

Missing persons – current tendencies*

Linda Schoeman-Malan

BA LLB LLD

Professor, Department of Private Law, University of Pretoria

OPSOMMING

Vermiste persone – huidige tendense

Elke jaar verdwyn derduisende mense wêreldwyd. Statistiek toon dat talle vermiste persone steeds spoorloos verdwyn ondanks die feit dat dit in moderne tye makliker is om mense op te spoor. Verdwynings kan aan talle faktore toegeskryf word. Indien 'n vermiste persoon se liggaam nie gevind kan word nie skep dit verskeie regsprobleme vir sy of haar naasbestaandes. Ingevolge die Romeins-Hollandse reg is dit moontlik om by die Hoë Hof aansoek te doen vir 'n bevel dat 'n persoon geag word “vermoedelik dood” te wees sodat 'n doodsertifikaat uitgereik kan word. Die gemeenregtelike vermoede-van-doodbevel het egter beperkte aanwending en is gemik op die administrasie van die vermiste persoon se boedel.

Alhoewel beide die Romeins-Hollandse reg en die Engelse gemenerereg (*common law*) die Suid-Afrikaanse erereg beïnvloed het, volg die Suid-Afrikaanse houe die Romeins-Hollandse reg telkens wanneer daar 'n aansoek dien vir 'n gemeenregtelike vermoede-van-doodbevel van 'n vermiste persoon. Die uitgangspunt is dat 'n persoon geag word te lewe en dat daar nie 'n vermoede is dat die persoon dood is na verloop van 'n sekere tydperk nie. Die “vermoedelike dood” van die verdwene persoon moet deur belanghebbendes op 'n oorwig van waarskynlikhede bewys word aan die hand van alle relevante feite. Die tradisioneel Engelse gemeenregtelike jurisdiksies volg egter 'n benadering dat 'n persoon wat langer as sewe jaar vermis word, vermoedelik dood is. Die vermoede bring mee dat, na verloop van sewe jaar, die bewyslas rus op die persoon wat aanvoer dat die vermiste nog lewe.

Tans het feitlik alle Europese siviele (*civil law*) en gemeenregtelike (*common law*) jurisdiksies wetgewing wat vermoede-van-doodbevele reguleer. Suid Afrika maak slegs statutêre voorsiening vir 'n ondersoek na die dood van 'n persoon wat (vermoedelik) aan onnatuurlike oorsake gesterf het en wie se liggaam nie opgespoor kan word nie. In alle ander omstandighede geld die gemeenregtelike posisie (Romeins-Hollandse reg).

Hierdie bespreking handel met die gemeenregtelike vermoede-van-doodbevel wat die uitreiking van 'n doodsertifikaat en administrasie van die boedel van 'n vermiste persoon magtig. Die historiese agtergrond van die vermoede dat “die vermiste persoon lewe” of dat “die vermiste persoon dood is” (na verloop van 'n tyd) word ondersoek. Die posisie in Suid-Afrika word vergelyk met statutêre ontwikkelinge in Engeland en Wallis waar die *Presumption of Death Act* in 2013 gepromulgeer is. Enkele probleme wat deur naasbestaandes ondervind word, word aan die hand van die Suid-Afrikaanse reg en die Engelse gemenerereg onder die loep geneem. Ten slotte word oorweging geskenk aan die vraag of Suid-Afrika regshervorming behoort te oorweeg.

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1 INTRODUCTION

Every year, thousands of people are globally reported to be missing.¹ Unresolved disappearances include those who are taken as prisoners of war, victims of hijackings or kidnappings, victims of plane crashes and also individuals suffering from mental illnesses.² Often, when disaster strikes (such as an air crash, tsunami or terrorist attack), several victims are unaccounted for.³ Occasionally, the missing person or the body of the missing person is indeed discovered some time later.⁴ However, as time passes and a person remains missing, several legal questions arise.⁵ Some of these disappearances have been the subjects of extensive search operations, wild speculation, media sensationalism, false accusations, dead-ends and wrong turns.⁶ Families of missing persons are subjected to emotional trauma and encounter a range of practical, financial and legal difficulties as a result of the disappearance of a family member.⁷ The International Committee of the Red Cross often is involved in the search for missing people. They state as follows:⁸

“Rarely do authorities consider ‘missing’ to be a legal status. This lack of recognition affects families’ rights to property, inheritance, guardianship of children, even remarriage. *Family members are seldom entitled to the same social benefits as those whose relatives are confirmed as deceased.* They might not have access to bank accounts or savings.”⁹

Worldwide the problems which arise when a person goes missing usually are addressed through a court order declaring the missing person to be presumably dead. Civil and common law jurisdictions in principle differ slightly from one another in their approach to missing persons who are “presumably dead”.¹⁰ The

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- 1 See Holmes “Living in limbo: The experiences of and impacts on the families of missing people” 2008 *London Missing People (LMP)*, available at <http://bit.ly/2zE9fki> (accessed on 20 January 2017); Parr and Stevenson *Families living with absence: Searching for missing people* (2013) 67.
 - 2 Cromwell “Family of missing Saint John woman say mental illness may play role in disappearance” 23 June 2017 *GlobalNews*. See also *Greathead v Greathead* [2017] EWHC 1154 (Ch).
 - 3 “Mass fatalities” are discussed in another contribution. See Henson “Before next time: The continued evolution of statutory responses to mass fatality incidents” 2012 *Contemp Health L & Pol’y* 9, available at <http://scholarship.law.edu/jchlp/vol29/iss1/4> (accessed on 18 March 2017).
 - 4 ICRC *Living with absence helping the families of the missing* (2014) 1 4. See also “The agony and the uncertainty: Missing loved ones and ambiguous loss” 2 June 2015 available at <http://bit.ly/1MDdL02> (accessed on 18 March 2017). See JS case no 2007 P008280 Probate Division 26 November 2007 where Mr Fossett’s death could later be confirmed.
 - 5 Zwane “387 missing adults not found” 7 April 2016 *New Age*. For statistics see Gunning-Stevenson, Ser and Dubois “Gone missing” 2015 *Alternative LJ* n 1 and 2.
 - 6 Henderson, Henderson and Kiernan “Missing persons: Incidence, issues and impacts trends & issues in crime and Criminal Justice No. 144” 2000 *Canb AIC*.
 - 7 See fn 1 and 3. Martin “When a family member goes missing, ‘not knowing’ is hardest” 19 March 2014 *NPRnews* available at <http://n.pr/1mhk1il> (accessed on 18 March 2017). See also Greene and Alys *Missing persons: A handbook of research* (2016).
 - 8 ICRC (fn 4) 4; Alikaj “Declaring a person missing or dead” 2015 *The MacrotHEME R (MR)* 129 130ff; Holmes (fn 1); Parr and Stevenson (fn 1) 69; Greene and Alys (fn 7) 139.
 - 9 Own emphasis.
 - 10 See Friedmann “Declarations of death - A new international convention” 2013 *St John’s LR* (1950) 18ff available at <http://bit.ly/2BamcON> (accessed on 30 May 2017); Irish Law Reform Commission (ILRC) Report *Civil law aspects of missing persons* LRC 106-(2013) para 1 43.

basis of the civil law is that a missing person is *presumed to be alive* until proven otherwise (there is no general presumption), while the English common law, after a period of seven years, *presumes a missing person to be dead*.¹¹ However, the point of departure in all jurisdictions is that it should be proved (by direct or circumstantial evidence) that the missing person is “probably dead”.

Despite the South African law of succession having been influenced by both English law and Roman-Dutch law, the latter dictates in this regard and no presumption prescribes the outcome of a finding.¹² Although, at present, almost all civil and common law jurisdictions have legislation that regulates presumption of death orders, South Africa only makes statutory provision for an investigation into the death of a person who (presumably) died of unnatural causes and whose body cannot be found.¹³

This contribution provides an overview of the historical background to presumptions related to both “life and death” of absentees.¹⁴ The position in South Africa is compared with statutory developments in England where legislation was adopted in 2013 incorporating clear procedures for the regulation of a situation where persons go missing. The possible problems which interested parties might face when a loved-one goes missing are discussed with reference to South African and English case law.¹⁵ In conclusion, the questions whether the time has come for South Africa to consider statutory intervention in this regard, and whether such intervention will contribute to legal certainty, are considered.

11 Own emphasis. See Sentell “The missing insured and the life insurance death claim” 2004 *Federation of Defense & Corporate Counsel Q* 203. “[A]lmost all states recognize the presumption of death, by statute or judicial recognition of the common law rule.” See TSP and JWD “Property law: The estates of missing persons” 1966 *Duke LJ* 745 749 fn 19–21; Evans “Omnipotence of the Presumption of Death Act 2013” 3 February 2015 available at <http://bit.ly/2Avpcce> (accessed on 25 May 2017). Council of Europe Committee of Ministers (CEC) *Principles concerning missing persons and the presumption of death: Recommendation CM/Rec* (2009) (9 September 2011) para 12.

