

Missing Persons

The horrendous death toll in the recent tsunami disaster unfortunately raises interesting legal questions.

The bodies of many of the victims may never be recovered. Public officials have simply *assumed* these people are dead for the purposes of reporting to the public. It another matter, however, to fulfill the legal requirements necessary to obtain official recognition that a particular individual is dead.

An individual's disappearance inevitably raises a variety of legal questions, ranging from the preservation of assets and the administration of the property to the right to inheritances and insurance proceeds.

When faced with a situation involving a missing person, the estate lawyer must determine which remedies may be available. Is there sufficient evidence to apply immediately for a court order of presumption of death? If not, should application instead be made to appoint an interim curator to administer the missing person's affairs?

In British Columbia, the relevant statutory provisions are:

- the *Estates of Missing Persons Act*, which provides, *inter alia*, for the appointment of an interim curator to deal with the property of the missing person; and

The presumption will not arise if the circumstances are such as to account for the absence.

- the *Survivorship and Presumption of Death Act*, which authorizes applications for a declaration of presumption of death and provides for a presumption of order of death where two or more persons die simultaneously.

The Common Law Rules

A. The Presumption of Death

It is helpful to first consider the common law, before these statutes.



The headnote to the case, *Re Phene's Trusts* (1869) L.R. 5 Ch. 139, succinctly summarizes the law as follows.

If a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time he died within that period is not a matter of presumption, but of evidence; the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.

Specifically, the common law courts would presume a missing person to be deceased only if all the following circumstances were proven:

- the person had been absent for at least seven years;
- during those seven years, the person had not contacted the persons he or she would normally contact;
- all reasonable enquiries have been made as to the person's whereabouts; and
- all these reasonable enquiries were to no avail.

Thus, for the presumption of death to arise, *there must be an unexplained absence*. The presumption will *not* arise if the circumstances are such as to account for the absence. Even where the original absence was capable of explanation, however, that may change. Thus an unexpectedly prolonged absence, together with no contact with family or friends, *may* be sufficient to satisfy the absence requirement.

Where it is shown, however, that the lack of contact by the missing person was characteristic, then the presumption of death will *not* arise.

The reasonable enquiries required will depend on the circumstances of the case. Generally speaking, enquiries must have been made to everyone who might normally have heard from or of the missing person. In addition, the court will usually require that enquiries be made of police departments, phone records, bank records, and by advertising in the locale where the person was last known to be.

There is no legal presumption as to any particular date, within the seven year period, that the person died; thus any precise date of death must be established by the evidence.

Once the presumption is established, the missing person will be declared dead in the absence of evidence to rebut the presumption. Rebuttal evidence usually focuses on possible motives for the missing person to deliberately disappear. For example alternative explanations for the disappearance such as criminal involvement, financial, or family problems may prevent the presumption from prevailing.

Proof of presumed death requires proof only on the balance of probabilities. Further, the onus of proof rests with the person who will benefit from the declaration of death. (*Re Lewe's Trusts* (1871) 6 Ch. App. 356)

B. The Inference of Death

At common law, the presumption of death based on passage of time could arise only after seven years.

In addition, however, it has long been

possible for the courts to infer death from reasonable evidence. Such fact situations are usually linked to an act of peril at the time of the disappearance. Examples could include disappearing while climbing Mount Everest or disappearing during a natural disaster such as the tsunami.

To persuade a court to infer death, based on the circumstances of disappearance, it is necessary to provide evidence from which the court would reasonably conclude that there could be:

- a) no other reasonable explanation for the absence; and
- b) no apparent motive for the disappearance.

The person claiming a right for which proof of death is necessary bears the burden of proof.

C. The Time of Death

At common law, it is sometimes important for succession purposes to determine whether the missing person survived to a particular relevant date.

The courts could declare that a person had died by a specified date if that date was established by the evidence. It was most often inferred from circumstantial evidence.

If death is to be presumed, the court will simply determine that the date of death was some time during the seven-year period following the disappearance. Although the courts have stated it is more likely that the missing person died sooner rather than later, there is no such presumption in law. It always a matter of satisfying the court based on the evidence adduced.

The person claiming a right for which proof of death is necessary bears the burden of proof. Similarly a person claiming a right for which proof of date of death is necessary bears the burden of proof.

For a death is to be presumed, the

person bearing the onus of proof must raise a *prima facie* case, whereupon the burden to rebut the presumption shifts to the person or persons who would deny the death has occurred.

Survivorship and Presumption of Death Act

The *Survivorship and Presumption of Death Act*, Section 3, replaces the common law requirement of a seven-year absence and instead provides that *any unexplained absence may be sufficient to justify an order of presumed death*.

The court *may* grant an order of presumed death where a review of the evidence satisfies the court on a number of grounds that the person should be presumed dead. The conditions are as follows:

- a) that the person has been absent and not heard of or from since a specific date, which is named in the application;
- b) that the person bringing the application has no reason to believe that the person is living; and
- c) that reasonable grounds exist for supposing that the person is dead.

