person with whom the person is likely to communicate.

2.29 There was general support in the submissions received for a statutory scheme under which an interim manager may be appointed to manage the property of a missing person. The submissions noted that an interim manager would permit those left behind to deal more effectively with third parties such as banks or creditors, and thus would somewhat alleviate the various practical problems that arise when a person goes missing.

2.30 Having reviewed the approach taken in the Consultation Paper and developments since then, the Commission sees no need to depart from that approach and has therefore concluded, and recommends, that an order to appoint an interim manager 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 anyone who lives at the person's last-known home address or any relative or friend of the person with whom the person is likely to communicate.

2.31 *The Commission recommends that an order to appoint an interim manager to manage 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 interim manager?

2.32 Under Australian law any person may apply to be appointed, but in practice the court will appoint someone who is close to the missing person, for example, a relative or close friend. The courts will make its decision with due regard to the wishes of the missing person, so far as they can be ascertained. A similar broad provision is provided for in the Canadian legislation, where any interested person, including the Public Curator²⁶ or a creditor may apply to obtain an administration of the affairs of the missing person.

2.33 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 managed. It is clear that this group of people is also likely to be involved in any application to have a person declared presumed dead.

2.34 There was general support for the view that any person with a legitimate interest in the financial affairs of the missing person should have standing to bring an application to have an interim manager appointed, which could include a spouse, civil partner or next of kin.²⁷

2.35 There was, however, some concern raised about a creditor being appointed as an interim manager, on the basis that such an appointment might not be in the best interests of the missing person. In this respect, the Commission would draw attention to the recommendations made later in this Chapter that would require any person appointed as an interim manager to act

²⁶ In its *Report on Vulnerable Adults and the Law* (LRC 74-2006), the Commission recommended, as part of its proposed adult capacity legislation, the establishment of the Office of Public Guardian, which would be the equivalent of the Canadian Public Curator. At the time of writing, it is expected that the Government will publish an *Assisted Decision-Making (Capacity) Bill* in early 2013, which would implement the key recommendations in the Commission's 2006 Report.

²⁷ See also in Chapter 3, below, as to persons who may apply for a presumption of death order.

in the best interests of the missing person at all times, and that the interim manager's powers be limited to those specified in his or her order of appointment.²⁸

2.36 The Commission has therefore concluded that it is desirable that there should be a detailed, albeit non-exhaustive, list of persons who may bring an application. The Commission considers that it would be appropriate to set out a list that matches the actual experience in other jurisdictions. As already noted, in those jurisdictions close family members are most usually appointed, but the list should also allow sufficient flexibility to provide for unusual cases.²⁹ The Commission is also conscious in this respect that this flexibility is reflected in the relevant legislation concerning presumption of death, discussed in Chapter 3 below, and that it would be important that the list of those who may apply for an interim management order should be the same as the list of those who may apply for a presumption of death order.

2.37 The Commission has accordingly concluded, and recommends, that the following persons should be entitled to apply to be appointed as the interim manager of the property of a missing person:

- (a) the spouse or civil partner of the missing person,
- (b) the cohabitant of the missing person,
- (c) any other family member of the missing person, including a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the missing person,
- (d) a person who is acting in *loco parentis* to the missing person,
- (e) a dependant of the missing person,
- (f) a creditor or

²⁸ See paragraph 2.46, below.

²⁹ Similar flexibility to allow for unusual situations is reflected in legislative provisions enacted by the Oireachtas. Thus, in the context of determining who may make a victim impact statement in a case of homicide, section 5 of the *Criminal Justice Act 1993*, as amended by section 4 of the *Criminal Procedure Act 2010*, defines a "family member" of the homicide victim as "(a) a spouse or partner of the person, (b) a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the person, (c) a person who is acting in *loco parentis* to the person, (d) a dependant of the person, or (e) *any other person whom the court considers to have had a close connection with the person*" (emphasis added).

(g) any other person with a sufficient interest including, where relevant, the Attorney General or other person acting on behalf of the State.

2.38 *The Commission recommends that the following persons should be entitled to apply to be appointed as the interim manager of the property of a missing person: (a) the spouse or civil partner of the missing person, (b) the cohabitant of the missing person, (c) any other family member of the missing person, including a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the missing person, (d) a person who is acting in loco parentis to the missing person, (e) a dependant of the missing person, (f) a creditor of the missing person or (g) any other person with a sufficient interest including, where relevant, the Attorney General or other person acting on behalf of the State.*

(3) What can an interim manager do?

2.39 The Consultation Paper discussed in detail the statutory provisions in Australia that require that a person appointed must act in the best interests of the missing person, taking into account as far as possible his or her wishes. The legislation in New South Wales, Victoria and the Australian Capital Territories all permit a limited and specific use of the property of the missing person for a 2 year period, but this may be extended for a further 2 years.³⁰ 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.³¹

2.40 This is similar to the situation in Quebec where legislation allows 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

³⁰ Section 60(AE) of the *Guardianship and Administration Act 1986*.

³¹ Section 65 of the *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).

obligation of support of the absentee.³² Similarly, in Ontario, the *Absentees Act 1990* provides for the administrator to act for the person's benefit.³³

2.41 The Commission noted 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.

2.42 In the submissions received, one suggestion was made that the Commission might consider an initial appointment for 3½ years rather than 2 years as provisionally recommended in the Consultation Paper by the Commission. The submission suggested that this would divide more equally into the 7 year period found in presumption of death legislation and at common law.

2.43 In light of the submissions received and following further consideration, the Commission is of the opinion that an initial appointment for a period of 2 years would avoid the unnecessary confusion that a period of 3½ years may cause. The Commission therefore recommends that an interim manager be appointed initially for a period of 2 years, with the option to renew the appointment for a further 2 year period.

2.44 The Commission has therefore concluded that an interim manager should have limited and specified powers to administer the affairs of the missing person for a period of up to 2 years, which can be extended for a further 2 years. The Commission also recommends that the Court should be empowered, prior to making any order, to serve notice on any person who may be affected by the appointment, notably for example where the interim manager is given a power of sale. The Commission also recommends that the interim manager must act in the best interests of the missing person at all times. The Commission considers that it is especially important that the interim manager be subject to some supervision of how he or she deals with the property of the missing person. In this respect, the Commission also considers, and recommends, that the interim manager should file annual accounts in court in such format as the Court prescribes in the order of appointment.

2.45 The Commission also considers, and recommends, that, in the event that the interim manager becomes aware that the missing person is in fact alive by, for example, learning that the missing person has made contact with any person with whom he had lost contact (that is, one of the key reasons why the interim manager was appointed), the interim manager must apply to court for an order discharging the appointment.

³² Article 88 of the Quebec Civil Code.

³³ Section 6 of the *Absentees Act 1990*. See also section 32(1) of the *Substitute Decisions Act 1992*.

2.46 *The Commission recommends that an interim manager have limited and specified powers to administer the affairs of the missing person for a period of up to 2 years, which can be extended for a further 2 years. The Commission also recommends that the Court should be empowered, prior to making any order, to serve notice on any person who may be affected by the appointment, including where the interim manager is given a power of sale. The Commission also recommends that the manager must act in the best interests of the missing person at all times. The Commission also recommends that the interim manager must file annual accounts in court in such format as prescribed in the order of appointment. The Commission also recommends that, in the event that the interim manager becomes aware that the missing person is in fact alive, the interim manager must apply for an order discharging his or her appointment.*

CHAPTER 3 PRESUMPTION OF DEATH LEGISLATION

A Introduction

3.01 In this Chapter, the Commission considers the details of the presumption of death legislation recommended in Chapter 1. This presumption of death legislation would complement the provisions recommended in Chapter 2, which deal with the interim management of a missing person's assets where no presumption of death order has been sought or granted. In Part B, the Commission discusses the limitations of the current law on presumption of death. In Part C, the Commission sets out its conclusions and final recommendations for reform including the key elements of the proposed presumption of death legislation.

B The Limited Nature of Existing Law on Presumption of Death

3.02 When a person dies, there is a statutory obligation to register the death within three months so that it can be placed on the Register of Deaths.¹ This is usually done by a close family member of the deceased.² The registration of death permits the issuing of a death certificate. This allows for an application to be made to the Probate Office for either a grant of probate³ or letters of administration.⁴ These processes allow for the assets of the deceased to be distributed to the relevant beneficiaries and for jointly held property to pass by survivorship. The issuing of the death certificate also enables the family of the deceased to deal with practical matters such as the closure of relevant

¹ Section 37(1) of the *Civil Registration Act 2004*. See generally Part 5 of the *Civil Registration Act 2004*.

² Section 37(1)(a) of the *Civil Registration Act 2004*. If a close family member is not available to register the death, sections 37(1)(b) and 37(5) of the *Civil Registration Act 2004* permits a "qualified informant" (such as a doctor) to register the death.

³ Where the deceased has made a valid will: see section 26 of the *Succession Act 1965*.

⁴ Where there is no evidence of a valid will and the deceased has died intestate: see section 27 of the *Succession Act 1965*.

bank accounts, payment of life insurance policies, or the transfer of ownership from any jointly owned assets. This can be contrasted to the situation where a person is missing and is believed to have died but where his or her death cannot be proven.

3.03 As discussed in Chapter 1 above, section 23 of the *Coroners Act 1962* provides for an inquest to be held where the coroner believes that a death has occurred in circumstances that indicate that the body has either been destroyed or is irrecoverable, and under this section the coroner may declare a missing person presumed dead. The coroner's declaration of death allows the death of the missing person to be registered on the Register of Deaths, which in turn allows the issuing of a death certificate. In broad terms, section 23 of the 1962 Act applies where the circumstances of the person going missing indicates that death is virtually certain.

3.04 As also discussed in Chapter 1, where death is not virtually certain but is highly probable, an application can be made to the High Court by virtue of the common law presumption of death after 7 years' absence.⁵ It is important to note that an application may be made before 7 years has passed since the person went missing, provided it can be established that it is highly probable that the missing person has died. This was the situation, for example in *In the Goods of Freytag*,⁶ in which a person was declared presumed dead 3 months after his disappearance during a catastrophic earthquake in Sicily.

3.05 If the High Court is satisfied that the evidence points to a reasonable presumption of death, it makes an order declaring presumed death.⁷ The High Court application is usually made under order 79 of the *Rules of the Superior Courts 1986* and the effect of the making of a declaration is that a representation can be raised to the estate of the missing person. The Court does not, however, pronounce the person dead and the death is not recorded on the Register of Deaths under the *Civil Registration Act 2004*, nor does a certificate of death issue. Similarly, as discussed in Chapter 1, the status of any pre-existing marriage or civil partnership is not affected.

3.06 It is therefore clear that a gap exists between situations where a person is known to be dead and where a missing person is believed to be dead. In considering reform in the area of presumption of death legislation affecting the civil law status of the person, the Commission takes account of the Council

⁵ This application is made by notice of motion in the non-contentious probate list under Order 79 of the *Rules of the Superior Courts 1986* (SI No.15 of 1986).