12 See Zimmermann and Visser “South African law as a mixed legal system” *Southern cross: Civil law and common law in South Africa* (1996) 3 fn 16; Du Toit “A comparative overview” in *Exploring the law of succession: Studies national, historical and comparative* (2007) 67ff explains the historical background in the South African law of succession and the influence of both civil law (Roman-Dutch) and common law (English law). For “presumption of death” see Boezaart *Law of persons* (2016) 167–169; Boezaart *Law of persons sourcebook* (2016) 314ff; Du Bois (ed) *Wille’s Principles of South African law* (2007) 158; Heaton *The South African law of persons* (2012) 29ff; Barratt *Law of persons and the family* (2012) 137ff.

13 Inquests Act 58 of 1959. S 16 states that if in the case of an inquest where the body of the person concerned is alleged to have been destroyed or where a body has not been found or recovered, the evidence proves beyond a *reasonable doubt* (own emphasis) that a death has occurred, the magistrate holding such inquest shall record a finding accordingly.

14 Friedmann (fn 10) 21ff. See the House of Commons Justice Committee (HCJC) “Presumption of death” *Twelfth Report of Session 2010–12* (7 February 2012); Gunning-Stevenson *et al* (fn 5); ILRC (fn 10); CEC (fn 11) para 5; Max Planck Institute for Comparative and International Private Law Working Group “Comments on the European Commission’s proposal for a regulation of the European Parliament” 26 May 2010 paras 30–31.

15 See fn 1 and 4; Greene and Alys (fn 7) 139; De Barros-Duchene “Missing loved ones: Helping families cope with uncertainty” 15 February 2010 *ICRC*.

The case law referred to in this contribution is mainly from jurisdictions influenced by the English common law presumption of death.¹⁶ Although there are several older cases reported in South Africa on people who are presumed dead,¹⁷ more recently there have been few reported cases that deal with “presumption of death orders”.¹⁸ However, when South African High Court rolls and media reports are scrutinised for such cases it becomes apparent that the number of people that go missing in South Africa correlates with statistics in other jurisdictions.¹⁹

The article focusses primarily on situations where an order of presumed death (presumption of death order) is granted after the body of a missing person could not be found.²⁰ Issues related to statutory inquests,²¹ missing children, immigrants and possible situations where a body of a missing person is (sooner or later) found, are not addressed in this contribution.²²

2 MISSING PERSONS

2.1 Announcing a person missing

The law calls people who have disappeared “absentees” or “missing persons”.²³ A missing person or absentee is defined as a person who had disappeared from

16 Own emphasis. See *Axon v Axon* 1937 59 CLR 395; *In re Watkins* [1953] 1 WLR 1323; *Chard v Chard* [1956] 3 All ER 721; *Re Bennett* [2006] QSC 250; *Bayes-Walker v Bayes-Walker* [2010] EWHC 3142 (Ch); *Re Medzech* 2012 SKQB 216; *Maynard v The Estate of Maynard* [2015] QSC 144; *Re Paul Allan Weeks; Ex Parte Weeks* [2016] WASC 25; *A v H* [2016] EWHC 762; *Greathead v Greathead* (fn 2).

17 *In re Booysen* 1880 Foord 187; *In re Kannemeyer: Ex parte Kannemeyer* (1899) 16 SC 407; *Re Beaglehole* 1908 TS 49; *In re Cuthbert* 1932 NLR 615; *Ex parte Engelbrecht* 1956 1 SA 408 (E); *Ex parte Maclean* 1968 2 SA 644 (C).

18 *Ex parte Pieters* 1993 3 SA 379 (D); *Ex parte Govender* 1993 3 SA 721 (D); *Ex parte Stoter* 1996 4 SA 1299 (E); *Oosthuizen v Louw* [2014] ZAGPPHC 456 para 13. For the factors that a court would take into consideration see Boezaart *Sourcebook* (fn 12) 314–326.

19 For media reports, see Venter “Ex-top model presumed dead – court” 2 October 2012 *Pretoria News*; Venter “Bid to have missing man declared dead” 16 January 2014 *IOL news*; Venter “SANDF in bid to declare young soldier dead” 13 February 2017 *IOL news*; SAPA “Missing yacht crew may now be presumed dead” 12 May 2006 *IOL news*; McGregor “Survivor describes Storms River horror” 27 March 2000 *IOL news*; SAPA “SA kayaker presumed dead after croc attack” 10 December 2010 *IOL news*. See also MI Alexander – 9122/13; GJ Slabbert – 23442/15; PC Maroon – 24086/15; K Adonis – 24085/15; J Diedericks – 24084/15; S Smit – 15053/16; PL Savage – 19511/16.

20 Own emphasis. See Holmes (fn 1); Henderson *et al* (fn 6); Asimou and Fung “Vanished: When loved ones are presumed dead” 13 March 2015 *Azcentral*; Hanks “The missing: Why do some people vanish into thin air” 16 January 2015, available at <http://bit.ly/2jWSiuk> (accessed on 9 August 2017); HCJC (fn 14) para 1.

21 See s 16 Inquest Act (fn 13); *Inquest: Lechalaba* [2013] ZAGPPHC 179; *In re: Outjo Inquest* 30 of 2012 [2013] NAHCMD 1 para 8; s 15 English Coroners Act 1988; s 23 Coroners Act 1962 (Ireland).

22 See CNN Library “Missing children fast facts” 23 April 2017 *CNN news*; *European Council on Refugees and Exiles* 6 May 2016 available at <http://bit.ly/2Avr0R0> (accessed on 30 May 2017).

23 Greene and Alys (fn 7) 138; ICRC (fn 4) 3; Lagniappe “Missing persons – 19 cases where people have simply disappeared” 7 October 2013 available at <http://bit.ly/2A71EtE> (accessed on 18 August 2017); Carreire “The rights of the living dead: Absent persons in the civil law” 1990 *Louisiana LR* 901–902.

his or her domicile, has had no contact with his or her relatives, could not be confirmed dead or whose body could not be found.²⁴ However, not all missing persons are necessarily dead.²⁵ There are differences between “a deceased person”, “declaring (announcing) a person missing”, and “presuming someone to be dead”. Alikaj points out that some scholars incorrectly reason that “declaring a person missing”, as well as, “declaring (announcing) a person dead”, have the same effect of “death being presumed”.²⁶

Declaring a person missing amounts to stating a fact, while the missing person could still be alive.²⁷ Declaring a person “presumably dead” has some legal consequences for the missing person’s estate and next-of-kin.²⁸ When a person is (still) only missing there is hope that he or she may be found alive. The fact that the phrase “declared dead” is sometimes used in the context of a missing person who is “presumed to be dead” contributes to the confusion as to what “presumed death” is.²⁹ Carreire states that a factual determination of the death of an absent person is a contradiction in terms.³⁰ Only once a missing person has been declared an absentee will it allow the surviving family members to put that person’s affairs in order and settle his or her debts.³¹

Once the person’s disappearance is confirmed and he or she therefore is regarded as “missing” or “an absentee”, the question arises whether such person is possibly dead and whether the death of the missing person can be looked upon with probable certainty.³² When a person is missing the normal procedures for

24 Duhaime “Presumption of death from absence” 11 November 2007 *Elder law wills trusts estates* (updated December 2011) available at <http://bit.ly/2znxZJg> (accessed on 24 February 2017); Loughran “The true presumption of death in New York” 1915 *Fordham LR* 1–7; Alikaj 2014 *MR* 131; Willis and Bowring “Presumption of death” (undated) available at <http://bit.ly/2A9mCWl> (accessed on 9 February 2017).

25 See Van der Vyver and Joubert *Persone- en familiereg* (1991) 55; Boezaart (fn 12) 168; M-Gillies “What happens when there’s no body?” 2012 available at <http://bit.ly/2Aw6vFl> (accessed on 25 April 2017). Warder “The 5 Most insane twist endings of real missing person cases” 14 August 2016 available at <http://bit.ly/2A3TphP> (accessed on 12 November 2017); Liran “Can you claim a life insurance (body) without a body?” 29 March 2014 available at <http://bit.ly/2i5tDmu> (accessed on 20 October 2017); Friedmann (fn 10) 18; Greene and Alys (fn 7) 139.

26 2014 *MR* 131; Jarvis and Chaney “The living, the dead, the undecided” 8 September 2016 available at <http://bit.ly/2n2ERtK> (accessed on 3 May 2017) 178–207.

27 Chin “Death by disappearance – As good as dead?” 2005 *Singapore J of Legal Studies* 416–425.

28 Friedmann (fn 10) 21; TSP and JWD (fn 11) 745; Henson (fn 3) 9; Jalet “Mysterious disappearance: The presumption of death and the administration of the estates of missing persons or absentees” 1968 *Iowa LR* 177 226–227; Jarvis and Chaney (fn 26) 178–207.

29 See also “Brach Heiress declared dead as of 7 years ago” 24 May 1984 *New York Times*; Van der Vyver and Joubert *Persone- en Familiereg* (1991) 55; Boezaart (fn 12) 168; Holmes (fn 1); Parr and Stevenson (fn 1) 69; Henderson *et al* (fn 6); Zwane (fn 5); Asimou and Fung (fn 20).

30 (Fn 23) 971.

