PUMP COURT
CHAMBERS

Missing PRs, beneficiaries, creditors and people

(i) General tips:

1. When researching for missing persons try using the following searches (i) presumed deceased or death (ii) absence (iii) missing people.
2. Remember that without a body you have no death certificate. There is a lack of direct evidence to substantiate any application premised on the fact that someone is dead.
3. Stop and think before you put your evidence together, as the date of presumed death may be of fundamental import e.g. (i) surviving spouses statutory entitlements to the fixed net sum on intestacy have to be considered on all of the dates (ii) the change of law and the raising of intestacy entitlement from £125,000 to £250,000 with effect from 31 January 2009; this may also affect the right to take a grant. Whether a sole grant to spouse or joint grant to spouse and another. Moreover, no exact date of death is stated on the oath; it is merely sworn that it is believed presumed that the deceased died on or since a particular date or, where a particular date cannot be given, on or since an approximate date.
4. If both the PR and Deceased are presumed dead (often in reality two partners or spouses) then a joint application can be made to have leave to swear deaths and/or pass over of the named executor or administrator with priority.

(ii) What if a PR is missing?

Section 116 Senior Courts Act 1981

5. Historically we used s.164 Judicature Act 1925 to obtain grants when a PR is missing. Its use has been superseded by the wide discretion under s.116 Senior Courts Act 1981 to pass over a named executor or administrator with priority pursuant to r. 22 Non-Contentious Probate Rules 1987.
6. The scope of s.116 SCA applications is broad. For missing PRs the precedents derived from s.164 JA 1925 are persuasive within the context of a s.116 SCA application e.g. where an executor was a prisoner of war a legatee was entitled to a take a limited grant (limited to the value of the legacy). However, the procedural background is very different so great care is required before you rely on any such precedents e.g. under s.164 the court would order (i) the transfer into court of all the estate (ii) that a missing representative if later found would be added as a party to the litigation and could be liable for the costs of the administration and the litigation! S.164 also applied much more broadly to cases where the executor was abroad [***Re Grant*** (1876) 1 PD 435]; but remember the difference in transportation and communication from then until now.
7. Succeeding on a s.116 SCA application requires us to jump over two discretionary hurdles (i) the requirement for "special circumstances" and (ii) for the appointment of another to be "necessary and expedient" for the due administration, and for the welfare of the beneficiaries, of the estate.
8. "Special circumstances" would arise when a PR is missing for an extended period or more or has disappeared in circumstances pointing to suicide or accidental death. An extended period can mean a reasonable period after full inquiries have been made; it need not be 7 years as the weight here is on the due administration of the estate for the welfare of the beneficiaries.

Procedural tips:

9. An application for s.116 discretionary grant and the application for leave to swear death pursuant to r. 53 of NCPR 1987 can be conjoined in the Probate Division.
10. An alternative application can be made both pre and post grant pursuant to s. 50 Administration of Justice Act 1985 for an order that a named executor is removed or substituted on the basis that the named executor is missing or presumed dead. This is made in the Chancery Division and can be joined with an application under Presumption of Death Act 2013.

R.53 NCPR 1987

11. Pursuant to r.53 of the NCPR 1987 the court has the power to give the person next entitled to a grant leave to swear to the death of the missing PR on or since a particular date.
12. The principle circumstances are were the presumed deceased PR has been missing for an extended period and (i) not heard of for a considerable period by those with whom he might be expected to communicate with or (ii) has disappeared in circumstances pointing to suicide or accidental death. An extended period can mean a reasonable period after full inquiries have been made; it need not be 7 years. Remember there may be good reason for estrangement i.e. abuse/neglect, by family members so ask probing questions.
13. Having said that it is not the practice of the probate court to make orders declaring that someone is “presumed deceased” save on the most convincing evidence. Even then the court does not presume the missing PR to be dead as if that person proved to be alive, they could apply to the court for revocation of the grant and/or rescission of the order.