⁶ (1909) 42 ILTR 116, discussed in Chapter 1 above.

⁷ See the discussion in Chapter 1, above.

of Europe 2009 Recommendation on Missing Persons,⁸ which distinguishes between situations where death is virtually certain and where death is highly probable. The Commission notes that this graduated approach in the 2009 Recommendation is consistent with the actual application of the existing common law rule, as applied in *In the Goods of Freytag*.⁹

C Conclusions and Final Recommendations

(1) *Where death is virtually certain*

3.07 In the Consultation Paper the Commission provisionally recommended that where a person disappears in circumstances that indicate that they are virtually certain to have died a coroner's inquest may be held so that the death may be registered on the Register of Deaths and a death certificate issued.¹⁰ This provisional recommendation would, in effect, extend the scope of section 23 of the *Coroners Act 1962*, which, as already discussed in Chapter 1, has already been used in the case of missing persons.

3.08 Linked to this, the Commission invited submissions on the period of time before such an application may be brought. The Commission also invited submissions on whether the certificate should have all the same legal effects as a standard certificate of death, and whether the death should be registered on the Register of Deaths without any special notation.¹¹

3.09 In this context, the Commission had regard not only to section 23 of the *Coroners Act 1962* but also to the 2009 Recommendation which recommends that a certificate of death be issued, without a minimum waiting period, where a missing person is virtually certain to have died.¹² This certificate has the equivalent legal effects of a standard death certificate.

3.10 There was general support in the submissions received for the introduction of a statutory framework to enable a death certificate to issue following a determination by a coroner that a missing person is virtually certain

⁸ 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), discussed in Chapter 1, above. The full text of the 9 Principles in the 2009 Recommendation is set out in the Consultation Paper, at paragraph 1.54.

⁹ (1909) 42 ILTR 116, discussed in Chapter 1, above.

¹⁰ See the Consultation Paper, at paragraph 3.14.

¹¹ *Ibid.*

¹² *Ibid.*, at paragraph 3.12.

to have died. There was also support for the provisional recommendation that there be no minimum waiting period before such an application may be brought. The submissions also supported the view that the order should result in registration of the death of the person on the Register of Deaths in accordance with the *Civil Registration Act 2004* and that a death certificate issued in such cases should have legal effects equivalent to a standard death certificate.

3.11 The Commission has therefore concluded, and recommends, that in a situation where death is virtually certain, there should be no minimum waiting period before an application may be brought to have the missing person declared dead. The Commission recommends that this application be brought before a coroner who, provided the relevant proofs are satisfied,¹³ would make a declaration of death, as already done in missing person cases under section 23 of the *Coroners Act 1962*; that this would authorise the applicant to register the death of the missing person in the Register of Deaths provided for under the *Civil Registration Act 2004*; and that it would authorise the applicant to obtain a death certificate for the deceased missing person.¹⁴ The Commission also recommends that this death certificate have legal effect equivalent to a standard death certificate so that it may be used to apply for a grant of probate or letter of administration, the payment of relevant life insurance policies and mean that the surviving spouse or civil partner may enter into another marriage or civil partnership.¹⁵ The Commission also recommends that, as in the case where an interim manager is appointed,¹⁶ the coroner should be empowered, prior to making any order, to serve notice on any person who may be affected by the making of the order.

3.12 *The Commission 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 death. The Commission also recommends that this declaration could be made by a coroner and would be identical to a standard declaration of death; that it would therefore authorise the applicant to register the death of the missing person in the Register of Deaths provided for under the Civil Registration Act 2004; that it would authorise the applicant to obtain a death certificate for the deceased missing person; and that this death certificate would have the same legal consequences as if it were known for certain that the person had died. The Commission also recommends*

¹³ See paragraph 1.83, above.

¹⁴ See Chapter 1, above.

¹⁵ The Commission discusses in detail the effect on marriage and civil partnership at paragraphs 3.31ff and 4.13ff, below.

¹⁶ See paragraph 2.46, above

that the coroner should be empowered, prior to making any order, to serve notice on any person who may be affected by the making of the order.

(2) Where death is highly probable

3.13 In the Consultation Paper, the Commission invited submissions on the recommendation that where a person is missing in circumstances where death is highly probable¹⁷ a declaration of presumed death¹⁸ should be sought in the High Court. The Commission was of the opinion that a court is best placed to ensure that the proofs, as outlined in the Consultation Paper (and reiterated in Chapter 1 of this Report), are satisfied before a declaration of presumed death is made.¹⁹

3.14 Linked to this, the Commission invited submissions on the possibility that a separate Register of Presumed Deaths should be established in line with the approach in comparable legislation such as the *Presumption of Death Act (Northern Ireland) 2009*.

3.15 The Commission considered the current practice in Ireland, where application may be brought if it can be proven on the balance of probabilities that a missing person has died before the end of the 7 year period. The Consultation Paper also gave due consideration to both the 2009 Council of Europe Recommendation and the practice of other jurisdictions, which permit an application to be brought where death is highly probable without the requirement of a minimum waiting period.

3.16 The submissions received during the consultation period supported the issuing of a declaration of presumed death where it is highly probable that a missing person has died. They also expressed support for the establishment of a separate Register of Presumed Deaths for cases where it is highly probable that the missing person has died.

3.17 The Commission has therefore concluded, and recommends, that in circumstances where death is highly probable, an application may be brought to court for a declaration of presumed death, allowing the issue of a death certificate which would have all the legal effects of a standard death

¹⁷ See the discussion of the category of “where death is highly probable” in Chapter 1, above.

¹⁸ As opposed to a declaration of death in the category of where death is virtually certain. The declaration of presumed death would have all the equivalent legal effects of a standard death certificate.

¹⁹ See the Consultation Paper, at paragraph 3.18.

certificate.²⁰ The Commission also recommends that the presumed death be placed on a Register of Presumed Deaths to be established under the *Civil Registration Act 2004*. In order to ensure consistency with its approach to the appointment of an interim manager of the assets of a missing person, discussed in Chapter 2, the Commission has also concluded that such an application may be made to the Circuit Court. As also noted in Chapter 2, this would have the advantage that an application may be made as close as possible to the missing person's former place of residence and is also likely to be more convenient and less costly for those left behind. The Commission also considers that this jurisdiction of the Circuit Court should, as in the case with the appointment of an interim manager, operate concurrently with the High Court, in particular where property over a rateable valuation of €254 is involved.²¹ The Commission also recommends that, as in the case where an interim manager is appointed,²² the Court should be empowered, prior to making any order, to serve notice on any person who may be affected by the making of the order.

3.18 *The Commission recommends that, in circumstances where death is highly probable, application may be made to the Circuit Court to obtain a declaration of presumed death. This declaration would allow the issuing of a death certificate with all the legal effects of a standard death certificate. The Commission also recommends that the presumed death be placed on a Register of Presumed Deaths to be established under the Civil Registration Act 2004. The Commission also recommends that the jurisdiction of the Circuit Court shall be concurrent with the High Court; that, where the rateable valuation of any land to which an application relates exceeds €254, the Circuit Court shall, on the application of an applicant, transfer the proceedings to the High Court, but any declaration or decision made in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court; and that the jurisdiction conferred on the Circuit Court may be exercised by the judge of the Circuit in which the missing person was ordinarily resident or carried on any business, profession or occupation before he or she went missing. The Commission also recommends that the Court should be empowered, prior to making any order, to serve notice on any person who may be affected by the making of the order.*

²⁰ The Commission discusses in detail the effect on marriage and civil partnership at paragraphs 3.31ff and 4.13ff, below.

²¹ See the detailed discussion at paragraphs 2.22 and 2.24, above.

²² See paragraph 2.46, above

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

3.19 In the Consultation Paper, the Commission noted that the common law 7 year rule concerning presumption of death is long-established and is well-known among those who deal with the issue of missing persons in Ireland. The Commission also noted that the rule has also been reflected in specific legislation and policy in Ireland.²³ The Consultation Paper also referred to a number of the statutory frameworks in place in other jurisdictions, as well as the Council of Europe 2009 Recommendation, which retain the 7 year time period as a reference point.²⁴ There was general support in the submissions received for retaining the 7 year reference period.

3.20 The Commission emphasises that the 7 year reference period does not constitute a mandatory minimum waiting period, and that an application may be made at any time to court where it can be established that, on the balance of probabilities, death may be presumed. In this respect, the Commission notes that this is consistent with the current law, as for example in *In the Goods of Freytag*,²⁵ in which a person was declared presumed dead by the High Court 3 months after his disappearance during a catastrophic earthquake in Sicily.

3.21 In light of the submissions received, and having regard to the use of the 7 year rule by the Oireachtas as recently as 2009,²⁶ the Commission recommends that the 7 year reference period should be retained for situations where the 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, whether a person is alive.

3.22 The Commission also notes in this respect that the 2009 Council of Europe Recommendation, the *Presumption of Death Act (Northern Ireland) 2009* and the *Presumption of Death (Scotland) Act 1977* include provisions on specifying the actual date of death. The Commission acknowledges the importance of this, and that, for example, any tax liability that arises on the distribution of the assets forming the estate of the presumed deceased may depend on the date of death. In this respect, the Commission has concluded, and recommends, that, where a presumption of death order is made and it is established that the missing person has died on a specific date, the order must

²³ See the Consultation Paper, at paragraph 3.21.

²⁴ See the Consultation Paper, at paragraph 3.22.

²⁵ (1909) 42 ILTR 116: see paragraph 1.34, above.

²⁶ See section 18 of the *Land and Conveyancing Law Reform Act 2009*, discussed at paragraph 1.26ff, above.

include a finding as to the date and time of death and, where it is uncertain when, within any period of time, the missing person died, the order must provide that he or she died at the end of that period; and that where a presumption of death order is made and it is established that the missing person has not been known to be alive for a period of at least 7 years, the order must include a finding that the missing person died at the end of the day occurring 7 years after the date on which he or she was last known to be alive.

3.23 *The Commission 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 whether a person is alive, their death may be presumed, subject to satisfying the proofs already referred to in this Report. The Commission also recommends that it should be provided, to avoid any doubt, that the 7 years reference period does not constitute a mandatory minimum waiting period, and that an application may be made at any time to the Circuit Court where it is established that, on the balance of probabilities, death may be presumed. The Commission also recommends that, where a presumption of death order is made and it is established that the missing person has died on a specific date, the order must include a finding as to the date and time of death. Where it is uncertain when, within any period of time, the missing person died, the order must provide that he or she died at the end of that period. Where a presumption of death order is made and it is established that the missing person has not been known to be alive for a period of at least 7 years, the order must include a finding that the missing person died at the end of the day occurring 7 years after the date on which he or she was last known to be alive.*

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

3.24 In the Consultation Paper, the Commission noted that when a missing person is believed to have died, it is often those closest to the person for example, the spouse, civil partner, children or parents who are directly affected by the financial and legal implications of the uncertainty arising from the disappearance and possible death of the person.