31 Green “Proof of death when a loved one is lost but not found” 21 September 2015 on Canadian law available at <http://bit.ly/2zDH1G7> (accessed on 1 May 2017). See also See TSP and JWD (fn 11) 745ff.

32 Carreire (fn 23) 904. See also Atheron and Vines *Succession families, property and death* (2003) para 4 9; Friedmann (fn 10) 18; Martin (fn 7); Boezaart (fn 12) 167–169; CEC (fn 11) para 5.

dealing with the affairs of a deceased person are not available.³³ Only after it has been established that a person is indeed missing, an order can be made by the court that the absentee is “presumed to be dead” and the administration process of a presumed dead person’s estate is authorised.³⁴

2.2 Verification of the death of a missing person

Normally, the death of a person is verified by obtaining a death certificate signed by a medical practitioner who has seen and examined the body. The death certificate constitutes direct evidence of the death.³⁵ If a missing person’s body is ultimately found, the death is proved as soon as the body can be identified.³⁶ If there is no body to prove the death, *the fact of death remains in doubt* (uncertain) until sufficient proof is forthcoming to replace direct proof.³⁷

The legal subjectivity of a missing person only ceases at his (presumed) death and, therefore, the legal competencies of an absentee continue as long as the person is regarded to be alive. Until such time as a death certificate can be obtained, a missing person’s affairs remain in limbo,³⁸ and the law continues to deal with that missing person’s property *in absentia*.³⁹ Citroni explains the state of affairs of a missing person as follows:⁴⁰

“Disappeared persons are placed in a legal limbo where, due to the concealment of their fate and whereabouts, *it is unknown whether they are dead or alive*. The regulation of their legal status while their fate is unknown is necessary to settle matters related to social welfare, inheritance, family law and property rights.”⁴¹

The importance of a death certificate is explained by Brooks and Reed:⁴²

“In addition to providing the decedent’s family with a cause of death, it has critical administrative and epidemiologic applications. Death certificates may be required to settle decedents’ estates and obtain insurance or other pensions/benefits.”

33 Boezaart (fn 12) 167 fn 25 for case law; Carreire (fn 23) 919–920; M-Gillies (fn 25).

34 Hanna “Administration upon estates of persons presumed to be dead” 1914 *Pennsylvania LR* 605ff; Boezaart (fn 12) 167–169; Boezaart *Sourcebook* (fn 12) 31ff; *Wille’s Principles* (fn 12) 158; Green (fn 31); Carreire (fn 23) 904; Jalet (fn 28) 226–227.

35 Boezaart (fn 12) 168; Moonsamy “Death benefits – Presumption of death” 6 November 2009 *Legal Update*; Willis and Bowring (fn 24).

36 See M-Gillies (fn 25); Evans (fn 11); Fox “Steve Fossett, missing adventurer, is declared dead at 63” 16 February 2008 *New York Times*.

37 M-Gillies (fn 25); Basson “Chief Master’s Directive 2015-02 – Department of Justice Circular 56/2015” 3 August 2015 available at <http://bit.ly/2Bb4jj2> (accessed on 16 June 2017) 6 fn 7; *Re Bennett* (fn 16); *Bayes-Walker v Bayes-Walker* (fn 16); *Greathead v Greathead* (fn 2).

38 *Re Johannisse and Gray* (1985) 33 ACWS (2d) 231; Boezaart (fn 12) 169; *Wille’s Principles* (fn 12) 158; Loughran 1915 *FLR* 1–7; Alikaj 2014 *MR* 131; TSP and JWD (fn 11) 745ff; Duhaime (fn 24); Hanna (fn 34) 606; Contributor “Life insurance and the presumption of death” 1937 *FLR* 91.

39 M-Gillies (fn 25); Citroni “The pitfalls of regulating the legal status of disappeared persons through declaration of death” 2014 *J Int Criminal Justice* 787–803; Holmes (fn 1); Parr and Stevenson (fn 1) 69.

40 (Fn 39) 787–803. Own emphasis.

41 Own emphasis. Atheron and Vines (fn 32) para 4 9; Henson (fn 3) 7-32; Hanks (fn 20); Lagnippe (fn 23); Warder (fn 25).

42 “Principles and pitfalls: A guide to death certification” 2015 *Clinical Medicine Research* 74–82. See also Greene and Alys (fn 7) 166; Evans (fn 11).

3 HISTORICAL OVERVIEW OF PRESUMPTIONS

3.1 Person's body cannot be found

Both civil law and common law jurisdictions have encountered uncertainty with situations where a person's body cannot be found.⁴³ It has long been accepted that when such a situation arises, the death of the person who went missing could be established by presenting evidence to the court to obtain an order of "presumed death".⁴⁴ In principle, civil law jurisdictions follow an approach that missing persons remain "alive until proven otherwise", while common law jurisdictions revert to a "presumption of death (after lapse of seven years)" to prove the death of an absentee after a certain time has lapsed.⁴⁵ The latter approach was followed in most English common law jurisdictions (Commonwealth).⁴⁶ Due to the influence of Roman-Dutch law and traditional English common law on the South African law of succession, both systems are discussed briefly.⁴⁷

3.2 Civil law approaches towards missing persons

In jurisdictions influenced by civil law it has long been accepted that the presumed death of a missing person can be proved by circumstantial evidence.⁴⁸ Initially, in Roman civil law, the opinion was held that missing persons remain "alive until proven otherwise". The absentee's status was based on the principle of continued life.⁴⁹ The origin of this approach may be found in *D 7 1 56*.⁵⁰ The text (which deals with a usufruct) refers to a hundred years as the (presumed) term of life of man:

"Whence another doubt arises, that is to say, how long a municipality should be protected in the enjoyment of an [sic] usufruct? *It has been settled that it will be protected for a hundred years, because this is the term of the longest life of man.*"⁵¹

In contrast to the vagueness in Roman law, the Napoleonic civil code, under the title "Des absents", created a more detailed pattern for the treatment of "absent persons".⁵² Carrière states the following in this regard:⁵³

"In contrast to its gradual emergence in common law jurisdictions, the law of absent persons in the Code Napoléon was conceived as a comprehensive unit to

43 Loughran 1915 *FLR* 1–7; Sentell (fn 11) 203; Citrone (fn 39) 787; Carrière (fn 23) 909.

44 Friedmann (fn 10) 21ff.

45 See CEC (fn 11) para 12; Max Planck Institute (fn 14) paras 30–31.

46 See Sentell (fn 11) 203: "Some states have amended their statutes to reduce the seven-year period to five consecutive years missing, and some, such as Minnesota and Georgia, have reduced the period to four years."

47 See fn 12 *supra*; Du Toit (2007) 67; Du Toit "Roman-Dutch law in modern South African succession law" 2014 *Ars Aequi* 278; Palmer *Mixed jurisdictions worldwide: The third legal family* (2001) 83; Tetley "Mixed jurisdictions: Common law vs civil law (codified and uncoded)" Part I 1999 *Uniform LR* 591 599.

48 *Iberia Cypress Co v Thorgeson* 116 La 218 222, 40 So 682 683 (1905); Loughran 1915 *FLR* 1–7; Sentell (fn 11) 203; Citrone (fn 39) 787.

49 Jarvis and Chaney (fn 26); TSP and JWD (fn 11) 746; Friedmann (fn 10) 21.

50 See Gaius *On the Provincial Edict book XVII*. See also Stone (fn 60) 516.

51 Own emphasis.

52 ILRC (fn 10) paras 1 43.

53 Carrière (fn 23) 919: "Treatises of the most noted French commentators contain comprehensive analyses of the regime of absent persons in the Code Napoleon. Carrière refers to Demolombe *Traité de l'absence* (1865) § 1 (3rd ed). See also Barrat *et al Fresh perspectives: Skills for law* (2008) 63."

deal with the unique problem of absentees. But the Code Napoleon contained *no legal presumption* of death. Instead it acknowledged that the absent person's existence was unknowable."⁵⁴

The original French code did not abandon the possibility that the absent person *might be alive*, because the principle was to protect the interests *of the missing person*.⁵⁵

The Roman-Dutch law, which was followed by South African courts, also took the point of view that if a person goes missing, in the absence of evidence to the contrary,⁵⁶ the person was *presumed to be living* even though he might have been 90 or 100 years old at the time the question of his or her possible death arises.⁵⁷ Voet explains that, in general, only once someone has died, can the division of inheritance take place.⁵⁸ Some commentators held the view that even after thirty years it was not allowed to divide an estate, but that a curator should rather be appointed by a public authority.⁵⁹ Stone summarises the position as follows:⁶⁰

"In the eighteenth and early nineteenth centuries the world was a much larger place than it is today. The courts recognised that in the poor communications of the times disappearance did not necessarily suggest death. Accordingly there was a presumption of continuance of life. Life was deemed to continue unless there was evidence adduced to the contrary."