Procedural tips:

14. The application is made to the Probate Court ex parte and must be supported by affidavit/SoT evidence setting out all relevant matters (it is wise to send off a draft of the application first to the Registrar to seek their view/opinion on what might be missing from your affidavit/SoT/application before getting the affidavit sworn/SoT signed and/or lodging the application):

    14.1. Set out the grounds of the application and depose to the applicant's belief that the presumed deceased PR is dead

    14.2. Give date of birth and age of presumed death at presumed date of death

    14.3. Describe the circumstances in which the presumed deceased was last heard of

    14.4. Provide copies or details of any relevant communications from the presumed deceased

    14.5. Provide details of searches and inquiries conducted and advertisements placed seeking information on his whereabouts with copies of any relevant documents

    14.6. Provide copies of any reports received from the emergency services

    14.7. Exhibit a copy of the will of the presumed deceased PR and/or give details of next of kin and/or draw a family tree

    14.8. Give particulars of any bank accounts, credit cards, online applications, mobile phones including the dates when they were last operated

    14.9. Give particulars of nay policies of assurance on the life of the presumed deceased

    14.10. Provide any relevant comparable court evidence i.e. dissolution of marriage based on desertion

    14.11. Provide any official particulars i.e. when a ship or aircraft is missing and give relevant particulars including copies of any certificates pursuant to regs 3 or 4 and 5 of Merchant Shipping (Returns of Births and Deaths) Regulations 1972 and 1979 or affidavit of ship/aircraft owner.

Multiple deaths in a disaster

15. Where there have been multiple deaths from disasters there is usually a record kept by the Principal Registry. If you are dealing with such a case first ascertain if you need to make your application for leave to swear presumed death as the Registrar may be in receipt of a circular from the Senior Judge of the Principal Registry of the Family Division stating that no proof of death is required.

Presumption of Death Act 2013

16. Presumed death orders after 1 October 2014 ought to be made under the Presumption of Death Act 2013 because it cannot be helpful to allow two different procedures to be used to resolve the same issue in two different courts.
17. PODA governs application to court for declarations of death in relation to persons who are thought to have died and have not been heard of for more than 7 years.
18. Applications can be made if the Deceased PR died domiciled or habitually resident in England or Wales for at least a full year before the date the Deceased was last known to be alive. If these conditions are not satisfied the Deceased PR's spouse, civil partner, child, parent or sibling provided they have been domiciled or habitually resident in England or Wales for at least a full year before the date the Deceased was last known to be alive, can make the application regardless of the Deceased's domicile or habitual residence. In all other cases the Court must refuse to hear the application unless the court considers that the applicant has "sufficient interest" in the determination of the application.
19. Unhelpfully, or helpfully, "sufficient interest" is not defined in PODA. In theory attorney's, executors, PRs or trustees could apply if no such authorised persons are alive or in existence. It will always be better to make the application in the name of an authorised person to keep costs proportionate. In all other scenarios the common law and r. 53 of the NCPR 1987 is the avenue to

pursue i.e. if the conditions as to domicile or habitual residence of the Deceased or applicant are not met.

20. A declaration is effective for the purposes of acquisition of an interest in property or the ending or a marriage or civil partnership to which the missing person is a party.

21. Significantly, the court has the power under PODA to direct that any beneficiary who inherits following such a declaration is protected from any variation or revocation of such declaration of presumed death either outright or if certain conditions are satisfied. PODA therefore gives protection to present beneficiaries when there is a missing beneficiary who subsequently reappears. Such protection is not available to beneficiaries on the making of a Benjamin order and accordingly it is more attractive to beneficiaries than a Benjamin order if the basis of the application is presumed death.

22. PODA also requires trustees (which includes executors, administrators and PRs) to take out missing beneficiary insurance in respect of any claim that might arise pursuant to s.7(2) of PODA if the estate is affected by the order. The premium is automatically payable out of the estate. But before the capital sum is paid to a beneficiary, they are required to take out insurance in respect of any claim which the insurer may make in the event of variation or revocation of the order under s. 5(1) PODA.

23. A variation or revocation PODA order does not revive a marriage or civil partnership. Nor does it affect an interest in property acquired as a result of such a declaration unless the court makes an order under s.7 PODA.