3.25 The Consultation Paper noted that, generally, it is this category of persons who may wish to bring an application to register the death of the missing person. This is reflected in the Northern Ireland and Scottish Acts which provide that a spouse, civil partner,²⁷ or persons who have a “sufficient

²⁷ Section 1(2)(b) and (c) of the *Presumption of Death Act (Northern Ireland) 2009* and section 1(3)(b) of the *Presumption of Death (Scotland) Act 1977*.

interest”²⁸ may make an application for a presumed death order. This would permit an application in circumstances where the missing person may be in the care of the State, or if the missing person is not married or in a civil partnership.

3.26 Similarly, the 2009 Council of Europe Recommendation also 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.”²⁹

3.27 The comparable term “interested persons” has been adopted by many countries. This approach is reflected in New Brunswick,³⁰ while in Quebec, the Civil Code provides such a declaration of presumed 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”³¹

3.28 Thus the Quebec Civil Code explicitly acknowledges that the state, through the Public Curator or Minister for Revenue, may have a legitimate interest in applying for a presumption of death order concerning a missing person. This can also be seen in the decision of the High Court in *Re Doherty*³² where the State, through the Minister for Finance, was found to have a legitimate interest under the doctrine of *bona vacantia* (“ownerless goods”) in section 29(2) of the *State Property Act 1954* which has the effect that, if a presumed dead missing person has no next-of-kin, the estate vests in the State. This means that the State had sufficient interest to initiate a presumption of death application concerning Mr Doherty.

3.29 The Commission also considers that it is important that the persons who may apply for a declaration of presumed death should be consistent with

²⁸ Section 2(3) of the *Presumption of Death Act (Northern Ireland) 2009* and section 1(5) of the *Presumption of Death (Scotland) Act 1977*.

²⁹ Committee of Experts on Family Law *Study On Missing Persons, Presumption of Death and Commorientes Following, In Particular, Terrorist Attacks and Natural Disasters* (20 November 2007) at 12-13, available at www.coe.org.

³⁰ Section 2(1)(d) of the *Presumption of Death Act (New Brunswick) 1974*.

³¹ Article 92 of the Quebec Civil Code.

³² [1961] IR 219: see paragraph 1.33, above.

the list of persons who may apply for the appointment of an interim manager to the property of a missing person, discussed in Chapter 2.³³

3.30 *The Commission recommends that the following persons may apply for a declaration of presumed death: (a) the spouse or civil partner of the missing person, (b) the cohabitant of the missing person, (c) any other family member of the missing person, including a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the missing person, (d) a person who is acting in loco parentis to the missing person, (e) a dependant of the missing person, (f) a creditor of the missing person or (g) any other person with a sufficient interest including, where relevant, the Attorney General or other person acting on behalf of the State.*

(5) The Status of a Marriage or Civil Partnership

3.31 The Consultation Paper identified the legal ambiguity that exists should the spouse or civil partner of a missing person wish to enter into a new marriage or civil partnership with a third party.³⁴ 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 spouse wishes to enter into a second marriage, he or she will have a defence to a criminal charge of bigamy if the missing spouse has been continually absent for 7 years and he or she believes that the missing spouse is dead. However, according to civil law if it is shown at any time that the missing spouse was in fact alive at the time of the second marriage, then the second marriage is completely void, and the marriage to the missing person remains in place.³⁵ Similarly, if the remaining spouse wishes to enter into a new civil partnership section 107(ii) of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* provides that he or she will not be permitted to do so while the marriage is still valid.

3.32 As discussed in the Consultation Paper, under the current law, it might be argued that the spouse of a missing person should be permitted to obtain a divorce after four years' living apart from the other party.³⁶ However, the Commission was of the opinion that it is unclear whether this provision applies in circumstances where the other spouse is missing and is believed to have died. Furthermore, the Commission was of the view that, given the sensitivities of those left behind, it may not be appropriate to use this mechanism to dissolve a marriage where one spouse is missing and believed to

³³ See paragraph 2.38, above.

³⁴ See the Consultation Paper, at paragraphs 3.31-3.39.

³⁵ See Lowe and Douglas, *Bromley's Family Law* 10th ed (Oxford 2007) at 1087.

³⁶ Section 5 of the *Family Law (Divorce) Act 1996*.

have died. In Chapter 4 of this Report, the Commission reiterates this by emphasising that the dissolution of marriage by divorce is quite different from ending a marriage by death.

3.33 The Consultation Paper noted that the law in England and Wales had been reformed in light of these problems.³⁷ The Commission noted that section 19(1) of the *Matrimonial Causes Act 1973* provides 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 for an order that the other party is presumed 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 common law 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.”

3.34 While the statutory presumption appears to be different from the common law presumption (because it refers to the spouse’s belief, as opposed to other matters, as evidence that the missing person is dead), the usual proofs must be satisfied to show that the missing spouse had probably died.³⁸ The Commission also notes that section 19(3) of the *Matrimonial Causes Act 1973* relates only to the dissolution of the marriage, and does not result in registration of the death of the missing person. This is, therefore, quite different from the ending of a marriage arising from death.

3.35 In Ireland, section 107(iii) of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010* forbids a party from entering into a second civil partnership if either party is already in a valid civil partnership. This means that even where a party to a civil partnership disappears in circumstances that indicate that he or she may have died, the remaining civil partner may not be able to enter into a second civil partnership should they wish to do so.

³⁷ See Lowe and Douglas, *Bromley’s Family Law* 10th ed (Oxford 2007) at 1087.

³⁸ See Lowe and Douglas, *Bromley’s Family Law* 10th ed (Oxford 2007) at 1088. See also *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.

3.36 The Consultation Paper noted that the law in England and Wales had also been reformed to take into account situations where the remaining civil partner may wish to enter into a new civil partnership.³⁹ Thus, 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. 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, and does not result in registration of the death of the missing person. In that respect, any proposed reform made in the context of this Report would involve providing for the ending of a civil partnership arising from death.

3.37 The Commission notes that, under section 3 of the *Presumption of Death Act (Northern Ireland) 2009*, the making of a presumption of death order is “effective against any person and for all purposes including the ending of a marriage or civil partnership to which the missing person is a party.” This means that once the declaration of presumed death is obtained, the missing person is treated as dead for all purposes, and the marriage or civil partnership is legally ended.

3.38 The Commission, as recommended in Chapter 1 of this Report, is of the view that a presumption of death order should have all the legal effects of a standard death certificate. In the Consultation Paper, the Commission invited submissions as to whether this was desirable with regard to pre-existing marriages or civil partnerships. There was general support in the submissions received that any legislative reform should reflect the legislative position in comparable jurisdictions, which permit the remaining person to enter into a new marriage or civil partnership. The Commission has therefore concluded that a declaration of presumed death should have the effect that, in general terms (discussed below), a marriage or civil partnership has come to an end. The Commission notes that this is not to provide for the dissolution of a marriage or civil partnership.

3.39 The Commission also recommends that, for completeness and transparency, appropriate provision to this effect should also be made in the relevant provisions of the *Family Law (Divorce) Act 1996* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. The Commission emphasises that these amendments would not involve providing for either a dissolution of marriage or of a civil partnership, but instead for orders ending a marriage or civil partnership on the grounds of presumed death. The Commission is conscious that this raises difficulties in those unusual instances where a person in respect of whom such an order has been made later returns. The Commission returns to that issue in Chapter 4, below.

³⁹ See the Consultation Paper, at paragraph 3.36.

3.40 *The Commission recommends that a declaration of presumed death should, in general, have the effect that a marriage or civil partnership has come to an end; and that appropriate provision to this effect should also be made in the relevant provisions of the Family Law (Divorce) Act 1996 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.*

CHAPTER 4 WHERE 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 unusual situation where a missing person, in respect of whose affairs an interim manager has been appointed or in respect of whom a declaration of presumed death has been made, is in fact alive and returns. The Commission also discusses the specific international aspects of the law on missing persons.

4.02 In Part B, the Commission discusses in general how the interests of the missing person may be protected, whether at the initial application (through an insurance bond) or in the event that he or she returns (through a dissolution order or 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 Protection of the Missing Person's Interests: General

4.03 The need to deal with the return of a missing person arises because, as noted in the Introduction to this Report,¹ some adults who go missing do so voluntarily: they may simply wish to break contact with family or friends, which can sometimes be connected with personal or emotional reasons. In such an instance, the missing person may be unaware that the disappearance has resulted in the appointment of an interim manager or a declaration of presumed death. It could also arise where fraud is involved, as in the case of John Darwin, the English man who faked his own death while out canoeing.² As also noted in the Introduction,³ the circumstances where persons who are declared presumed dead and subsequently are located alive are extremely rare; out of a total of about 150 presumed dead orders made in Scotland since the introduction of the

¹ See the discussion in the Introduction, at paragraph 9, above.

² See the discussion in paragraph 1.08, above.

³ See the discussion in the Introduction, at paragraph 10, above.

Presumption of Death (Scotland) Act 1977, only one person was subsequently found to be alive.

4.04 In the unusual cases where a missing person returns, he or she will usually wish to regain control of any property. If this property is subject to an interim management order, the interim management order would need to be dissolved; and in many cases no irrevocable actions will have been taken by the interim manager and the property of the missing person will be intact (although this will not always be the case, as where for example the interim manager is empowered by the Circuit Court to institute or defend proceedings on behalf of the missing person, or to sell property). If the missing person is declared dead or presumed dead, then his or her assets may have been distributed pursuant to a will, or under the *Succession Act 1965*.

4.05 In Northern Ireland, section 5 of the *Presumption of Death Act (Northern Ireland) 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 provides 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. The provisions in the 2009 Act for variation orders are virtually identical to those in sections 5 and 6 of the Scottish 1977 Act, with the exception that the Scottish 1977 Act allows for close family members (parents, children, grandparents and grandchildren) to make a claim to be exempted from any variation orders.

4.06 To complement these provisions, section 7 of the Northern Ireland 2009 Act, again mirroring section 7 of the Scottish 1977 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. The insurance also covers the cost of returning the property to the missing person if they are subsequently discovered to be alive. In addition, section 7 of the 2009 Act and section 7 of the 1977 Act provide that if the missing person who is presumed dead had a life insurance policy, the insurer may require the person who receives the proceeds of the policy to take out an additional insurance policy. This insurance would cover the person in the event that the missing person is subsequently found to be alive,

and the insurance monies given must then be repaid. The legislation in Northern Ireland and Scotland is also similar to that in a number of Canadian provinces.⁴

4.07 The Commission has concluded that it is appropriate to provide for a procedure to vary or revoke an order appointing an interim manager or a declaration of presumed death; and that the application for such a revocation or variation order may be brought by any person with sufficient interest. This is in line with the position in Northern Ireland,⁵ Scotland,⁶ New Brunswick⁷ and British Columbia.⁸

4.08 The Commission has concluded that the Court should have a wide discretion if the returning missing person wishes to bring a claim for an order dissolving an order appointing an interim manager or the declaration of death and varying or revoking the consequential distribution of his or her property and assets. This approach ensures, in the Commission's view, a suitable calibration of the respective interests and rights of those involved, including property and related rights protected under the Constitution of Ireland and the European Convention on Human Rights. The Commission also notes in this respect that the 2009 Council of Europe Recommendation on Missing Persons envisages a process for nullifying a declaration of presumed death, but that this should also protect persons who may be adversely affected by this.⁹

4.09 The Commission is therefore 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. This approach is consistent with section 18(7) of the *Land and Conveyancing Law Reform Act 2009*,¹⁰ which specifies

⁴ See section 6(2) of the *Presumption of Death Act (New Brunswick) 1974* and section 5(2) of British Columbia's *Survivorship and Presumption of Death Act 1996*, discussed in the Consultation Paper, paragraphs 4.08-4.10.