The refusal to treat the absent person as dead apparently arose from a desire to balance the protection of such person's interests and the interests of his or her dependants.⁶¹ After codifications in Europe the substantive laws of different civil law jurisdictions envisage different solutions for situations where the death of a natural person cannot be ascertained after he or she has disappeared for years *without any proof of life* or where that person was *involved in a life-threatening event*.⁶² Disappearance as a result of a life-threatening event (for example, war or shipwreck) was treated as an exception and a court could immediately issue a "death declaration".⁶³

54 See also CEC para 5; Carreire (fn 23) 919; Contributor (fn 38) 91–93 for the civil law.

55 Own emphasis. Chin (fn 27) 416–425.

56 Hubback *A treatise on the evidence of succession to real and personal property and peerages* (1845) 493.

57 Voet 10 2 20 refers to *D* 7 1 56.

58 Voet 10 2 18: It is not quite agreed among commentators whether and after what lapse of time it is allowable to go forward to the division of the inheritance to him as though he were deceased. See CEC (fn 11); *Re Beaglehole* (fn 17) 51–52; *Dempers and Van Ryneveld v SA Mutual Life Assurance Society* 25 SC 162–172.

59 See Heaton (fn 12) 29ff for the Roman-Dutch law; McB "Presumptions: Are they evidence" 1938 *California LR* 519–538 *CLR* 519.

60 "The presumption of death: A redundant concept?" 1981 *MLR* 516. In *Benson v Olive* 2 Strange 920 a deposition of a witness taken 60 years before trial was rejected. See Hubback (fn 56) 132; McB (fn 59) 519; Morgan "Some observations concerning presumptions" 1931 *Harvard LR (HLR)* 906–909.

61 Carreire (fn 23) 935–936 refers to *Code Civil* (France), *Bürgerliches Gesetzbuch* (BGB) (West Germany); Italian Civil Code; Swiss Code Civil and Greek Civil Code. See also Thayer *Preliminary treatise on evidence* (1898) 319.

62 See Friedmann (fn 10) 25; see Sentell (fn 11) 203ff for different time frames in different jurisdictions.

63 Carreire (fn 23) 919; *Iberia Cypress Co v Thorgeson* (fn 48) 683; ILRC (fn 10) para 1 43; CEC (2009) para 5.

In 1978, France revised its regime of absent persons to include a declaration of absence that is, in effect, a “presumption of death”.⁶⁴ Other civil law countries have likewise adopted such a presumption. The Max Planck Institute distinguishes two groups in civil law:⁶⁵

“The first group (e.g., Germany and Austria) provides that the courts render a ‘death declaration’ to the effect that he or she is presumed to be dead from the moment fixed in the decree with regard to all legal relations. It is geared to the extinction of the absentee’s legal personality. The second group (e.g., France) traditionally focuses on the protection of the absentee’s interests.”⁶⁶

3 3 English common law approaches to missing persons

3 3 1 Origin of presumption

It seems as if initially the traditional English common law, similar to the civil law, entertained a legal presumption of life.⁶⁷ The only use of any presumption in the context of missing persons was also one of “being alive” rather than “being dead”.⁶⁸ The origin of the presumption that a person is “presumed to be dead” is rather vague. Swinburne⁶⁹ explains that there was a school of thought which indeed promoted the idea of a “presumption of death after lapse of a certain time”. Some scholars trace the (seven-year) “presumption of death” to The Statute of Bigamy of 1604, the black plague and great fire of London in 1666.⁷⁰ After these disasters, Parliament enacted the *Cestui Que Vie Act*.⁷¹ In terms of this Act the state (London) took custody of “everybody and their property” into a trust.⁷²

3 3 2 Presumption of death after seven years absenteeism

Since the 1800s, a line of cases in England suggested that a seven-year absence might give rise to a presumption of death.⁷³ According to Duhaime these cases initially appeared to have been intended to be *specific to the facts at hand*, but the suggestion of a presumption of death after a seven-year absence became both attractive and novel.⁷⁴ Thus, in *Eagle v Emmet*, the scope and historical development of the principle were stated as follows:⁷⁵

64 For France, see Carreire (fn 23) 920 968; ILRC (fn 10) para 1 56.

65 Para 29.

66 See para 30; a 88 French Civil Code (since 1977) and also Belgian Civil Code; Spanish Civil Code; Italian Civil Code; and Dutch Civil Code. A third group identified, refers to English law.

67 Duhaime (fn 24).

68 Stone (fn 60) 516; McB (fn 59) 519.

69 *A brief treatise of testaments and last willes* (1978) (1st ed 1590) 223; Loughran 1915 *FLR* 1–7; see *Eagle v Emmet* 4 Bradf NY 117 118.

70 Lord Ellenborough, in *Doe d George v Jesson* 6 East 80 102 Eng Rep 1217 (1805) traced the origin of the presumption of death to 17th century legislation. See Carreire (fn 23) 908 fn 42.

71 1666. See Stone (fn 60) 517.

72 The state became the “trustee” holding all titles to the people and property, until a living man comes back to reclaim those titles. Sentell (fn 11) 203.

73 Sentell (fn 11) 203; *Doe d George v Jesson* (fn 70); *Nepean v Doe d Knight* [1837] 2 M & W 894; *Wallace v Fletcher* (1855) 30 NH 434; *Dalton v Angas* (1881) 6 App Cas 740. For case law, see also Contributor “The presumption of life” 1909 *Columbia LR* 435–438; Duhaime (fn 24).

74 Own emphasis. Duhaime (fn 24).

75 4 Bradf NY 117 118.

“The common law is in accordance with the civil law, in the adoption of the principle that the continuation of life is presumed until the contrary is shown. The statutes relative to bigamy, and to leases for life . . . [made] an inroad upon this doctrine, and established a rule which was ultimately adopted by way of analogy, in cases beyond the purview of the statutes. Accordingly, when a party has been absent seven years since any intelligence of him, he is in contemplation of law presumed to be dead.”⁷⁶

The 1869 case *Re Phene's Trusts* has been referred to as authoritative on the seven-year rule.⁷⁷ This approach (relying on a presumption as proof),⁷⁸ marked the point at which protection of the missing person's affairs shifted from the interests of the absentee to those of living individuals (those who must deal with the absence of a person).⁷⁹ However, where there is no acceptable confirmatory evidence that a person was alive at some time during a continuous period of seven years or more the presumption takes effect and the person is “presumed to be dead”.⁸⁰ The presumption does not stand on its own and additional evidence is required.⁸¹ Stone explains it as follows:⁸²

“The presumption of death thus cannot arise until four ‘facts’ are found. In summary form they are these (1) absence for at least seven years, (2) unheard of, (3) by persons who are likely to have heard, (4) all due inquiries having been made. When combined the four facts give rise to a strong inference that the person in question is dead.”

Where a person has been missing for less than seven years, the presumption does not take effect.⁸³ Once an order of presumed death is granted, a death certificate can be issued⁸⁴ by the Registrar of Deaths and the family members can access the estate through the usual succession law channels.⁸⁵ Such an order is not conclusive in any other legal proceedings, for example, dissolving a marriage, and remains rebuttable.⁸⁶

3.3.3 Presumed death – before lapse of seven years

Similar to the position in civil-law jurisdictions it has long been possible in common law jurisdictions, where a person had gone missing in circumstances of

76 Own emphasis. See Thayer (1898) 319; McB (fn 59) 519; Hanna (fn 34) 605; Jalet (fn 28) 226–227.

77 (1869) LR 5 Ch 139.

78 Anon “Presumptions. Death after seven years’ absence as a statutory rebuttable presumption of law” 1938 *Virginia LR* 577–579.

79 See Max Planck Institute (fn 14) paras 30–31.

80 Loughran 1915 *FLR* 1–7; Sentell (fn 11) 203; Citrone (fn 39) 787; Carreire (fn 23) 909.

81 McB (fn 59) 519; Stone (fn 60) 516; Green (fn 31).

82 Stone (fn 60) 517; *Rex v Twynning* 2 B & A 386; *Doe d George v Jesson* (fn 70); Anon (fn 78) 577–579; Swinburne (fn 69) 223.

83 *Re Phene's Trusts* (fn 77) 139. For Canada, see *Re Burgess* 2004 BCSC 62; *Dersch v Dersch* 1994 CanLII 1348 (BCSC); *Re Cyr* 2006 BCSC 1523 (CanLII).

84 See *Halsbury's Laws* (2016) Vol 102 para 745.

85 See *Re Burgess* (fn 83); Sentell (fn 11) 203.

86 *Halsbury's Laws* (2016) para 745; *Bayes-Walker v Bayes-Walker* (fn 16); Alikaj 2014 *MR* 131; Bernstein “Presumption of death certificate is rebutted” 8 March 2010 *Legal Information*; Bohlan “Rebuttable presumptions of law” 1920 *Penn LR* 307–321; Gai “Missing person's death date is day court declares so” 16 December 2013 *The Times of India*; Anon (fn 78) 577–579.

special peril,⁸⁷ that an interested party was *allowed to prove the death* of the person who vanished without having to rely on the presumption of death based on the period of absence.⁸⁸ In *Estate of Fossett*,⁸⁹ a well-known explorer went missing in the scouring terrain on the Nevada-California border. He had taken off alone in a two-seater plane and never returned. Twelve weeks later his wife petitioned the court to have her husband declared presumed dead in circumstances of specific peril.⁹⁰ Also, when Robert Puffer went missing the court was asked to declare Robert deceased as of the date of his disappearance (2007) or, alternatively, declare him an “absentee” so that his property could be legally managed by his brother.⁹¹ He disappeared and his family discovered his vehicle along the shores of a lake with his kayak missing. He had previously attempted suicide. Lederer J found that there were sufficient circumstances to constitute “circumstances of peril”.⁹²

It should be understood that the “presumption of death order” is nothing more than an order “presuming the missing person dead” and not “declaring a missing person dead”.⁹³ Friedmann explains the use of presumptions as follows:⁹⁴

“In order to avoid the continuance of detrimental uncertainty, necessity may arise in certain proceedings to obtain a declaration of the absentee’s presumed or certain death. *Declaring a person dead is an artificial act*: the crossing out of a person’s name from the imaginary register of the living.”