24. The court has the power to determine domicile of the Deceased, give a beneficiary of the presumed deceased person locus to bring claims against trustees (for devastavit or breach of trust usually) and make any further order at the time of any PODA application.

Procedure

25. The procedure for PODA is set out in CPR 57 part 5 and supplemented by Practice Direction 57B.

26. If you have a missing person there comes a time when you need a declaration that they are presumed dead [s 1 Presumption of Death Act 2013].

27. Even more rarely you will need to vary or revoke such a declaration [s 5 of the 2013 Act].

28. Proceedings can only be brought in the High Court, Family or Chancery Divisions pursuant to CPR 8 with the following modifications:

    28.1. The claim form must contain the information required by CPR 8.2 and CPR 57B PD 1.1 (declaration) or PD 1.2 (variation or revocation).

    28.2. CPR 8.2A & 8.5 is modified so that "without naming a defendant" is replaced with "without serving notice on any person".

    28.3. CPR 8.3 & 8.5 "acknowledgement of service" is replaced with "a person giving notice of an intention to intervene or applying for permission to intervene" is within 21 not 14 days of service of the claim form by the person intervening (there are no defendants as such in these proceedings).

29. A number of people must be notified of your intentions to apply for a declaration [CPR 57.20(1)] and others of your intention to apply for a variation or revocation [CPR 57.120(2)].

30. The claim must within 7 days of the issue of the claim be advertised and published in the form set out in CPR 57B PD 2 and in at least one newspaper circulating in the vicinity of the last known address and arguably location too of the missing person [CPR 57.21(1)]. This evidence must then be presented to the court at least 5 clear days before any hearing [CPR 57.21(2)].

31. If you wish to intervene and are entitled to do so pursuant to s11(1) of the 2013 Act or you are instructed by the Attorney General then you must first notify the court of your intentions in accordance with CPR 57B PD 3 and submit an application for permission (unless acting for the AG).

The court can grant permission to intervene on conditions and any case management directions including joining the interveners as parties [CPR 57.22].

32. An application under section 12 of the 2013 Act must be supported by evidence and in particular explain why the order is sought and provide evidence, explain why the person making the application believes that the other person has information and include any other relevant information. This application notice must be served on all parties and the relevant person at least 14 days before any hearing [CPR 57.23].

(ii) What if the person missing is the Deceased?

33. You have to seek a declaration that the Deceased is presumed dead before a grant will be issued. Thankfully, the procedure is exactly the same pursuant to r. 53 NCPR 1987 and/or PODA as if you had a missing PR.

Non-domicile

34. Where the presumed dead deceased died abroad, and the court of domicile makes an order presuming death and vests the estate in the persons entitled thereto the English court will not require any independent evidence showing the death. However, where there is a presumption of death but no vesting of the estate, the court will require evidence to show the death of the presumed deceased. Regardless an application for leave to swear death must be made unless the court of domicile has made a presumed death order and granted a death certificate.

(iv) What if beneficiaries are missing?

35. Usually missing beneficiaries occur where the will or will file does not provide accurate or full contact details (or family tree) or the Deceased died intestate and was estranged from family members.

36. A duty of the PR is to identify the beneficiaries of the estate so that the funds can be distributed to the right people. PRs prefer to do so without personal liability and accordingly seek a good discharge from the beneficiaries.

37. PRs are entitled to a receipt when they pay out a legacy [***Re Roberts*** [1869] 38 LJ Ch 708]. When they distribute the residue, the PRs should ask the residuary beneficiaries to settle/agree the accounts by signing them [***Chadwick v Heatley*** (1845) 2 Coll 137; 63 ER 671].

38. Assuming all practical steps have been taken then the PRs have the following options to facilitate them distributing the estate: (i) kin inquiries (ii) missing beneficiary insurance (iii) retention of contingency fund (iv) indemnity from beneficiaries (v) Benjamin order (vi) declaration of presumed death (vii) alternative valid receipts (viii)

Kin inquiries

39. An application to the High Court for Kin inquiries to be made when it is uncertain who are the next of kin of an intestate, or who are the in a class of beneficiaries named in a will. Usually such an application results in a Master of the Chancery Division giving directions as to s.27 Trustee Act 1925 advertisements for the kin or class of beneficiaries to communicate. Often it is more practical therefor that such advertisements are publicised in all relevant publications where the next of kin and or class of beneficiaries are known to exist. The cost of such advertisements and the cost of making a kin inquiry need to be considered against the costs of the options below. If the premium for missing beneficiary insurance is less than the anticipated costs incurred of advertisements and kin inquiries then the beneficiaries usually prefer such a route. An insurance premium is a proper administration expense for which a PR will always be reimbursed [***Re Evans*** [1999] 2 All ER 777].