⁵ Section 5(1)-(2) of the *Presumption of Death (Northern Ireland) Act 2009*.

⁶ Section 4(1) of the *Presumption of Death (Scotland) Act 1977*.

⁷ Section 5(2) of the *Survivorship and Presumption of Death Act 1996*.

⁸ Section 6(2) of the *Presumption of Death Act (New Brunswick) 1974*.

⁹ Principle 7 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).

¹⁰ See the discussion of the 2009 Act at paragraph 1.26ff, above.

that, in comparable situations concerning trusts of land, the court has a wide discretion to make an order that is “just and equitable in the circumstances.” The Commission notes that the 2009 Act replicates in modern form the long-standing approach to this matter contained in the *Life Estates Act 1695*, which section 18 of the 2009 Act replaced. The variation order would not, other than in exceptional circumstances, require the reimbursement of any income disbursed from the date of the appointment of the interim manager or the declaration of presumed death to that of the variation order. It would also protect third parties who acquire the property in good faith and for value from potential claims brought against the property.

4.10 The Commission also recommends that, to complement these provisions, the court may, as provided for in the Northern Ireland 2009 Act and the Scottish 1977 Act, order that an applicant for appointment as interim manager or an applicant for a declaration of presumed death take out an insurance policy or bond in order to provide an indemnity against claims that may arise after the distribution of the missing person’s assets has occurred; and that if the missing person had a life insurance policy, the insurer may require the person who receives the proceeds of the policy to take out an additional insurance policy. The Commission notes in this respect that the taking out of such an insurance policy or bond is a common feature of orders made under the current jurisdiction of the courts applying the 7 year common law presumption.¹¹

4.11 *The Commission recommends that a missing person in respect of whom an interim manager has been appointed or who has been declared presumed dead, but who returns, may apply to dissolve such orders and for such consequential orders for the return of property or the variation of any distribution of the assets or property of the person. The Commission 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 the orders made. The Commission 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 appointment of an interim manager or the declaration of presumed death as it considers just and reasonable in all the circumstances. The Commission also recommends that: (a) the variation order will have no effect on any income disbursed between the time of the making of such orders and the variation order; and (b) that if a third party acquires rights to or in the*

¹¹ That is, in applications in the non-contentious probate list under Order 79 of the *Rules of the Superior Courts 1986* (SI No.15 of 1986), which may result in, for example, the making of a Benjamin Order: see paragraph 1.23, above.

property, in good faith and for value, the returning person may not bring a claim for the return of the property against him or her.

4.12 *The Commission recommends that the court may order that an applicant for appointment as interim manager or an applicant for a declaration of presumed death 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; and that if the missing person had a life insurance policy, the insurer may require the person who receives the proceeds of the policy to take out an additional insurance policy.*

C Marriage or Civil Partnership of the Missing Person Who Returns

4.13 As already discussed in Chapter 3, when a spouse or civil partner dies, their marriage or civil partnership comes to an end. The surviving spouse or civil partner is then free to enter into a subsequent marriage or civil partnership, and also becomes entitled, for example, to the widowed or surviving civil partner social welfare payment. The Commission has recommended in Chapter 3 that the proposed legislation on missing persons should provide that when a missing person is declared dead or presumed dead all the legal effects of death should follow. This includes that any marriage or civil partnership would thereby come to an end.¹² The Commission notes that this is consistent with the current effect of a declaration of death made by a coroner under section 23 of the *Coroners Act 1962*. Where the remaining spouse has remarried or entered into a civil partnership in the incorrect belief that the missing person was dead, the missing person's return may create a difficulty. This Part discusses the consequences where the marriage or civil partnership of a missing person who is declared dead or presumed dead and is thereby ended, and that missing person is subsequently found to be alive.

(1) Marriage

4.14 In Northern Ireland and Scotland, where a missing person who is presumed dead subsequently returns (and if no appeal against the making of an order is brought within the time allowed or if an appeal is dismissed), the ending of the marriage or civil partnership is final. Section 3 of the Northern Ireland 2009 Act and section 3 of the Scottish 1977 Act both provide that "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."

¹² See paragraph 3.40, above.

4.15 In Scotland, section 3(3) of the *Presumption of Death (Scotland) Act 1977* adds that, where a presumed death order has been made, the ending 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.” Section 4(5) of the Scottish 1977 Act also provides that, in respect of the power of the court to make a revocation or variation order, “[n]othing in this section shall operate so as to revive a marriage of the missing person.”

4.16 The 2009 and 1977 Acts therefore provide (the 1977 Act being more explicit on this) that the declaration of presumed death has the effect of ending a marriage for all purposes, even in circumstances where the missing person who was presumed dead was in fact alive. In the Consultation Paper, the Commission considered the different approaches to this issue, and noted that the status of a marriage or civil partnership of the missing person who returns might depend on the specific circumstances.

4.17 Having considered this, the Commission is of the opinion that, as recommended in Chapter 3, a declaration of death or presumed death should, in general terms, be conclusive for all matters, including the ending of a marriage. The Commission emphasises that under existing law a declaration of death made under the *Coroners Act 1962* in respect of a missing person, and the consequent registration of death, brings a marriage to an end because of the virtual certainty that the missing person is dead. (This is different from a divorce which, since 1995, involves the dissolution of a marriage in accordance with Article 41.3.2^o of the Constitution. Article 41.3.2^o provides that a court may dissolve a marriage only where the parties have lived apart for at least four of the previous five years and where there is no reasonable prospect of a reconciliation between the spouses.)

4.18 Where a declaration of death order is made, the marriage ends because it has been established that a death has occurred, and this power has been in place long before divorce was permissible in the State. Indeed, the common law 7 year rule as to presumption of death precedes the foundation of the State and has been adopted by the Oireachtas as recently as 2009. In the case of a missing person the declaration of death may, in fact, have been made in respect of a person who is alive and later returns. The experience with the making of such orders, whether under the *Coroners Act 1962* or under presumption of death legislation in other jurisdictions, is that this is an exceptionally rare occurrence. The Commission considers that it is important to provide that, under the proposed legislative scheme, there should be as much clarity as possible as to the effect of a declaration of presumed death, namely, that the marriage has ended and that a spouse who is left behind may act on that basis and, if he or she wishes, may remarry.

4.19 Nonetheless, the Commission has also concluded, and recommends, that in the case of a person who has been declared dead and who was, at the time the declaration was made, in a subsisting marriage but who later returns, he or she may apply to the Circuit Court seeking a declaration that the marriage continues to have effect. The Commission also considers that the Court should, in this respect, have a discretion to make such order as, in the court's view, appears just. Where the spouse who was left behind has not remarried and indicates that he or she wishes to renew the marriage, the Court could, having ordered that the entry of death in the Register of Presumed Death be removed, direct that in these specific circumstances the marriage continues to have effect from the date of the making of the order. Alternatively, the Court may decide that a new marriage ceremony should take place between the parties.

4.20 In the event that the spouse who was left behind has remarried the position is more complex. The missing person who returns may be under the impression that he or she is still married to the spouse left behind. The Commission emphasises, however, that when the missing person returns there are not two subsisting marriages in place: the first marriage has ended arising from the declaration of presumed death and there is, therefore, one marriage only in place, being the marriage between the spouse who was left behind and his or her new spouse. The Commission accepts that this might be a difficult position for the parties but, equally, that this potential dilemma is not new and has been a possibility for many centuries because it arises from the existence of the common law presumption of death after 7 years and the statutory power of a coroner to make a declaration of death in respect of a missing person. Nonetheless, bearing in mind that the unlikely return of a missing person may require further judicial consideration, the Commission is conscious that the court should be in a position to consider the consequences and effect if the other spouse has remarried on foot of a declaration of death or of presumed death.

4.21 *The Commission recommends that where a declaration of death or presumed death has been made, that person's marriage should, in general terms, not remain valid even if the missing person returns. The Commission also recommends, that in the case of a person who has been declared dead and who was, at the time the declaration was made, in a subsisting marriage, but who later returns, he or she may apply to the Circuit Court seeking a declaration that the marriage continues to have effect, and that the Court should, in this respect, have a discretion to make such order as in the court's view appears just.*

(2) Civil Partnership

4.22 Broadly similar factors arise in the context of civil partnership in that, under the 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.

4.23 As stated, the position under section 3 of the 2009 Northern Ireland Act is that, where a missing person who is presumed dead subsequently returns and if no appeal is brought within the time allowed or an appeal is dismissed, the dissolution of the civil partnership is final.¹³ 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 who is missing is presumed dead. This presumption of death order has the effect of dissolving the civil partnership.¹⁴

4.24 In Ireland, unlike in the case of marriage, there is no specific constitutional reference to civil partnerships. Nonetheless, the Commission has also concluded, and recommends, that in the case of a person who has been declared dead and was, at the time the declaration was made, in a subsisting civil partnership, but who later returns, he or she may apply to the Circuit Court seeking a declaration that the civil partnership continues to have effect, and that the Court should have a discretion to make such order as in the court's view appears just.

4.25 *The Commission recommends that where a declaration of death or presumed death has been made, any pre-existing civil partnership should, in general terms, not remain valid even if the missing person returns. The Commission also recommends, where a person has been declared dead and who was, at the time the declaration was made, in a subsisting civil partnership, but who later returns, he or she may apply to the Circuit Court seeking a declaration that the civil partnership continues to have effect, and that the Court should have a discretion to make such order as in the court's view appears just.*

D International Aspects of Missing Persons

4.26 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 where due to the nature of the events, declarations of presumed death were required for individuals who disappeared while abroad.¹⁵ In the context of increased international travel and patterns of emigration and immigration in a globalised setting, there is an even more

¹³ The Scottish 1977 Act is confined to the effect on marriage only.

¹⁴ Section 37(1)(c) of the *Civil Partnership Act 2004*.

¹⁵ See the discussion in the Consultation Paper, at paragraphs 1.46-1.47, of the 1950 UN Convention on Missing Persons in World War II.

pressing need to ensure that reform in this area reflects the international nature of some missing person cases. This has been recognised in the 2009 Council of Europe Recommendation on Missing Persons.¹⁶

4.27 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” is a limited category of missing persons who were abducted and are believed to be buried in unmarked secret locations by paramilitary groups operating in Northern Ireland during the period of violence between the 1970s and late 1990s. At the time of writing, 9 of 16 of the remains of the Disappeared have been found, leaving 7 still missing.