3 4 South Africa’s approach to missing persons

As mentioned above, South Africa is regarded as a mixed jurisdiction. As far as adopting an approach towards “presumed death of a missing person” is concerned, South African law reflects a mixture *par excellence* of the English common law and the civil Roman-Dutch law.⁹⁵ In South Africa, when a person goes missing and there is no indication that he or she died from unnatural causes as provided

87 See fn 62 for life-threatening event; *Halsbury’s Laws* (2016) para 745; Stone (fn 60) 525; Carreire (fn 23) 904; Henson (fn 3) 19–20; Hanks (fn 20); *Garden v Garden* 7 Del 574, 1863 WL 816 3 (Del Super Ct 1863); *In Re Mayne* (1858) 1 SW & TR 11; 164 ER 606; *Mackay v Mackay* (1901) 18 WN (NSW) 266; *In Re Purton* (1943) QWN 33.

88 *Matter of Lafuente* 191 Misc 2d 577 [2002]. See Henson (fn 3) 10–11.

89 See fn 4. See also *Re Burgess* (fn 83); *Re Smith* (1975) 6 ALR 123; *Re Ryan* [1990] 3 NZLR 91; Fox (fn 36); Asimou and Fung (fn 20). Atheron and Vine (fn 32) para 4 10 refers to “a logical probability of death”.

90 See Staff reporter “Fossett’s wife asks court to declare aviator dead” 27 November 2007 *Reuters*; Zorn “Declaring death doesn’t always take 7 years” 29 November 2007 *Chicago Tribune*.

91 Henson (fn 3) 19–20; Hanks (fn 20); *Davie v Briggs* 97 US 628 636 (1878) (death of individual who vanished while passing through hostile Indian territory held to have occurred at that time); *In re Frankel’s Estate* 196 Misc 268, 92 NY S2d 30 (NY Sur Ct 1949).

92 *Re Puffer* 2012 Carswell Ont 8257.

93 *Ibid*; Setati “Presumption of death: What evidence to lay before the High Court” 17 April 2016 *Robin Twaddle & Associates*; Bohlan (fn 86) 307–321. For South African law, see Boezaart *Sourcebook* (fn 12) 316; Van der Vyver and Joubert (fn 29) 425–426; Moonsamy (fn 35).

94 Friedmann (fn 10) 21; Hanna (fn 34); TSP and JWD (fn 11) 767; Bernstein (fn 86); Stone (fn 60) 525.

95 See, in general, Zimmermann and Visser (1996) 3 fn 16; Du Toit 2014 *Ars Aequi* 278; Palmer (2001) 83; Tetley (fn 47) 599; Boezaart (fn 12) 160; Boezaart *Sourcebook* (fn 12) 316; *Wille’s Principles* 158–159 fn 12 17 18; Friedmann (fn 10) 21ff.

for in the Inquests Act, there is only one possible remedy for the next-of-kin of the absentee and that is to apply to the High Court for a “presumption of death” order.⁹⁶

Although earlier case law suggested that the English “presumption of death after seven years had lapsed” was initially adopted in South Africa,⁹⁷ the courts have since the early 1900s followed the Roman-Dutch law principle that there is no general presumption of death and that a missing person is “presumed to be alive” until proved otherwise.⁹⁸ To prove the probable death of a missing person the person who so alleges has to prove on a balance of probabilities that the missing person had probably died.⁹⁹ The question (whether a person is alive or dead) remains a factual one that needs to be verified like any other alleged fact.¹⁰⁰

A court considering such an application takes into consideration the period for which a person has been missing as well as factors such as age, occupation, mental and physical health, the risk the absentee had been exposed to and the circumstances under which the person disappeared.¹⁰¹ An application for an order of “presumed death” can be brought at any time after a person had gone missing. A court order does not amount to a “declaration of death”, and is not conclusive in any other legal proceedings, for example, dissolving a marriage.¹⁰² The presumed dead order remains rebuttable.¹⁰³

Although obtaining such a “presumption of death” order is rather straightforward,¹⁰⁴ it seems that in some instances the courts were hesitant to presume a missing person dead, apparently because the circumstances did not justify the granting of an order “presuming death”, but nevertheless ordered that the missing person’s property should be divided among his or her heirs.¹⁰⁵ This possibility was also foreseen in the Roman-Dutch law subject to security being provided.¹⁰⁶

96 See fn 13 and 21 *supra*.

97 *In re Booysen* (fn 17); *In re Labistour* 1908 NLR 227 231; fn 12 17 18 *supra*.

98 See Voet 10 2 18–20; Heaton (fn 12) 29 fn 168 for Roman-Dutch law; Barratt (fn 12) 139; *Re Beaglehole* (fn 17) 51, 52; *Dempers and Van Ryneveld v SA Mutual Life Assurance Society* (fn 58) 172.

99 See (fn 12); *Ex parte Holden* 1954 4 SA 128 (N); *Ex parte Pieters* (fn 18); *Ex parte Govender* (fn 18). See also Schwikkard and Van der Merwe *Principles of evidence* (2009) 499.

100 See also *Ex parte Stoter* (fn 18); *Ex parte Verster* 1956 1 SA 409 (C).

101 See *Ex parte Estate Russell* 1926 WLD 118 120; Boezaart *Sourcebook* (fn 12) 325; *Wille’s Principles* (fn 12) 158.

102 See Nathan “Presumption of death and dissolution of marriage” 1979 *SALJ* 439 441; Heaton (fn 12); Barratt (fn 12) 137–138; Boezaart (fn 12) 332 for s 1 of the Dissolution of Marriages Act 23 of 1979.

103 *Berger v Aiken* 1964 2 SA 396 (W); *Ex parte Holden* (fn 99); *Ex parte Pieters* (fn 18); *Ex parte Govender* (fn 18). See also Schwikkard and Van der Merwe (fn 99) 499; Heaton (fn 12) 32; Barratt (fn 12) 140; Moonsamy (fn 35).

104 Venter “Bid to have missing man declared dead” 16 January 2016 *IOL News*. See also *SAPA* (fn 19); *Wille’s Principles* (fn 12) 158 fn 100.

105 See fn 17; *In re Hoffmeester* 1900 17 SC 539; *Ex parte Volckers* 1911 CPD 101; *Ex parte Halbert* 1912 CPD 706; *Ex parte Davids* 1948 1 SA 1018 (W).

106 See Voet 10 2 18–20. For criticism see Boezaart (fn 12) 167; Boezaart *Sourcebook* (fn 12) 316; Heaton (fn 12) 31; Van der Vyver and Joubert (fn 29) 426. Obtaining an order to distribute the estate of a missing person requires all beneficiaries to furnish security for the assets received.

According to Van der Vyver this cautioned approach stems from a misapprehension by the courts of what “a presumption of death” entails.¹⁰⁷ Boezaart agrees with Van der Vyver and explains the position as follows:¹⁰⁸

“It should also be stressed that a court of law cannot declare a person dead, but may merely grant an order in terms of which a person who went missing for a period of time, is presumed dead. In some older cases the courts err in this way.”

4 COMPARISON BETWEEN SOUTH AFRICAN AND ENGLISH COMMON LAW

Although case law indicates that South Africa does not follow the English common law on presumption of death, this assumption is only partially true. The underlining principles in both systems are that a court order can be obtained subject to sufficient proof that the missing person is probably dead. The major difference is that English law recognises a “presumption that a person is seemingly dead after seven years”, while no such presumption exists in South African law. In England the courts will rely on the “presumption as proof” when an application serves, while in South Africa the probable death remains a factual question and several circumstantial factors will determine the outcome of an application for “presumed death”.¹⁰⁹

4.1 Similarities

If a person remains missing and the body is not forthcoming, in both systems an order presuming a missing person dead should be obtained before a death certificate can be issued.¹¹⁰ If, despite a thorough investigation, a person remains missing (unaccounted for), someone who has an interest in the missing person or his or her disappearance¹¹¹ may approach the court for an order declaring that the absentee is presumed to be dead. In appropriate situations, the court might grant an order which will then replace the medical or direct evidence that the person had died.¹¹² Green explains what should be proved:¹¹³

“Before making the declaration of death, the court has to receive evidence that family members or interested parties made reasonable inquiries to find the missing person during the . . . period; that the family members or interested parties have no reason to believe the missing person is alive; and there is sufficient evidence to find that the missing person is dead.”