Missing beneficiary insurance

40. If the sum of money involved for the missing beneficiary is modest then purchasing missing beneficiary indemnity insurance may be the most cost-effective option. This has the benefit of allowing the administration of the estate to be finalised with the certainty that if the missing beneficiary subsequently emerges the insurance will pay their entitlement. Whether it is appropriate to take out the insurance depends on the levels of risk involved, compared to the premium and the size of the estate.

41. The disadvantage of this approach is, of course, the associated costs of the insurance. If insurance is taken out in appropriate circumstances (that is, where it is warranted by the risks involved), it will be an administration expense, payable out of the estate.

42. If the insurance company does not pay out any claim for whatever reason e.g. failure to give full disclosure on taking out the policy, the PR will be personally liable for any valid claim. It is possible to ask the court to permit distribution on condition that PRs obtain insurance. However, this will mean that the estate incurs the costs of both a CPR 64 claim for directions in the administration of an estate and insurance, which may, in some circumstances, be disproportionate to the risk concerned.

Retention of contingency fund

43. Another option is to keep a reserve fund to pay the missing beneficiaries' share in the event that they emerge within the 12-year limitation period. The PRs can apply under CPR 64 for an order that an estate can be distributed as long as a specified sum is retained to pay known or potential liabilities.

44. If a distribution is made after such an order, a PR will not have any personal liability if a further claim on the estate appears [***Re Yorke*** [1997] 4 All ER 907].

45. Where a sum is retained but is not spent, it can be paid out to the known beneficiaries once any claims are statute barred.

46. This option would only generally be feasible for smaller estates and has the distinct disadvantage of meaning that the PRs obligations potentially continue for a number of years (but if there are professional PRs who know their investment duties and obligations this is often the easiest and most cost efficient option).

47. In some cases, if the possibility of a future claim arising is very remote, the court may order a distribution without a retention [**Re K** [2007] EWHC 622 (Ch)].

48. If the PRs do not obtain a court order, a retention that proves to be insufficient will not protect a PR from personal liability (unless protection under s. 27 of the TA 1925 applies as to which see below).

49. Unless it is permitted by the terms of the will or ordered by the court, once the PRs have made reasonable enquiries as to potential claims advertised under s. 27 of the TA 1925, they should not retain a contingency fund, unless they know (or it is reasonable to believe) that a future liability belonging to the estate is going to arise. Even in those circumstances, the fund should not be held in perpetuity. At some stage, the PRs must make a decision about whether a future demand is likely to be made. If the PRs retain the fund indefinitely, they are open to claims that they have retained the fund for their own benefit by the known beneficiaries who would inherit that share.

Indemnity from beneficiaries

50. As an alternative to asking the court to permit distribution on condition that a sum is retained by the PRs (see Retention of contingency fund above), the PRs can ask the court to authorise distribution on the basis of an indemnity from the beneficiaries. This, of course, is only appropriate where the beneficiaries can demonstrate that they are good for that indemnity.

51. This would mean paying the missing beneficiaries' share to the other beneficiaries, and if the missing beneficiary subsequently emerges then the other beneficiaries would have to pay the legacy to the missing beneficiary. PRs should exercise extreme caution before proceeding under this option by ascertaining the financial standing of the said beneficiaries.
52. Distribution on the basis of an indemnity by beneficiaries can be agreed without the court's sanction. However, the PRs will still be personally liable if the court does not authorise distribution on that basis and (on being called on to make good their indemnity) the beneficiaries turn out to be impecunious.