4.28 Against this particular background in Ireland, and as already discussed, the provisions of the 2009 Northern Ireland Act were tailored to take account of the need to provide for declarations of presumed 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, because it is generally accepted that at least some of the Disappeared may have been abducted in Northern Ireland but were possibly killed and buried in this State. To date, 7 of the bodies actually recovered had been buried in the State.

(1) *Where an Irish citizen disappears abroad*

4.29 In Ireland, it is clear that, if a person goes missing abroad in circumstances that indicate that death is virtually certain, a presumption of death order may be obtained in the courts immediately. Thus, in *In the Goods of Freytag*,¹⁷ 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 administration¹⁸ 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 Report, highly probable.

¹⁶ 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, available at www.coe.org.

¹⁷ (1909) 42 ILTR 116, discussed at paragraph 1.34, above.

¹⁸ See “Wife of dead climber granted probate order” *The Irish Times* 5 May 2000. This application is made by notice of motion in the non-contentious probate list under Order 79 of the *Rules of the Superior Courts 1986* (SI No.15 of 1986).

4.30 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.

4.31 The Commission has, therefore, concluded that where an Irish citizen disappears while abroad an application may be made to the Circuit Court for any of the orders already provided for in this Report. The Commission also recommends that any such application should be subject to the same criteria as apply where the Court grants such orders in respect of a person who has gone missing in Ireland, and that the Circuit 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 Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities.¹⁹

4.32 *The Commission recommends that where an Irish citizen disappears while abroad an application may be made to the Circuit Court for any of the orders provided for in this Report, namely (a) an order for the interim management of the missing person's property or (b) a declaration of presumed death. The Commission also recommends that any such application should be subject to the same criteria as apply where the Court grants such orders in respect of a person who has gone missing in Ireland, and that the 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 Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities.*

(2) Where a person from abroad disappears in Ireland

4.33 Comparable, though somewhat different, considerations arise in the context of a person from abroad who goes missing in the 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

¹⁹ The Commission discussed in detail the 1961 Hague Convention, commonly known as the Apostille Convention, 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.

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.

4.34 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 the number of tourists being struck by natural disasters has also increased in recent times. For example, the 1985 terrorist attack on a plane flying from Montreal to Delhi, 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.

4.35 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.”²⁰

4.36 The relevant legislation in a number of countries reflects a more narrow approach than suggested in the Council of Europe 2009 Recommendations. For example, the legislation in Northern Ireland²¹ and Scotland²² requires that the person, in respect of whom the declaration of presumed death is sought, must have been habitually resident or domiciled in the country at the time of the disappearance. These provisions also permit a

²⁰ 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).

²¹ Section 1(2)(a) *The Presumption of Death Act (Northern Ireland) 2009*.

²² Section 1(3)(a) *The Presumption of Death (Scotland) Act 1977*.

spouse (or civil partner in Northern Ireland) to make an application if they themselves are domiciled or habitually resident there.²³

4.37 The Commission considers that the spouse or civil partner should be able to make an application for a presumption of death order for their respective spouse or civil partner. 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 an application should be made to the authorities in Ireland for the type of orders already discussed in this Report.

4.38 In this respect, the Commission considers that the model adopted in the 2009 Northern Ireland Act provides a suitable template for the 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.

4.39 Separately, section 1(2)(c) of the 2009 Act provides that an application may be made by a close relative (defined as a parent, child or sibling) 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 the State is the *Criminal Justice (Location of Victims' Remains) Act 1999*.

4.40 The Commission considers that, bearing in mind this specific historical background, 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 in the State and in Northern Ireland should, to the greatest extent possible, be consistent with each other.

4.41 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 Circuit Court by any interested person who has been habitually resident in the State for 12

²³ Section 1(2)(b) of the *Presumption of Death Act (Northern Ireland) 2009* and section 1(3)(b) of the *Presumption of Death (Scotland) Act 1977*.

months for any of the orders recommended in this Report, namely, an interim management order or a presumption of death order.

4.42 The Commission has also concluded that separate provision should be included to deal with “the Disappeared,” and that an application may also be made for the orders recommended in this Report by a spouse or family member²⁴ of a missing person where that missing person is likely to have been a victim of violence within the meaning of the *Criminal Justice (Location of Victims’ Remains) Act 1999*.

4.43 The Commission also recommends that the Circuit 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 Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities.

4.44 *The Commission 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 Circuit Court by any interested person who has been habitually resident in the State for 12 months for any of the orders provided for in this Report, namely, (a) an order for the interim management of the missing person’s property or (b) a declaration of presumed death. The Commission recommends that an application may also be made for the orders provided for in this Report by a spouse or other family member 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 recommends that the 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 Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities.*

²⁴ The Commission considers that having regard to the passage of time and the possibility that such applications may be made in the future the list of applicants should be extended beyond the category of close relatives provided for in the Northern Ireland 2009 Act.

CHAPTER 5 SUMMARY OF RECOMMENDATIONS

The recommendations made by the Commission in this Report are as follows:

5.01 The Commission recommends that in any legislation to deal with the civil law status of missing persons, a missing person should be defined as a person who is observed to be missing from his or her normal patterns of life, where those who are likely to have heard from the missing person are unaware of his or her whereabouts and where the circumstances of the person being missing raise concerns for the person's safety and well-being. [paragraph 1.13]

5.02 The Commission 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 the making of a presumption of death order in respect of two categories of missing persons. The first category is where the circumstances of the disappearance indicate that death is virtually certain. The second category is where both the circumstances and length of the disappearance indicate that it is highly probable that the missing person has died and will not return, such as where the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed. [paragraph 1.82]

5.03 The Commission recommends that, where a person applies to have a presumption of death order, the following detailed list of matters should be proved to the satisfaction of the court:

1. Specific evidence tending to indicate that the missing person is dead, including the circumstances surrounding the disappearance of the missing person, absence of communication with people who would be likely to hear from the missing person, including last known correspondence or communication, and the length of time since the disappearance.
2. The date when the missing person was last heard from.
3. Evidence of advertising for information concerning the whereabouts of the missing person, including where relevant by using the internet and social media (unless there are exceptional reasons for not doing so, explained by the applicant).
4. Where relevant and practicable, evidence from a searching organisation that confirms that attempts were made to locate the missing person but were fruitless (whether by affidavit, statutory declaration or, in the case of searches outside the State, in accordance

with the 1961 Hague Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities).

5. The full background relating to the disappearance of the missing person, including the missing person's age and health (including mental health),

6. Where relevant and practicable, evidence of corroboration from a family member of the missing person (if the applicant is not a family member),

7. Where relevant, the next-of-kin entitled to distribution of the assets of the missing person on his or her death, and

8. A declaration by the applicant of his or her belief that the missing person is dead. [paragraph 1.83]

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

(a) the time, location, and circumstances of the disappearance,

(b) where relevant, the abandonment of valuable property,

(c) where relevant and practicable, the extent and nature of post-disappearance searches,

(d) the presence or absence of a motive for the missing person to remain alive but disappear,

(e) where relevant, evidence suggesting that the disappearance was a consequence of foul play,

(f) where relevant, the time between a life assurance policy being obtained on the life of the missing person and his or her disappearance, and

(g) where relevant, any prior history of fraud involving the missing person. [paragraph 1.84]

5.05 The Commission recommends that it would be appropriate to include provision in the proposed adult capacity legislation for limited management 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 recommends that, pending the enactment of adult capacity legislation, an application to appoint an interim manager to manage the affairs of a missing person should be made to the Circuit Court. The Commission also recommends that, if such an application is limited to matters such as accessing a bank account in order to pay utility bills or to make a repayment on a loan or mortgage, it may be made to and granted by a County Registrar, subject to appeal to the Circuit Court. The Commission also recommends that the jurisdiction of the Circuit Court should be concurrent with the High Court; that, where the rateable valuation of any land to which an application relates exceeds €254, the Circuit Court should, on the application of an applicant, transfer the proceedings to the High Court, but any declaration or decision made in the course of such proceedings before the transfer shall be valid unless discharged

or varied by the High Court; and that the jurisdiction conferred on the Circuit Court should be exercised by the judge of the Circuit in which the missing person was ordinarily resident or carried on any business, profession or occupation before he or she went missing. [paragraph 2.24]

5.06 The Commission recommends that an order to appoint an interim manager to manage 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 2.31]

5.07 The Commission recommends that the following persons should be entitled to apply to be appointed as the interim manager of the property of a missing person: (a) the spouse or civil partner of the missing person, (b) the cohabitant of the missing person, (c) any other family member of the missing person, including a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the missing person, (d) a person who is acting *in loco parentis* to the missing person, (e) a dependant of the missing person, (f) a creditor of the missing person or (g) any other person with a sufficient interest including, where relevant, the Attorney General or other person acting on behalf of the State. [paragraph 2.38]

5.08 The Commission recommends that an interim manager have limited and specified powers to administer the affairs of the missing person for a period of up to 2 years, which can be extended for a further 2 years. The Commission also recommends that the Court should be empowered, prior to making any order, to serve notice on any person who may be affected by the appointment, including where the interim manager is given a power of sale. The Commission also recommends that the manager must act in the best interests of the missing person at all times. The Commission also recommends that the interim manager must file annual accounts in court in such format as prescribed in the order of appointment. The Commission also recommends that, in the event that the interim manager becomes aware that the missing person is in fact alive, the interim manager must apply for an order discharging his or her appointment. [paragraph 2.46]

5.09 The Commission 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 death. The Commission also recommends that this declaration could be made by a coroner and would be identical to a standard declaration of death; that it would therefore require the applicant to register the death of the missing person in the Register of Deaths provided for under the *Civil Registration Act 2004*; that it would allow the

applicant to obtain a death certificate for the deceased missing person; and that this death certificate would have the same legal consequences as if it were known for certain that the person had died. The Commission also recommends that the coroner should be empowered, prior to making any order, to serve notice on any person who may be affected by the making of the order. [paragraph 3.12]

5.10 The Commission recommends that, in circumstances where death is highly probable, application may be made to the Circuit Court to obtain a declaration of presumed death. This declaration would allow the issuing of a death certificate with all the effects of a standard death certificate. The Commission also recommends that the presumed death be placed on a Register of Presumed Deaths to be established under the *Civil Registration Act 2004*. The Commission also recommends that the jurisdiction of the Circuit Court shall be concurrent with the High Court; that, where the rateable valuation of any land to which an application relates exceeds €254, the Circuit Court shall, on the application of an applicant, transfer the proceedings to the High Court, but any declaration or decision made in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court; and that the jurisdiction conferred on the Circuit Court may be exercised by the judge of the Circuit in which the missing person was ordinarily resident or carried on any business, profession or occupation before he or she went missing. The Commission also recommends that the Court should be empowered, prior to making any order, to serve notice on any person who may be affected by the making of the order. [paragraph 3.18]