In both jurisdictions a court order “presuming a missing person dead” does not amount to a declaration of death.¹¹⁴ Once the order is granted it only applies to

107 Heaton (fn 12) 32. See case law in fn 17 and 18.

108 *Sourcebook* (fn 12) 316; Van der Vyver and Joubert (fn 29) 425–426; Moonsamy (fn 35).

109 For English law, see para 3.3 *supra* and for South African law, see para 3.4 *supra*. The recent reform in England and Wales is discussed in para 5 *infra*. See Ryan and Durey “For probate purposes, when is a missing person presumed to be dead?” 17 March 2017 available at <http://bit.ly/2AcrlLh> (accessed on 14 November 2017).

110 For South African law, see para 3.4; for English law see para 3.3 *supra*.

111 See *Ex parte Maclean* (fn 17); Heaton (fn 12) 29; ICRC (fn 4) 1–15; Atheron and Vines (fn 32) para 4.9; Jarvis and Chaney (fn 26).

112 For South African law, see para 3.4; for English law, see *Halsbury’s Laws* (2016) para 745; Setati (fn 93).

113 Fn 31 *supra*; Duhaime (fn 24); Evans (fn 11); Citrone (fn 39) 787ff.

114 For South African law, see fn 12 and 102 and for English law, see fn 112; Carreire (fn 23) 908; Bohlan (fn 86) 307–321; Gai (fn 86).

the *administration of the presumed dead's estate* and does not deal with other legal issues.¹¹⁵ The “presumed death order” can be rebutted at a later stage if proof becomes available (that is, the person shows up) that the person is in fact still alive.¹¹⁶

One of the reasons why the English common law approach was criticised is mainly because an order of presumed death only deals with the administration of the estate of the missing person and does not solve other issues such as marriage and insurance claims. This is also the situation in South Africa.¹¹⁷ The various fragmentary statutory provisions are limited to the purpose of that specific statutory sanctioned procedure (administration of estate, dissolving marriage, insurance claims, *et cetera*) and separate or additional applications are required to settle each aspect of the affairs of the missing person.¹¹⁸

4.2 Differences between South African and English law

As indicated above the main difference between South African law and English common law is their approach towards the “presumption of death” *to prove the missing person to be presumably dead*.¹¹⁹ In South Africa the “presumable death” of a missing person remains a factual question and should be proved as in any other legal proceedings, while the English common law applies a “presumption of proof” as evidence of the presumed death.¹²⁰ Thus, in English law when an interested party approaches the court for a “presumption of death order after seven years” it is presumed that the missing person is dead and the *onus of proof* then shifts and rests with the person who wants to prove that the person is *not presumably dead* (is still alive).¹²¹ In South Africa, the presumed death always remains a factual question and the time period a person has already been missing is only one of the factors that a court will take into account.¹²²

Another difference between the two systems is that the English (traditional) common law makes provision for an exception to the “seven-year rule” in situations where it can be proved that a person disappeared in circumstances of

115 Own emphasis. See fn 12, 102 and 103 *supra* for South African law. *Halsbury's Laws* (2016) para 745; Stone (fn 60) 521; Carreire (fn 23) 904; Holmes (fn 1).

116 Bernstein (fn 86); TSP and JWD (fn 11) 747; Stone (fn 60) 516 519; Morgan (fn 60) 909; Liran (fn 25) discusses the incident where a man showed up, 6 500 miles away from where he started. He was missing at sea for 13 months. See Boezaart (fn 12) 169; Heaton (fn 12) 32; *Wille's Principles* (fn 12) 158; Greene and Alys (fn 7) 176 229; *Re Phene's Trusts* (fn 77); see also Morgan “Instructing the jury upon presumptions and burden of proof” 1933 *HLR* 59 77; Dolak “Runaway mom's ex-husband facing insurance payout fight” 3 May 2013 *ABC News*; *Nelson v Schubert* 98 Wn App 754 (2000).

117 See fn 12 13 102 *supra*; TSP and JWD (fn 11) 747; CEC (fn 11) para 17; Stone (fn 60) 521; HCJC (fn 14) paras 3 6 1 and 15.

118 Carreire (fn 23) 904; Holmes (fn 1); *Halsbury's Laws* (2016) para 745; s 15 of the Coroners Act 1988; s 19 of the Matrimonial Causes Act 1973; s 37 of the Civil Partnership Act 2004; Leave to swear death order under r 53 of the Non-Contentious Probate Rules 1987.

119 See Friedmann (fn 10) 18; ILRC (fn 10).

120 South African case law (fn 18); *Ex parte Verster* (fn 100); English case law (fn 16) *supra*. See also McB (fn 59) 519; Setati (fn 93); ICRC (fn 4) 1–15; Bohlan (fn 86) 307–321.

121 *Bayes-Walker v Bayes-Walker* (fn 16).

122 For South African law, see Voet 10 2 18–20; Heaton (fn 12) 29; *Re Beaglehole* (fn 17) 51, 52; *Dempers and Van Ryneveld v SA Mutual Life Assurance Society* (fn 58).

“specific peril”.¹²³ South Africa handles all situations the same. If a person went missing in dangerous circumstances the court will obviously take that into account.

4.3 Swear the death

While an application for a presumed death order in a South African court will obviously include sworn affidavits, the common law makes specific provision for an additional method to obtain an order through “swearing the death” of a person who has gone missing.¹²⁴ Such an application should be made to a judge or a registrar to swear the death in accordance with the relevant will or intestacy of a missing person.¹²⁵ However, “leave to swear death” does not replace a death certificate and is only an administrative facility in managing the estate.¹²⁶ “Leave to swear the death” can be applied for at any point after the person’s disappearance.¹²⁷ This application shows similarities with orders given by South African courts for purposes of the distribution of an estate without presuming a person dead.¹²⁸

The “swear the death principle” was applied in *Re Paul Allan Weeks; Ex Parte Weeks*.¹²⁹ The wife of a passenger presumed to be on a flight which disappeared between Kuala Lumpur and Beijing brought an application to swear the death of her husband to the registrar.¹³⁰

5 RECENT DEVELOPMENTS IN ENGLAND AND WALES

5.1 Background to the Presumption of Death Act

As seen above, the English common law presumption was criticised and regarded as arbitrary.¹³¹ Even in situations where it was seemingly clear that a missing person was most likely to be dead, it was still very difficult to register that person’s death.¹³² Families of missing persons were often faced with lengthy delays and had to pursue separate legal processes in order to resolve different affairs

123 For South African law, see fn 19; for English law see fn 86; Asimou and Fung (fn 20); Atheron and Vine (fn 32) para 4 10 refer to “a logical probability of death”. See also *Re Smith* (fn 89); *Re Ryan* (fn 89) 91.

124 In South Africa an order will always be granted by a court. See *Halsbury’s Laws* (2016) para 745; *In the Goods of Matthews* [1898] P 17; *Re Jackson, Jackson v Ward* [1907] 2 Ch 354.

125 *Halsbury’s Laws* (2016) para 745. See *Guide to coroners* available at <http://bit.ly/Ot5Adh> (accessed on 7 August 2017). In England a leave to swear death order is made pursuant to r 53 of the Non-Contentious Probate Rules 1987.

126 *Halsbury’s Laws* (2016) para 745; *Guide to coroners* (fn 125).

127 *Gunning-Stevenson et al* (fn 5); *Maisel v The National Mutual Life Association of Australasia Ltd* [2016] QSC 166; *Re Heynatz* [2006] QSC 173.

128 See para 3 3 *supra*.

129 For *Weeks* see fn 16; see also *Maynard Estate* (fn 16); *In the Goods of Matthews* (fn 124); *Re Fulton* [1994] 2 Qd R 505; *Maisel v The National Mutual Life Association of Australasia Ltd* (fn 127) paras 5 13.

130 Own emphasis. See *Winegarten Tristram and Coote’s Probate practice* (2015) 534–535; HCJC (fn 14) para 5; *Setati* (fn 93); *Re Parker* [1995] 2 Qd R 617; *Re Bennett* (fn 16).

131 See *Ryan and Durey* (fn 109); *Friedmann* (fn 10) 21; *TSP and JWD* (fn 11) 767; *Bernstein* (fn 86); *Stone* (fn 60) 525.

132 See para 3 3 4 *supra*; <http://www.missingpeople>; HCJC (fn 14) para 3.

such a marriage, insurance claims and policy payments.¹³³ The English system was misunderstood and said to be inflexible and that it created difficulties for the missing person's family. It is explained as follows:¹³⁴

“There is a misconception that, if a person has been missing for 7 years, then that person is presumed to be dead. But an automatic presumption of fact does not arise even if 7 years have passed without any sign of the person in question. In fact, it is possible for a person to be declared dead where that person has been missing for fewer than 7 years. It will depend on the circumstances of each case.”