Benjamin Order

53. Where the amount due to the missing beneficiary is large, it may be cost proportionate for the PRs to obtain a 'Benjamin order' pursuant to CPR 64. Broadly speaking, this is an application to the court requesting permission to distribute the estate on the basis of a particular factual version of events (e.g. the missing beneficiary has likely died).
54. If that version of events is subsequently revealed to be untrue (e.g. the missing beneficiary emerges) then the PR will be protected from liability, although the other beneficiaries may still be liable to repay the additional sums that they have received back to the missing beneficiary. However, such claims against the receiving beneficiaries are statute barred after 12 years unless the beneficiaries were also the PRs [see further s.21 & 22 Limitation Act 1980].
55. Various expressions have been used to describe the circumstances in which this jurisdiction will be exercised and they are helpful to guide the practitioner e.g. (i) when the proposed distribution reflects the practical probabilities of what has happened or is based on the probable inferences (ii) where there is practical impossibility of proof of the facts or events in question (iii) where every reasonable step has been taken to trace the individuals in question and it was improbable that any such individual would ever establish a claim.

56. A disadvantage of this option is that costs of making the application can be significant, and potentially prohibitive if the amount of the legacy due to the missing beneficiary is limited. This is because the court will require the PR to satisfy the court that they have undertaken all reasonable enquiries to establish the position, and that there is no reasonable prospect of establishing the true position without disproportionate expense.

Declaration of presumed death

57. There is also the option of obtaining a declaration of presumed death pursuant to PODA or common law in exactly the same way as for a missing PR or Deceased so that either (i) the deceased's beneficiaries inherit pursuant to his will or intestacy or (ii) the sums fall to be distributed to the known beneficiaries.

Benjamin order or PODA?

58. There are similarities between the Benjamin order and the PODA application but the jurisdiction is distinct. It is more likely that a court would grant a Benjamin order than a PODA. A Benjamin order is far more extensive as it gives leave to distribute on the basis that a person died without issue and without having married, or on the basis that all debts and liabilities have been ascertained or where an original will or settlement has been lost that those trusts can be established by secondary evidence.

Alternative valid receipts

59. An executor may obtain a valid receipt from a consular official for a foreign national resident abroad [s. 1(2) Consular Conventions Act 1949].

60. A PR does not normally have a right to require a beneficiary to sign a formal deed of release (King v Mullins (1852) 1 Drew 308; Tiger v Barclays Bank [1951] 2 KB 556). This is unless there are exceptional circumstances, such as an agreed variation in the distribution of the estate.

Payment into court

61. The final option is to pay the funds due to the missing beneficiary into the court pursuant to a s.63 Trustee Act 1925 application. This is often used when PRs cannot get good discharge for a payment to a beneficiary because while they are not missing they are not communicating or have "vanished".

62. This may be the option that is least attractive to the other beneficiaries as it would mean that the sums otherwise due to the missing beneficiary are unavailable.

63. However, it will usually alleviate the PRs of all responsibility and liability and allow the estate administration to be completed.

64. S. 63 permits trustees (including executors, administrators and PRs) whether they act unanimously or by majority to apply to pay sums into court. On receipt or certificate by the proper officer of the Court (i.e. upon the payment being made into court), the PRs are validly discharged.

65. Section 63 of the TA 1925 should only be relied on where there is no other way to deal with the money and get a valid discharge. If the court takes the view that the payment in should not have been requested, there is a danger that the PR will, at best, not be permitted to take costs out of the fund or, at worst, be ordered to pay costs.

66. It is often better to ask the court for directions that (when followed) will give the PR protection and tack an application for the payment of funds into court on to the same as a last resort. However, the situation may arise where the only directions the court could give would be to order payment in. In those circumstances, PRs should make an application directly to pay sums into court.

67. Previously, payments into court were appropriate where:

    67.1. A beneficiary lacked mental capacity so could not give good receipt. Now, there is often an attorney under an enduring power of attorney or property and financial affairs lasting power of attorney, or a property and financial affairs deputy to deal with this (or a deputy can be appointed).

    67.2. A beneficiary was missing (but this can be more efficiently dealt with by purchasing insurance or making an PODA or r. 53 NCPR application. This is really very fact specific.