5.11 The Commission 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 whether a person is alive, their death may be presumed, subject to satisfying the proofs already referred to in this Report. The Commission also recommends that it should be provided, to avoid any doubt, that the 7 years reference period does not constitute a mandatory minimum waiting period, and that an application may be made at any time to the Circuit Court where it is established that, on the balance of probabilities, death may be presumed. The Commission also recommends that, where a presumption of death order is made and it is established that the missing person has died on a specific date, the order must include a finding as to the date and time of death. Where it is uncertain when, within any period of time, the missing person died, the order must provide that he or she died at the end of that period. Where a presumption of death order is made and it is established that the missing person has not been known to be alive for a period of at least 7 years, the order must include a finding that the missing person died at the end of the day occurring 7 years after the date on which he or she was last known to be alive. [paragraph 3.23]

5.12 The Commission recommends that the following persons may apply for a declaration of presumed death: (a) the spouse or civil partner of the missing person, (b) the cohabitant of the missing person, (c) any other family member of the missing person, including a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the missing person, (d) a person who is acting in loco parentis to the missing person, (e) a dependant of the missing person, (f) a creditor of the missing person or (g) any other person with a sufficient interest including, where relevant, the Attorney General or other person acting on behalf of the State. [paragraph 3.30]

5.13 The Commission recommends that a declaration of presumed death should, in general, have the effect that a marriage or civil partnership has come to an end; and that appropriate provision to this effect should also be made in the relevant provisions of the *Family Law (Divorce) Act 1996* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. [paragraph 3.40]

5.14 The Commission recommends that a missing person in respect of whom an interim manager has been appointed or who has been declared presumed dead, but who returns, may apply to dissolve such orders and for such consequential orders for the return of property or the variation of any distribution of the assets or property of the person. The Commission 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 the orders made. The Commission 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 appointment of an interim manager or the declaration of presumed death as it considers just and reasonable in all the circumstances. The Commission also recommends that: (a) the variation order will have no effect on any income disbursed between the time of the making of such orders 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 return of the property against him or her. [paragraph 4.11]

5.15 The Commission recommends that the court may order that an applicant for appointment as interim manager or an applicant for a declaration of presumed death 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; and that if the missing person had a life insurance policy, the insurer may require the person who receives the proceeds of the policy to take out an additional insurance policy. [paragraph 4.12]

5.16 The Commission recommends that where a declaration of death or presumed death has been made, that person's marriage should, in general

terms, not remain valid even if the missing person returns. The Commission also recommends, that in the case of a person who has been declared dead and who was, at the time the declaration was made, in a subsisting marriage, but who later returns, he or she may apply to the Circuit Court seeking a declaration that the marriage continues to have effect, and that the Court should, in this respect, have a discretion to make such order as in the court's view appears just. [paragraph 4.21]

5.17 The Commission recommends that where a declaration of death or presumed death has been made, any pre-existing civil partnership should, in general terms, not remain valid even if the missing person returns. The Commission also recommends, where a person has been declared dead and who was, at the time the declaration was made, in a subsisting civil partnership, but who later returns, he or she may apply to the Circuit Court seeking a declaration that the civil partnership continues to have effect, and that the Court should have a discretion to make such order as in the court's view appears just. [paragraph 4.25]

5.18 The Commission recommends that where an Irish citizen disappears while abroad an application may be made to the Circuit Court for any of the orders provided for in this Report, namely (a) an order for the interim management of the missing person's property or (b) a declaration of presumed death. The Commission also recommends that any such application should be subject to the same criteria as apply where the Court grants such orders in respect of a person who has gone missing in Ireland, and that the 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 Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities. [paragraph 4.30]

5.19 The Commission 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 Circuit Court by any interested person who has been habitually resident in the State for 12 months for any of the orders provided for in this Report, namely (a) an order for the interim management of the missing person's property or (b) a declaration of presumed death. The Commission recommends that an application may also be made for the orders provided for in this Report by a spouse or other family member 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 recommends that the 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 Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities. [paragraph 4.42]

APPENDIX: DRAFT CIVIL LAW (MISSING PERSONS) BILL 2013

Draft Civil Law (Missing Persons) Bill 2013

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4. Order for interim management of property of missing person
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6. General effects of presumption of death order
7. Insurance against claims
8. Dissolution and Variation Order and consequences of return of missing person
9. International aspects of missing persons

10. Jurisdiction of Circuit Court

11. Consequential amendments

ACTS REFERRED TO

Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010	2010, No.24
Civil Registration Act 2004	2004, No.3
Coroners Act 1962	1962, No.9
Criminal Justice (Location of Victims' Remains) Act 1999	1999, No.9
Family Law (Divorce) Act 1996	1996, No.33

DRAFT CIVIL LAW (MISSING PERSONS) BILL 2013

Bill

entitled

An Act to provide for the effects in civil law of persons who are missing, including arrangements for interim management of the missing person's property, and to provide for the civil status of the missing person where the circumstances of their absence leads to a presumption of death; and to provide for related matters.

Be it enacted by the Oireachtas as follows:

Short title and commencement

1.—(1) This Act may be cited as the Civil Law (Missing Persons) Act 2013.

(2) This Act comes into operation on such day or days as the Minister for Justice and Equality may appoint by order or orders either generally or with reference to any particular purpose or provision, and different days may be so appointed for different purposes or provisions.

Explanatory Note

This is a standard provision setting out the Short Title and commencement arrangements.

Interpretation

2.—In this Act, unless the context otherwise requires—

“applicant” has the meaning given in *section 3*;

“EC Convention” means the Convention Abolishing the Legalisation of Documents in the Member States of the European Communities of 25 May 1987;

“Hague Convention” means the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents done at the Hague on 5 October 1961;

“Minister” means the Minister for Justice and Equality;

“missing person” means a person who is observed to be missing from his or her normal patterns of life, that those who are likely to have heard from the person are unaware of the person’s whereabouts and that the circumstances of the person being missing raises concerns for his or her safety and well-being.

Explanatory Note

This section contains some key definitions of terms used throughout the Bill. The definition of “missing person” implements the recommendation in paragraph 1.13 that a missing person should be defined, for the purposes of legislation dealing with the civil law aspects of missing persons, as a person who is observed to be missing from his or her normal patterns of life, where those who are likely to have heard from the missing person are unaware of his or her

whereabouts and where the circumstances of the person being missing raise concerns for the person's safety and well-being.

Persons who may apply for orders under this Act

3. — The following, in this Act referred to as the applicant, may apply for an order provided for in *section 4* and *section 5* of this Act —

- (a) the spouse or civil partner of the missing person,
- (b) the cohabitant of the missing person,
- (c) any other family member of the missing person, including a child, grandchild, parent, grandparent, brother, sister, uncle, aunt, nephew or niece of the missing person,
- (d) a person who is acting in *loco parentis* to the missing person,
- (e) a dependant of the missing person,
- (f) a creditor or
- (g) any other person with a sufficient interest including, where relevant, the Attorney General or other person acting on behalf of the State.

Explanatory Note

This section implements the recommendation in paragraph 2.38 concerning the persons who may apply for an order under *section 4* of this Bill for interim, limited, management of the property of a missing person; and the recommendation in

paragraph 3.30 that the same persons may apply for a presumption of death order under *section 5* of this Bill.

Order for interim management of property of missing person

4. — (1) An applicant may, subject to the conditions in this section, apply to the Circuit Court for an order to be appointed as the interim manager of the property of a missing person.

(2) A County Registrar may, subject to appeal by way of re-hearing to the Circuit Court, make an order appointing a person as interim manager of the property of a missing person where the appointment does not involve empowering the interim manager, on behalf of the missing person, to initiate or defend proceedings, or to enter into a conveyance of an interest or estate in land.

(3) An order may be made under this section only where it is established by the applicant, grounded on an affidavit, that—

(a) it is not known whether the missing person is alive,

(b) reasonable efforts have been made to find the missing person, and

(c) for at least 90 days, the missing person has not contacted—

(i) any person who lives at the missing person's last-known home address, or

(ii) any relative or friend of the missing person with whom he or she is likely to communicate.

(4) Prior to making an order under this section, the Court may serve notice on any person who may be affected by the appointment, including where the interim manager is given a power of sale.

(5) The appointment of a person as interim manager of the property of the missing person shall be —

(a) subject to the duty of the interim manager to act in the best interests of the missing person at all times,

(b) subject to such limited and specified powers and actions of the interim manager as are laid down in the order of appointment, and

(c) for a period of up to 2 years, which term may be extended for a further 2 years.

(6) The interim manager shall file annual accounts with the Court in such form as shall be prescribed by the Court in the order of appointment.

(7) Where the interim manager becomes aware that the missing person is alive, he or she shall apply to the court for an order discharging his or her appointment.

Explanatory Note

Subsection (1) implements the recommendation in paragraph 2.24 that, pending the enactment of adult capacity legislation, an application to appoint an interim manager to manage the property of a missing person should be made to the Circuit Court. Such an application does not require that the applicant establish that the missing person is presumed dead. Assuming the enactment of adult capacity legislation, applications would then be made using the mechanisms in such legislation, which would reflect comparable provisions in the legislation on capacity and adult guardianship in, for example, Australia, Canada and England, and which are discussed in this Report.

Subsection (2) implements the recommendation in paragraph 2.24 that a County Registrar may, subject to appeal to the Circuit Court, appoint a person as interim manager, provided that this is limited to matters such as accessing a bank account in order to pay utility bills or to make a repayment on a loan or mortgage.

Subsection (3) implements the recommendation in paragraph 2.31 that an order to appoint an interim manager 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.

Subsection (4) implements the recommendation in paragraph 2.46 that, prior to making any order, the Court may serve notice on any person who may be affected by the appointment, including where the interim manager is given a power of sale.

Subsection (5) implements the recommendation in paragraph 2.46 that the interim manager must act in the best interests of the missing person at all times, that the order will specify the exact powers and type of actions that the manager is to have, and that the appointment is for a period of up to 2 years, which can be extended for a further 2 years.

Subsection (6) implements the recommendation in paragraph 2.46 that the manager must file annual accounts with the Court.

Subsection (7) implements the recommendation in paragraph 2.46 that, in the event that the interim manager becomes aware that the missing person is in fact alive, the manager must apply to court for an order discharging his or her appointment.

Presumption of death order in respect of missing person

5. — (1) An applicant may, subject to the conditions in this section, apply for a presumption of death order in respect of a missing person.

(2) An application for a presumption of death order shall be grounded on an affidavit by the applicant and shall contain the following—

(a) specific evidence tending to indicate that the missing person is dead, including —

(i) the circumstances surrounding the disappearance of the missing person,

(ii) absence of communication with people who would be likely to hear from the missing person, including last known correspondence or communication, and

(iii) the length of time since the disappearance,

(b) the date when the missing person was last heard from,

(c) evidence of advertising for information concerning the whereabouts of the missing person, including where relevant by using the internet and social media (unless there are exceptional reasons for not doing so, explained by the applicant),

(d) where relevant and practicable, evidence from a searching organisation that confirms that attempts were made to locate the missing person but were fruitless (whether by affidavit, statutory declaration or, in the case of searches outside the State, in accordance with the EC Convention or the Hague Convention),

(e) the full background relating to the disappearance of the missing person, including the missing person's age and health (including mental health),

(f) where relevant and practicable, evidence of corroboration from a family member of the missing person (if the applicant is not a family member),

(g) where relevant, the next-of-kin entitled to distribution of the assets of the missing person on his or her death, and

(h) a declaration by the applicant of his or her belief that the missing person is dead.