While most other traditional English common-law jurisdictions adopted legislation during the 20th century to clarify the so-called “presumption of death”, the presumption prevailed in England and Wales until 2014. After the United Kingdom's Missing People Support Group had launched a successful campaign for legislation, the House of Commons Justice Committee accepted legislation in 2013 to give more guidance to families whose loved-ones had disappeared.¹³⁵

5.2 Presumption of Death Act

Modelled on legislation of Northern Ireland and Scotland, the Presumption of Death Act was passed in March 2013 and came into force on 1 October 2014.¹³⁶ The Act addresses flaws in the former common law system by creating a new court procedure and provides for a single statutory procedure enabling close family to obtain a declaration from the High Court that a missing person is deemed to have died.¹³⁷ The Act provides that *any unexplained disappearance* may be sufficient for the court to justify an order of presumed death.¹³⁸ The court can now make the declaration (grant the order) if it is satisfied that the missing person has died, or has *not been known to be alive for a period of at least seven years*.¹³⁹ The application can be made at any time after a person went missing. If the order is granted it serves as conclusive proof of the fact (of presumed death), and date of the missing person's presumed death. It is important to note that the order deals with property rights and also dissolves the marriage or civil partnership (of the missing person).¹⁴⁰

The principles were applied in the Northern Ireland case of *Re O'Flaherty née Donnelly*.¹⁴¹ O'Flaherty left their holiday cottage one morning and was never seen again. Her car was subsequently discovered by the ocean with the ignition

133 *Re Bennett* (fn 16); *Re Parker* (fn 130); Lagniappe (fn 23); Duhaime (fn 24); Alikaj 2014 MR 131; Willis and Bowring (fn 24).

134 Ryan & Durey (fn 109).

135 See (fn 4); HCJC (fn 14) and Missing People available at <http://bit.ly/1nA29NB> (accessed on 27 May 2017).

136 See Presumption of Death (Scotland) Act 1977; Presumption of Death (Ireland) Act 2009; HCJC (fn 14) para 38; Gunning-Stevenson *et al* (fn 5); ILRC (fn 10) para 1 43; CEC (fn 11) para 5; Max Planck Institute (fn 14) paras 30–31.

137 *Halsbury's Laws* (2016) para 745; ICRC (fn 4) 1–15; Evans (fn 11); Young “The Presumption of Death Act 2013” 01-10-2014 available at <http://bit.ly/2BblO2R> (accessed on 20 July 2017).

138 Own emphasis. S 1 of the Act; Young (fn 137). The Act is considered to be consistent with the Council of Europe's 2009 recommendations.

139 Own emphasis. Instead of presuming a person to be dead after 7 years the person is now regarded to be alive. See *Greathead v Greathead* (fn 2); Young (fn 137); Setati (fn 93).

140 See *A v H* (fn 16).

141 [2012] NI Ch 2. See “Missing Strabane doctor declared dead” 13 February 2012 *Ulster Herald*. See fn 136 and Presumption of Death Act 2009.

keys and several personal items still in it. There was no subsequent activity on her bank or credit card accounts, there were no problems in her marriage and no apparent reason why she would commit suicide. She was presumed dead since the last day that she was known to have been alive.¹⁴²

Most recently the 2013 Act was applied in *Greathead v Greathead*.¹⁴³ Edward, a young man with psychiatric and mental problems, disappeared in 2005 and had not been seen again. He had a South African passport but no attempt had been made to renew it or to withdraw money from his account. He was presumed dead during 2017. In an application to have him declared presumably dead, the court applied the new principle as follows:¹⁴⁴

“It is clear on this evidence that Edward *has not been known to be alive for a period* of at least 7 years. But the question is whether the court can be satisfied on this evidence that (on the balance of probabilities) he has in fact died.”

6 ASPECTS RELATED TO MISSING PERSONS

6.1 Actions by next-of-kin

As discussed above, it has become standard procedure for an interested party to obtain a court order (i) sanctioning the issuing of a death certificate; and (ii) authorising the commencement of the administration process. Unfortunately, several other loose ends with regard to a missing person might still need attention.¹⁴⁵ As indicated above, the affairs of a missing person can become an intricate exercise for his or her next-of-kin.¹⁴⁶ Carreire lists some of the potential problems which, according to her, can create a morass of legal problems:¹⁴⁷

“Questions may arise concerning the security of transactions with the missing person’s estate, such as the disposition of his land, the right to proceeds of insurance policies on his life and pensions, the right to a cause of action, the necessity of providing for his dependants, the marital status of his spouse, the paternity and legitimacy of children of his spouse’s second marriage, the conservation of his property from possible waste, the devolution of succession rights that would pass to him, the release of property from a life tenancy, the requirement of his consent to certain transactions, the merchantability of land titles from his estate, and claims of inheritance from him.”

Of all the potential problems listed in the quote above, only two aspects, namely, the dissolution of a marriage and insurance claims, are discussed briefly. These issues and the date of death of the missing person can have an indirect impact on the division of the estate of an absentee.

142 The first application of the Act was in a rather peculiar case dealing with the disappearance of Lord Lucan in 1974. A death certificate was granted on 3 February 2016. See “Lord Lucan’s death certificate granted” 3 February 2016 *BBC News*.

143 Fn 2 *supra*.

144 See *Greathead* (fn 2) para 21.

145 Hanna (fn 34) 605; Martin (fn 7); Green (fn 31); Moonsamy (fn 35); Moya “NP: Missing, finally presumed dead” 13 August 2004 *Mail&Guardian*.

146 See *Matter of Board of Education of New York* (fn 126) 326: “Rights are not to be held in abeyance indefinitely on account of the absence of a person of whom no trace can be found.” See Atheron and Vines (fn 32) para 4 9; Citroni (fn 40) 787–803; Jalet (fn 28) 178; Holmes (fn 1); Parr and Stevenson (fn 1) 69; De Barros-Duchene (fn 15).

147 (Fn 23) 904. See also De Barros-Duchene (fn 15).

6.1.1 Dissolution of marriage or civil union

The traditional English common law order presuming death had no effect upon the legal subjectivity of the person concerned and therefore did not automatically terminate the marriage of such person.¹⁴⁸ In South Africa, if a surviving spouse or civil partner wishes to dissolve the marriage or civil partnership (when a person has gone missing), a separate application must be made to the court in terms of the Dissolution of Marriages on Presumption of Death Act.¹⁴⁹ The application can be made simultaneously with the presumption of death order or separately at a later date. The court will state the date of dissolution of the marriage.¹⁵⁰ The court will not grant the application *mero motu*, but only on application by the spouse or civil partner of the missing person. Once an order is granted it is final and may not be set aside even if the person presumed dead should later reappear.¹⁵¹

Until recently the position in England and Wales regarding the dissolution of marriages was similar to the position in South Africa.¹⁵² The position was, however, described as unsatisfactory by the House of Commons Justice Committee:¹⁵³

“Depending on circumstances, families may need to go through several court processes to resolve a missing relative’s affairs. For example, if a missing person’s spouse wants to administer their loved one’s estate and dissolve their marriage, they need to seek Leave to Swear Death, Probate, and a Decree of Presumption of Death and Marriage Dissolution Order.”

England changed the position through the Presumption of Death Act. The Act provides for the court to make a “declaration of presumed death” for all purposes, including dissolution of a marriage.¹⁵⁴ The Act was applied in *A v H* where the husband sought to remarry and therefore made an application under the Presumption of Death Act. The judge was satisfied that he could make findings as to the facts (for example, date of marriage and the date on which the husband last saw the wife) which enabled him to make the declarations sought.¹⁵⁵

148 See UK Missing People Guidance Sheet; see Explanatory notes of Parliament available at <http://bit.ly/2Ax5EV5> (accessed on 2 November 2017) para 6; Stone (fn 60) 521; Carreire (fn 23) 904; Holmes (fn 1).

149 23 of 1979. For a discussion of this Act, see Nathan (fn 102) 441; *Van Dyk v Fouchee* 1973 (2) SA 662 (E); Moonsamy (fn 35); Boezaart (fn 12) 165; Heaton (fn 12) 30–31; Van der Vyver and Joubert (fn 29) 424–425.

150 See Boezaart (fn 12) 169; *Wille’s Principles* (fn 12) 153; Van der Vyver and Joubert (fn 29) 425.

151 See in general *Ex parte Martienssen* 1944 CPD 139; *Ex parte Chodos* 1948 4 SA 221 (N); Heaton (fn 12) 32; Van der Vyver and Joubert (fn 29) 421.

152 *Halsbury’s Laws* (2016) para 745; CEC (fn 11) paras 17 43 44. See also Matrimonial Causes Act 1973 and Civil Partnership Act 2004; TSP and JWD (fn 11) 763; Young (fn 137).

153 See (fn 14) para 4.

154 S 3; explanatory notes (fn 148) para 20; Young (fn 137). See also ILRC (fn 10) paras 4 21 4 25.

155 (Fn 16) para 15.

6.1.2 Insurance claims

Claiming life insurance for a missing person can become a troublesome exercise.¹⁵⁶ Tucker explains the dilemma faced by next-of-kin:¹⁵⁷

“With no legal authority to act on their behalf, families can find that their worries are worsened considerably by being unable to deal with their missing family member’s banking, mortgage, insurance or benefits in their absence. At worst, the missing person’s finances can be irreparably damaged and homes may even be lost.”