    67.3. It is still appropriate to use this mechanism where a beneficiary is known to be alive and believed to have capacity but is refusing to accept payment or has gone incommunicado for unknown reasons. In these circumstances, not only is a PR not able to obtain good discharge but, if they are solicitors, they may find themselves in breach of the Solicitors Accounts Rules 2011. These provide that: "Client money must be returned to the client (or other person on whose behalf the money is held) promptly, as soon as there is no longer any proper reason to retain those funds." [Solicitors Accounts Rules 2011: 14.3.]

68. There is no general rule on which of the above options is the most prudent when you have a missing beneficiary. It will depend on the facts of the particular case.

(v) What if creditors are missing?

69. A creditor has 6 years from the date of the grant to make a claim on an estate.

S. 27 Trustee Act 1925

70. However, by the use of s.27 Trustee Act 1925 notices this six year period can be reduced to a minimum of 2 months from the date of publication of that notice.

71. If a s.27 Notice has been drafted and advertised properly this gives the PRs protection against unknown claims on the estate – both creditors and beneficiaries [***Re Aldhous*** [1955] 1 WLR 459].

72. Advertisement must be in the London Gazette and a newspaper circulating in the district in which land which they propose to transfer is situated, and by such other like notices, including notices in England & Wales or worldwide as would likely to have been directed by a Master on kin inquiries i.e. in the vicinity of known addresses to which the Deceased is connected.

73. The date stated in the notice for distribution must be at least two months after the notice appears. If anyone interested in the estate fails to make a claim within that time, the PRs can pay the debts and distribute the estate to those who they know are interested. If someone turns up after the estate is distributed, they cannot pursue the PRs for any sums they claim are due to them. They can however, follow the assets into the hands of the distributees [section 27(2), TA 1925].

74. Nevertheless, if someone makes their claim known to the PRs after the notice period has expired but before distribution, the PR should give effect to their claim (if properly founded) [see ***National Westminster Bank plc v Lucas*** [2014] EWHC 653 (Ch)]. If not, the PRs will be personally liable for wrongful distribution in exactly the same way as if they had distributed without advertising any s. 27 notices.

75. However, if a PR has notice of a claim in one estate but only because they also act as a PR of another estate, they are not viewed as having notice and will not be personally liable for distributing the first estate without taking account of the claim [s. 28 TA 1925].

76. A testator cannot exclude s.27 or 28 Trustee Act 1927.

(vi) The Guardianship (Missing People) Act 2017

77. GMPA received royal assent on 27 April 2017 but the substantive provisions of the GMPA are not expected to come into effect in July 2019. On 19 December 2018, the Ministry of Justice published a consultation paper, seeking views on the department's proposals for implementation. The consultation period ended on 12 February 2019.

78. Interplay between the Guardianship (Missing People) Act 2017 and Presumption of Death Act 2013 is important to understand. When a person goes missing, depending on the circumstances, someone else may need to look for the missing person, deal with their property and financial affairs while they are missing, and/or apply for a declaration of presumed death. A missing person may be reported to the police. In addition, a number of organisations offer assistance in searching for a missing person but none sort out the affairs of that person between then and being able to apply for a declaration of presumed death.

79. GMPA aims to bridge that obvious gap by the introduction of a guardian who can be appointed on behalf of, and in the best interests of, a missing person. GMPA enables the appointment of a guardian to act in relation to the property and affairs of a missing person that was domiciled and/or habitually resident in England or Wales. It also provides for the supervision and regulation of the way that guardians exercise their powers.

80. In contract the PODA enables an application to be made to the High Court for a declaration that a missing person, who is thought to have died or who has not been known to be alive for at least seven years, is presumed dead. A missing person guardian, while not currently one of the members of the class entitled to make such an application (unless also the spouse, civil partner, parent, child or sibling), surely will be added as a lawful applicant as part of the enactment process. Once such an order can no longer be the subject of an appeal, a declaration is conclusive as to the presumed death and effective for all purposes and against all persons. The missing person's property passes to its heirs (intestacy or by will) and his or her marriage or civil partnership is ended.

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