(3) A presumption of death order may be made by a coroner following an inquest held under the Coroners Act 1962 where the coroner is satisfied that, in respect of the missing person, the circumstances of the person having gone missing indicate that his or her death is virtually certain.

(4) A presumption of death order may be made by the Circuit Court where the Court is satisfied that, in respect of the missing person, the circumstances of the person having gone missing indicate that his or her death is highly probable.

(5) Prior to making an order under this section, the coroner or, as the case may be, the Court may serve notice on any person who may be affected by the making of the order.

(6) In determining whether a presumption of death order is to be made under this section, the coroner or, as the case may be, the Court shall take into account all the circumstances surrounding the disappearance and absence of the missing person, including the following—

(a) the time, location, and circumstances of the disappearance,

(b) where relevant, the abandonment of valuable property,

(c) where relevant and practicable, the extent and nature of post-disappearance searches,

(d) the presence or absence of a motive for the missing person to remain alive but disappear,

(e) where relevant, evidence suggesting that the disappearance was a consequence of foul play,

(f) where relevant, the time between a life assurance policy being obtained on the life of the missing person and his or her disappearance, and

(g) where relevant, any prior history of fraud involving the missing person.

(7) (a) Without prejudice to the rebuttable presumption in *paragraph (b)*, and subject to the requirements of this section, an application for a presumption of death order may be made at any time after a person has gone missing and is not subject to a minimum waiting period.

(b) 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 missing person is alive, it shall continue to be presumed that the person is dead.

(8) (a) Where the coroner or, as the case may be, the Circuit Court, makes a presumption of death order and is satisfied that the missing person has died on a specific date, the order shall include a finding as to the date and time of death and, where it is uncertain when, within any period of time, the missing person died, the order shall provide that he or she died at the end of that period.

(b) Where the coroner or, as the case may be, the Circuit Court, makes a presumption of death order and is satisfied that the missing person has not been known to be alive for a period of at least 7 years, the order shall include a finding that the missing person died at the end of the

day occurring 7 years after the date on which he or she was last known to be alive.

Explanatory Note

Subsection (1) implements the general recommendation in paragraph 1.82 that there should be a statutory framework to provide for making presumption of death orders.

Subsection (2) implements the recommendation in paragraph 1.83 concerning the detailed list of matters which an applicant must include in a sworn affidavit when applying for a presumption of death order. This must include: (a) specific evidence tending to indicate that the missing person is dead, including, (i) the circumstances surrounding the disappearance of the missing person, (ii) absence of communication with people who would be likely to hear from the missing person, including last known correspondence or communication, and (iii) the length of time since the disappearance; (b) the date when the missing person was last heard from; (c) evidence of advertising for information concerning the whereabouts of the missing person, including where relevant by using the internet and social media (unless there are exceptional reasons for not doing so, explained by the applicant); (d) where relevant and practicable, evidence from a searching organisation that confirms that attempts were made to locate the missing person but were fruitless (whether by affidavit, statutory declaration or, in the case of searches outside the State, in accordance with the 1961 Hague Convention on Proof of Foreign Public Documents (the Apostille Convention) or the 1987 EC Convention on Proof of Documents in the European Communities); (e) the full background relating to the disappearance of the missing person, including the missing person's age and health (including mental health); (f) where relevant and practicable, evidence of corroboration from a family member of the missing person (if the applicant is not a family member); (g) where relevant, the next-of-kin entitled to distribution of the assets of the missing person on his or her death; and (h) a declaration by the applicant of his or her belief that the missing person is dead.

Subsections (3) and (4) implement the recommendation in paragraph 1.82, that, for the purposes of this legislation, there are two categories of missing persons: those who go missing in circumstances (whether arising, for example, from a civil accident or arising from a violent incident) where their death is virtually certain; and those who go missing in circumstances (for example, mountain-climbing or other dangerous activity) that their death is highly probable. *Subsection (3)* implements the recommendation in paragraph 3.12 that a coroner may make a presumption of death order where death is virtually certain. As noted in the Report, coroners have already made declarations of death under section 23 of the *Coroners Act 1962* in respect of some missing persons, so that the Commission's recommendations would provide clarity as to the grounds for making such orders. *Subsection (4)* implements the recommendation in paragraph 3.18 that the Circuit Court may make a presumption of death order where death is highly probable. As also noted in the Report, the High Court currently makes presumption of death orders, but these are limited in scope, and the Commission's recommendations, implemented in the sections of the Bill that follow, would provide for a single process where all relevant civil law issues could be dealt with in a single application. The general effects of the presumption of death orders are dealt with in *section 6* of the Bill.

Subsection (5) implements the recommendation in paragraphs 3.12 and 3.18 that, prior to making an order under this section, the coroner or, as the case may be, the Court may serve notice on any person who may be affected by the making of the order.

Subsection (6) implements the recommendation in paragraph 1.84 that, in determining whether a presumption of death is to be ordered, all the circumstances surrounding the absence of the missing person must be taken into account, including: (a) the time, location, and circumstances of the disappearance, (b) where relevant, the abandonment of valuable property, (c) where relevant and practicable, the extent and nature of post-disappearance searches, (d) the presence or absence of a motive for the missing person to remain alive but disappear, (e) where relevant, evidence suggesting that the disappearance was a consequence of foul play, (f) where relevant, the time between a life assurance policy being obtained on the life of the missing person and his or her disappearance, and (g) where relevant, any prior history of fraud involving the missing person.

Subsection (7)(a) implements the recommendation in paragraph 3.12 that, subject to complying with the requirements already set out in this section, there should be no minimum waiting period before an application can be made to obtain a declaration of presumed death order. *Subsection (7)(b)* implements the recommendation in paragraph 3.23 that where, because of a person's absence from the State or otherwise, it remains uncertain for a period of at least 7 years as to whether the missing person is alive, it should continue to be presumed that the person is dead: this also retains the long-standing 7 year common law presumption of death rule. The combined effect of *subsections 7(a) and 7(b)* is to confirm the existing law that those left behind need not necessarily wait for 7 years before applying for a presumption of death order, and also that after 7 years absence, where it is uncertain that the person is alive, it can still be presumed that he or she is dead.

Subsection (8) implements the recommendation in paragraph 3.23 that a specific date of death be identified in a presumption of death order. It is based on the comparable provisions of section 2(1) of the *Presumption of Death Act (Northern Ireland) 2009*, and it follows from the different circumstances in which a coroner or, as the case may be, the Circuit Court, makes a presumption of death order. *Subsection (8)(a)* provides that where the coroner or, as the case may be, the Circuit Court, makes a presumption of death order and is satisfied that the missing person has died on a specific date, the order must include a finding as to the date and time of death and, where it is uncertain when, within any period of time, the missing person died, the order must provide that he or she died at the end of that period. *Subsection (8)(b)* provides that where the coroner or, as the case may be, the Circuit Court, makes a presumption of death order and is satisfied that the missing person has not been known to be alive for a period of at least 7 years (in other words, in situations where the 7 year rule in *subsection 7(b)* of this Bill applies), the order must include a finding that the missing person died at the end of the day occurring 7 years after the date on which he or she was last known to be alive. Specifying the date of death is important in terms of all the consequences that follow from a declaration of death, including the payment of any life assurance policy, succession law and the related distribution of the property and estate of the person.

General effects of presumption of death order

6. — (1) Subject to the provisions of this Act, a presumption of death order made by a coroner under *section 5* has the same effect in law as a declaration of death made under the Coroners Act 1962.

(2) Subject to the provisions of this Act, a presumption of death order made by a coroner under *section 5* authorises the applicant to apply to register the death of the missing person in the Register of Deaths provided for in Part 5 of the Civil Registration Act 2004, and the appropriate registrar shall register the death in the Register of Deaths in such manner as an tArd-Chláraitheoir may direct.

(3) Subject to the provisions of this Act, a presumption of death order made by the Circuit Court under *section 5* has the same effect in law that arises from issuing a death certificate in accordance with the Civil Registration Act 2004.

(4) An tArd-Chláraitheoir shall establish a Register of Presumed Deaths.

(5) Subject to the provisions of this Act, a presumption of death order made by the Circuit Court under *section 5* authorises the applicant to apply to register the death of the missing person in the Register of Presumed Deaths, and the appropriate registrar shall register the death in the Register of Presumed Deaths in such manner as an tArd-Chláraitheoir may direct.

(6) (a) A presumption of death order made by a coroner or by the Circuit Court under *section 5* has the effect, subject to *section 8(5)(a)*, that a marriage with the missing person has come to an end.

(b) A presumption of death order made by a coroner or by the Circuit Court under *section 5* has the effect, subject to *section 8(5)(b)*, that a civil partnership with the missing person has come to an end.

Explanatory Note

Subsection (1) implements the recommendation in paragraph 3.12 that a presumption of death order made by a coroner under *section 5* of this Bill has the same legal effect as a standard declaration of death made under the *Coroners Act 1962*.

Subsection (2) implements the recommendation in paragraph 3.12 that the making of a presumption of death order by a coroner under *section 5* of this Bill would authorise the applicant to register the death of the missing person in the Register of Deaths provided for in Part 5 of the *Civil Registration Act 2004*. This would, in turn, allow the applicant to obtain a death certificate for the missing person, which would have the same legal consequences that arise as if it were known for certain that the person had died. As the notes to *sections 5(3) and (4)*, above, point out this reflects the current position where coroners have made declarations of death in respect of missing persons under the

Coroners Act 1962. These legal consequences are, however, made subject to the other recommendations of the Commission (and the resulting provisions of *section 8* of the Bill), in particular in the unlikely event that the missing person returns.

Subsection (3) implements the recommendation in paragraph 3.18 that a presumption of death order made by the Circuit Court under *section 5* of this Bill has the same legal effect that arises from issuing a standard death certificate under the *Civil Registration Act 2004*.

Subsection (4) implements the recommendation in paragraph 3.18 that a Register of Presumed Deaths should be established under the *Civil Registration Act 2004*. The Commission recognises that this would require detailed amendments to the *Civil Registration Act 2004*, notably, the addition of a Register of Presumed Deaths to the list of registers in section 13 of the 2004 Act, and the insertion of a new Part into the 2004 Act, which would, in general, mirror the existing provisions in Part 5 of the 2004 Act concerning the Register of Deaths.