Understandably, insurance companies are cautious when a person mysteriously disappears¹⁵⁸ as several incidents have been reported where a person who had been missing for a long time (and was presumed dead) appeared again.¹⁵⁹ One of the more problematic consequences is that the missing person’s life policies are paid out to the beneficiaries on condition that security for restitution be provided.¹⁶⁰ It should also be kept in mind that premiums are not paid within the grace period, a life insurance scheme lapses and the benefits are no longer available under such circumstances.¹⁶¹

The insurer will usually pay the policy proceeds to the beneficiary from the date the insured person is presumed to be dead. The case *Smt Raj Bala vs LIC of India* shows the problems which an insurance claim can cause.¹⁶² Mrs Singh lost a large portion of an insurance claim when the court ruled that the date of death is not the date when her husband went missing, but rather the date when the court passed its decree declaring him to be (presumably) dead, or at the most when the suit for such declaration was instituted.¹⁶³

The Presumption of Death Act 2013 anticipates situations where an order presuming someone dead is granted and the “missing person” appears again.¹⁶⁴ Section 14 requires an insurer to pay a capital sum as a result of a declaration of presumed death.¹⁶⁵ It entitles the insurer to require the prospective recipient to

156 Chopra “Claiming life insurance for a missing person” 28 May 2017 *Business Standard*; Johnston “Life insurance challenging to collect in missing persons cases” 11 September 2013 available at <http://bit.ly/2A65PpF> (accessed on 12 November 2017). See *Smt Raj Bala vs LIC of India* (fn 161); CEC (fn 11) paras 5–17; Loughran 1915 *FLR* 1–7; Sentell (fn 11); Liran (fn 25); Contributor (fn 38) 91; *Re Cyr* (fn 83).

157 “What happens to someone’s finances if they go missing?” 1 August 2015 *The Guardian*. She refers to Vicki Derrick’s husband who went missing in 2003. Vicki received the life insurance payout eight years after her husband went missing.

158 See also Labra “Are they dead – The missing insured” 2013 *Munich Re*; Johnston (fn 156).

159 Liran (fn 25); Morton “Erased identities – Or how to fake your own death” 23 January 2011 *NZ Herald* for shocking true stories of faked insurance claims. One such incident is of a Pennsylvania woman, Brenda Heist, who turned up alive eleven years after having been missing since 2002. Her family collected insurance proceeds in 2010, completely unaware that she was still alive. See Dolak (fn 116); Liran (fn 25); Labra (fn 158); Johnston (fn 156).

160 TSP and JWD (fn 11) 775ff; Chopra (fn 156); see also *In re Booyesen* (fn 17); *In re Labistour* (fn 97); *Ex parte Holden* (fn 99); Boezaart (fn 12) 170; Moonsamy (fn 35).

161 TSP and JWD (fn 11) 776; Labra (fn 158); Moonsamy (fn 35).

162 See the dilemma in *Smt Raj Bala vs LIC of India* judgement dated 19 Nov 2013, by a bench of Justice Chaudhari and Dr Gupta.

163 See Gai (fn 86); Chopra (fn 156).

164 See Dolak (fn 116); Liran (fn 25); Labra (fn 158); Johnston (fn 156); Moonsamy (fn 35).

165 See the recommendations ILRC (fn 10) para 1 44; explanatory notes (fn 148) para 49.

insure in his or her own name and for the benefit of the insurer against any claim that the insurer may make following a variation order.¹⁶⁶

6.2 Date of death

As seen above, in *Smt (Mrs) Raj Bala vs LIC of India* the date when the court presumed a person dead can become a problem for the estate of a missing person.¹⁶⁷ Whenever the court is approached for a presumption of death order it also has to establish the date of presumed death of the missing person,¹⁶⁸ because “presumed death *in absentia* produces legal effects going back to the assumed day of death”.¹⁶⁹ The “actual date of death” has to be established by circumstantial evidence.¹⁷⁰ Evans recommends that the date of the presumed death is the last date of either a period of seven years since the missing person was last known to be alive, or of a window of time in which death is known to have taken place.¹⁷¹

The courts would normally presume (rule) that a person had died either (i) on the date of disappearance; or (ii) on another specified date (usually on the date of the order). Although it seems more likely that the missing person died shortly after the disappearance than later, there is no presumption in law as to the date of death of a missing person.¹⁷² Usually, if a person disappeared under life-threatening circumstances, the day of his or her actual disappearance may also be considered the legal date of death.¹⁷³

The date of death of a missing person is addressed in the Presumption of Death Act.¹⁷⁴ It is required that every declaration (by the court) must state when the missing person is to be deemed to have died. If the court is satisfied that the missing person has died but is uncertain as to when, it must deem the person to have died at the end of the period in which the court thinks he or she may have died. If, on the other hand, the court is satisfied that the missing person *has not been known to be alive* for a period of at least seven years, but is not satisfied that the person has died, the time and date of the deemed death will be the end of

166 Chopra (fn 156); HCJC (fn 14) para 4.

167 Fn 162 163 *supra*.

168 See Boezaart (fn 12) 169; *Wille's Principles* (fn 12) 153; Heaton (fn 12) 30.

169 See case law referred to in fn 16–18; Basson (fn 37); Department of Justice and Constitutional Development 2017 statement available at <http://bit.ly/2AuO7wB> (accessed on 12 November 2017); TSP and JWD (fn 11) 768; *Re Medzech* (fn 16).

170 See *Re Medzech* (fn 16) 216. It was found that, in the circumstances, it was most likely that she died on the date she had disappeared. See also “Court declares missing Saskatoon woman dead” *CBC News*; *Re O’Flaherty* (fn 147); *Re Bennett* (fn 16); *Re Parker* (fn 130); Alikaj 2014 *MR* 131; Willis and Bowring (fn 24); Lagniappe (fn 23); Stone (fn 60) 520; Contributor (fn 38) 99–100.

171 Fn (11). He argues that there cannot be any evidence about the actual date, time and place of his death. In *A v H* fn 16 *supra* the judge made a declaration that the wife was presumed to have died on 30 January 2005 – namely, the last day of the seventh year from 31 January 2008. See also *Re O’Flaherty* (fn 147).

172 Boezaart (fn 12) 166ff; Basson (fn 37); *Re Jackson, Jackson v Ward* (n 124); *Re Medzech* (fn 16); *Re O’Flaherty* (fn 147); *Greathead* case (fn 2).

173 See also *Re Medzech* (fn 16); Friedmann (fn 10) 18ff; Duhaime (fn 24).

174 See the recommendations of CEC (fn 11) para 43–44. In *Matter of Consentino* 177 Misc 2d 629 631 (NY Sur Ct 1998) a missing firefighter’s wife sought a determination that her husband died as of the date of his disappearance because their family might be eligible for additional benefits.

the period of seven years *beginning on the day after the day* on which he or she was last known to be alive.¹⁷⁵ Recently, in *Greathead v Greathead* the judge stated:¹⁷⁶

“In my judgment, it is right that the court should make a declaration that Edward is *presumed to have died on the day that he disappeared*. The court is required to state not only the day but also the time of the presumed death. I will record the time as midnight on 17 November 2005, because it is the end of the period during which I consider on the evidence it is more likely than not that Edward died, namely, the day on which he disappeared.”¹⁷⁷

7 CONCLUSIONS

A substantial number of people go missing and are presumed dead where there is no direct proof of death. Central to the issues surrounding missing persons is the fact that the status (alive or dead) cannot be confirmed as the absentee’s location and fate are unknown. These uncertainties and lack of closure may be extremely painful with long-lasting effects on family and friends.

South African case law claims to follow the Roman-Dutch common law but it seems that over time the dividing lines between the civil law and common law have become vague. In South Africa, the granting or not of an application for an order for the presumed death of a missing person depends on the facts of the case. It can be obtained within a relatively short period of time where the circumstances surrounding a person’s disappearance overwhelmingly support the belief that the person had died. A court order stating that the missing person is presumed to have died will normally resolve only the issue that underlies the application, but not necessarily other related matters. Statutory provisions related to missing persons are often task-specific, numerous and complex and may necessitate multiple applications. Until a death certificate is issued or a specific other order is granted, a missing person’s affairs are in legal limbo and dependants may have no access to funds and debts will be unpaid.

Recent developments in England have addressed pressing issues such as the common law “presumption of death after a lapse of seven years”, but also property rights, dissolution of marriages or civil unions, date of death, and certain claims against insurers or trustees. The Act allows for a single application to be made to court. The effect of an order results in a conclusive declaration as to the presumed death and is effective for all purposes and against all persons. Issues regarding the date of presumed death are addressed.

It has become apparent that uncertainties regarding missing persons and presumed deaths could be addressed effectively through statutory intervention. The English Act addresses several problems and it is suggested that the South African legislator should also re-consider legislation on missing people to contribute to a smoother process for family members who have to deal with the loss of a loved one. Such an Act will go a considerable way towards clarifying the law on missing persons and presumed death orders and to assist families who are going through emotional turmoil.

175 Own emphasis. S 2(2)–2(4). See paras 18 and 19 of the explanatory notes (fn 148).

176 (Fn 2) para 18.

177 Own emphasis. See *Greathead* (fn 2) para 24.