Section 3 also allows the court to make an order that a person shall be presumed dead for all purposes, or *only* for those purposes that are specified in the order. This allows the court to satisfy immediate needs without prejudicing the interests of other parties.

Again, the presumption may be rebutted by contrary evidence.

A. Simultaneous Deaths

Section 2 of the *Survivorship and Presumption of Death Act* provides that when two or more persons “die at the same time or in circumstances that make it uncertain which of them survived the other or others, those deaths are, for all purposes affecting the title to property, presumed to have occurred in the order of seniority, and accordingly the younger is deemed to have survived the older.”

There are a few exceptions to this general provision such as:

- 1) Section 72 of the *Insurance Act*, which deems the beneficiary to have died before the insured;
- 2) death of an executor named in a Will that names an alternate executor clause;
- 3) death of a beneficiary under an instrument that contains an alternate disposition of property with alternate beneficiaries;
- 4) in accident or sickness insurance policies, the beneficiary is deemed to have died before the insured.

Subject to the exceptions contained in the Act, the effect of the presumption is that the younger person will be deemed to have survived the older person.

B. Case Law Examples

a) *Re Burgess*, 2004 BCSC 62, in estate circles known as the “Hell’s Angels case,” is good illustration of the practical considerations often applied by the court in presumption of death applications.

On or about January 7, 2002, Burgess, an actor and stuntman in the movie industry, disappeared. He had membership in the local Chapter of Hell’s Angels Motorcycle Club. On the date of his disappearance, he was planning to attend the regular meeting of the Hell’s Angels local, scheduled for the following day.

Four days later, an RCMP constable phoned Burgess’s wife. He told her that based on confidential information he had received, in his opinion her husband had been killed by the Hell’s Angels. That same day, a member of the Hell’s Angels club arrived at the Burgess home and requested that his wife turn over his “colours.” Evidence was presented that it was the custom of the club to retrieve club colours when a member died, accidentally or otherwise.

The surviving wife and mother of Burgess’s two children successfully applied under the *Survivorship and Presumption of Death Act* for a declaration that Burgess was presumed to be dead.

The court found that on the balance of probabilities, Burgess had died by misadventure.

b) *Sobliecki v. Bertsch Estate* 14 E.T.R.(2d) 63 is an illustration of a contested application involving the death of a couple in a motor vehicle accident and ensuing fire. At issue was the question of who died first. The husband was the older of the two, his wife the younger.

On or about January 7, 2002, Burgess, an actor and stuntman in the movie industry, disappeared.

The son testified that his mother was alive when he escaped the fire but that his father was not moving. On the other hand, a *post mortem* indicated the father had a higher level of carbon dioxide in his bloodstream than did his wife, likely indicating he was able to breathe longer and by implication had thus lived longer.

The husband’s sister applied to court seeking a finding that her brother had survived his wife. She stood to benefit from this finding. She alleged her brother had died last. The burden of proving that the older survived the younger is on the party alleging it.

In this case, the court was unable to determine on the evidence who had died first and thus applied the presumption of survivorship. On that basis the court found that the deaths occurred in the order of seniority.

c) In *re Schmidt* (1987) 26 E.T.R. 34, the BC Court of Appeal dealt with a lawyer who had disappeared after visiting a friend in Saskatchewan in September 1966. After the visit, the lawyer simply disappeared; the car he had been driving was never found.

Almost 10 years after the disappearance, the lawyer’s wife applied for a court order of presumption of death. The application was made in 1975. Due to delay, however, the actual court order was not made until 1985. In the order, the

court declared the lawyer dead as of a few days after his disappearance.

The insurers appealed, arguing that the date of death should be declared to be years later. They maintained the date of death should be either seven years from the date of the disappearance or as of the date of the order in 1985.

The court ruled that the date of death is not a matter of presumption but rather a matter of evidence. The onus of proving that a death took place at any time within seven years is upon the person who claims a right founded on the establishment of that fact. The court found that in this case, the circumstantial evidence had established that the lawyer died from a misadventure on or about the day he went missing.

C. Where the Deceased is Ultimately Found Alive

A personal representative is free to distribute the assets of the estate once he or she obtains an order declaring a person to be presumed dead for the purpose of distributing the estate assets.

Where, however, the personal representative later learns the person may *not* in fact be dead, then Section 4 requires him or her to refrain from further dealing with the assets unless the presumption of death is reconfirmed by an order under Section 3.

Section 5 provides that where the personal representative has distributed the estate assets, and is *not* in contravention of Section 4, then the distribution is deemed to be a final distribution against the person presumed to be dead.

Practitioners dealing with distribution problems relating to missing heirs should familiarize themselves with Section 39 of the *Trustee Act*, R.S.B.C. 1996. This provides for a court order directing the payment of the distribution of assets. The purpose of this section is to give the personal representative protection when distributing assets of an estate involving missing heirs. The specific terms of any order will depend upon the specific difficulties encountered in attempting to locate the beneficiaries.