Subsection (5) implements the recommendation in paragraph 3.18 that the making of a presumption of death order by the Circuit Court under *section 5* of this Bill would authorise the applicant to apply to register the death of the missing person in the Register of Presumed Deaths. This would, in turn, allow the applicant to obtain a death certificate for the missing person, which would have the same legal consequences that arise on the death of any person. As with a presumption of death order made by a coroner, these legal consequences are, however, made subject to the other recommendations of the Commission (and the resulting provisions of *section 8* of the Bill), in particular in the unlikely event that the missing person returns.

Subsection (6) implements the recommendation in paragraph 3.40 that a presumption of death order made by a coroner or by the Circuit Court under *section 5* of this Bill has the effect that a marriage or, as the case may be, a civil partnership with the missing person has come to an end. As with the other provisions of this section, these legal consequences are, however, made subject to the other recommendations of the Commission in paragraphs 4.21 and 4.25 (and the resulting provisions of *section 8(5)* of the Bill), in particular in the unlikely event that the missing person returns.

Insurance against claims

7.—(1) Where an order has been made under *section 4* or *section 5*, the interim manager appointed under *section 4* or, as the case may be, the person who applied under *section 5* shall, unless the court otherwise directs, as soon as may be effect a policy of insurance in respect of any claim which may arise by virtue of an order under *section 8(2)*.

(2) Any premium payable by the interim manager or, as the case may be, the person who applied under *section 5* in respect of a policy of insurance effected under *subsection (1)* shall be a proper charge on, as the case may be, the property of the missing person being managed by the interim manager or the estate of the missing person being administered by the person who applied under *section 5*.

(3) Where an order has been made under *section 4* or *section 5*, an insurer may, before making payment of any capital sum (other than in respect of an annuity or other periodical payment) to any person as a result of such order, require that person to effect in his or her own name for the benefit of that insurer a policy of insurance to satisfy any claim which that insurer may establish in the event of an order under *section 8(2)* being made.

Explanatory Note

This section implements the recommendation in paragraph 4.12 that the court may order that an applicant for appointment as interim manager or an applicant for a declaration of presumed death 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; and that if the missing person had a life insurance policy, the insurer may require the person who receives the proceeds of the policy to take out an additional insurance policy. This section draws on the comparable provisions in section 7 of the *Presumption of Death Act (Northern Ireland) 2009*.

Dissolution and Variation Order and consequences of return of missing person

8. — (1) A missing person in respect of whom an order has been made under *section 4* or *section 5*, and who subsequently returns to the State, may apply to the Circuit Court for an order, in this Act referred to as a variation order, dissolving or varying the terms of any such order made under *section 4* or *section 5*.

(2) Subject to the provisions of this section, a variation order shall not have any effect on rights to, or in, any property acquired as a result of an order made under *section 4* or *section 5*.

(3) The Court shall, when making a variation order, make such further order, if any, in relation to any rights to or in any property acquired as a result

of an order made under *section 4* or *section 5* as it considers reasonable in all the circumstances.

(4) Without prejudice to the generality of *subsection (3)*—

(a) a variation order shall have no effect on any income accrued between the time of the making of an order under *section 4* or *section 5* and the variation order, and

(b) where a third party acquires rights to or in the property of the missing person, in good faith and for value, the missing person who has returned may not bring a claim for the property against the third party.

(5) (a) Notwithstanding the generality of *section 6(6)(a)*, a missing person in respect of whom an order has been made under *section 5* and who returns to the State may apply to the Circuit Court for a declaration that a marriage that subsisted at the time the order was made continues to have effect, and in determining that application the Court may, in its discretion, make such order as, in the Court's view, appears just.

(b) Notwithstanding the generality of *section 6(6)(b)*, a missing person in respect of whom an order has been made under *section 5* and who returns to the State may apply to the Circuit Court for a declaration that a civil partnership that subsisted at the time the order was made continues to have effect, and in determining that application the Court may, in its discretion, make such order as, in the Court's view, appears just.

Explanatory Note

Subsection (1) implements the recommendation in paragraph 4.11 that a missing person in respect of whom an order has been made under *section 4* or *section 5*, and who subsequently returns to the State, may apply to the Circuit Court for an order dissolving or varying the terms of any such order. The provisions on Variation Orders in section 8 are in line with those in the *Presumption of Death Act (Northern Ireland) 2009*.

Subsection (2) implements the recommendation in paragraph 4.11 that, subject to the specific provisions of this section of the Bill, a variation order does not have any effect on rights to, or in, any property acquired as a result of any order made under *section 4* or *section 5* of this Bill.

Subsection (3) implements the recommendation in paragraph 4.11 that, where the Circuit Court makes a variation order, it 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.

Subsection (4) implements the recommendations in paragraph 4.11 that: (a) a variation order is not to have any effect on any income accrued between the time of the making of an order under *section 4* or *section 5* of this Bill and the variation order, and (b) where a third party acquires rights to or in the property of the missing person, in good faith and for value, the missing person who has returned may not bring a claim for the property against the third party.

Subsection (5) implements the recommendations in paragraphs 4.21 and 4.25 that notwithstanding the generality of *section 6(6)* of this Bill (that a presumption of death order made under *section 5* of this Bill brings a marriage or, as the case may be, a civil partnership to an end), a missing person in respect of whom an order has been made under *section 5* and who returns to the State may apply to the Circuit Court for a declaration that a marriage or, as the case may be, a civil partnership that subsisted at the time the order was made continues to have effect, and in determining that application the Court may, in its discretion, make such order as, in the Court's view, appears just.

International aspects of missing persons

9. — (1) Where a citizen of Ireland goes missing while outside the State, the Circuit Court may make, in accordance with the provisions of this section —

- (a) an order for the interim management of the property of the missing person in the form provided for under *section 4*, and
- (b) a presumption of death order in the form provided for under *section 5*,

and the provisions of *sections 2 to 8* related to the application for, the making of and the effects of such orders shall apply with such necessary modifications and adjustments as are necessary for the purpose of this section.

(2) Where 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 the State for 12 months and who goes missing while in the State, or is believed to have gone missing in the State, the Circuit Court may, on the application of an applicant who has been habitually resident in the State for 12 months, make, in accordance with the provisions of this section —

- (a) an order for the interim management of the property of the missing person in the form provided for under *section 4*, and
- (b) a presumption of death order in the form provided for under *section 5*,

and the provisions of *sections 2 to 8* related to the application for, the making of and the effects of such orders shall apply with such necessary modifications and adjustments as are necessary for the purpose of this section.

(3) An application may be made under *subsection (3)* by a spouse or family member 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) In any application under *subsections (1) or (2)*, the Circuit Court may, where relevant, recognise any orders made in any other State in connection with the disappearance of the missing person, subject to relevant rules concerning proof of foreign documents, including those in the EC Convention and the Hague Convention.

Explanatory Note

Subsection (1) implements the recommendations in paragraph 4.30 that where a citizen of Ireland goes missing while outside the State, the Circuit Court may make (a) an order for the interim management of the property of the missing person in the form provided for under *section 4* of this Bill, and (b) a presumption of death order in the form provided for under *section 5* of this Bill; and that the provisions of *sections 2 to 8* that relate to the application for, the making of and the effects of such orders are to apply in an application under *subsection (1)*.

Subsections (2) and (3) implement the recommendations in paragraph 4.42 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 Circuit Court by any interested person who has been habitually resident in the State for 12 months for (a) an order for the interim management of the property of the missing person in the form provided for under *section 4* of this Bill, and (b) a presumption of death order in the form provided for under *section 5* of this Bill; that the provisions of *sections 2 to 8* that relate to the application for, the making of and the effects of such orders are to apply in an application under *subsection (2)*; and that an application under *subsection (2)* may be made by a spouse or family member 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*. *Subsections (2) and (3)* ensure that this Bill mirrors the comparable provisions in the *Presumption of Death Act (Northern Ireland) 2009*.

Subsection (4) implements the recommendations in paragraphs 4.30 and 4.42 that, in any application under *subsections (1) or (2)*, the Circuit Court may, where relevant, recognise any orders made in any other State in connection with the disappearance of the missing person, subject to relevant rules concerning proof of foreign documents, including those in the 1961 Hague Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities.

Jurisdiction of Circuit Court

10. — (1) The jurisdiction of the Circuit Court conferred by this Act shall be concurrent with the High Court.

(2) Where the rateable valuation of any land to which an application for an order provided for in *section 4* and *section 5* relates exceeds €254, the Circuit Court shall, on the application of an applicant, transfer the proceedings to the High Court, but any declaration or decision made in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court.

(3) The jurisdiction conferred on the Circuit Court may be exercised by the judge of the Circuit in which the missing person was ordinarily resident or carried on any business, profession or occupation before he or she went missing.

Explanatory Note

This section implements the recommendations in paragraphs 2.24 and 3.18 that (in line with the position under family law legislation) the jurisdiction of the Circuit Court concerning both interim management orders and presumed death orders is to be concurrent with the High Court; that, where the rateable valuation of any land to which an application relates exceeds €254, the Circuit Court must, on the application of an applicant, transfer the proceedings to the High Court, but that any declaration or decision made in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court; and that the jurisdiction conferred on the Circuit Court may be exercised by the judge of the Circuit in which the missing person was ordinarily resident or carried on any business, profession or occupation before he or she went missing.

Consequential amendments

11. — (1) The Family Law (Divorce) Act 1996 is amended by the insertion of the following section after section 10—

Presumption of death and ending of marriage

“10A — (1) Without prejudice to *section 6(6)* of the *Civil Law (Missing Persons) Act 2013*, and subject to *section 8(5)(a)* of that Act of 2013, any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may apply to the court to have it presumed that the other party is dead and that the marriage has ended, and provided the requirements of *section 5(2)*, (4), (5) (6) and (7) of that Act of 2013 are complied with, the court may, if satisfied that such reasonable grounds exist, grant a declaration of presumption of death and make a declaration that the marriage has ended.

(2) In any proceedings under this section the fact that for a period of 7 years or more the other party to the marriage has been continually absent from the applicant and the applicant 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.”

(2) The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 is amended by the insertion of the following section after section 113—

Presumption of death and ending of civil partnership

“**113A** — (1) Without prejudice to *section 6(6)* of the *Civil Law (Missing Persons) Act 2013*, and subject to *section 8(5)(a)* of that Act of 2013, a civil partner who alleges that reasonable grounds exist for supposing that the other party to the civil partnership is dead may apply to the court to have it presumed that the other party is dead and that the civil partnership has ended, and provided the requirements of *section 5(2), (4), (5) (6) and (7)* of that Act of 2013 are complied with, the court may, if satisfied that such reasonable grounds exist, grant a declaration of presumption of death and make a decree that the civil partnership has ended.

(2) In any proceedings under this section the fact that for a period of 7 years or more the other party to the civil partnership has been continually absent from the applicant and the applicant 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.”

Explanatory Note

This section implements the recommendation in paragraph 3.40 that, to complement the provisions in this Bill that a declaration of presumed death should have the effect that a marriage or civil partnership has come to an end, appropriate provision should also be made in the relevant provisions of the *Family Law (Divorce) Act 1996* and the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*.