



South Australian Law Reform Institute

Management of the Affairs of a Missing Person

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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Terms of reference

The Attorney-General of South Australia, the Hon John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. This Report, on the management of the affairs of a missing person, came about as a result of the Institute's review of the rules of intestacy in South Australia. It is presented separately from the report on intestacy because it is about estates of people who are missing, in circumstances in which it is not known whether they are dead.

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Acknowledgements

This Report was written by Dianne Gray.

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Background

1. During preliminary consultations about reform of the law of intestacy in South Australia, the Institute's attention was drawn to an article by Leonie Millard¹ concerning the difficulties that arise when a person is missing and it is not known whether the person is dead and the remedial legislation available in NSW and Victoria.²
2. The recommendation below was originally included in a draft of the Institute's report on reform of the rules of intestacy, but because the recommendation is not about the estates of people known to be dead, and because it is equally relevant whether or not the missing person has a will, it was removed from that report to be reported separately, as advised by the Institute's Advisory Board.

The Problem

3. As there is no body, a death certificate is not issued, and no application can be made for a grant of probate or letters of administration. If a person has been missing without trace for at least seven years, a court may declare that the person is presumed to be dead and then the person's property can be dealt with as a deceased estate. There is also a procedure under the Probate Rules 2015 of the Supreme Court for making an application for permission to swear to death when the fact of death is uncertain but there is evidence from which death may be presumed to have occurred.³ The Public Trustee can apply to the Court for an administration order authorising the Public Trustee to administer the estate for the benefit of creditors and to discharge the person's liabilities as if the person were dead.⁴ However, all of this still leaves a lacuna, in that there may be no one who has authority to conduct the missing person's affairs and it may be seven years before an application can be made for a declaration that the missing person is presumed to be dead.

¹ Leonie Millard, 'Missing – Presumed Dead – or Just Missing?' (2011) *The Last Testament* (Law Society of South Australia, December 2011).

² Actual examples given to the Institute were of people who have not returned home from a fishing trip but no boat or bodies were found, an aeroplane ditching into the sea and a passenger's body never found, a diver not returning and his diving mate saying he was attacked by a shark, and several people disappearing and remains never being found or found years later. There have been cases in which people who suffer a mental illness or are otherwise troubled have disappeared and it is not known whether they have committed suicide or simply gone away. People who are evading law enforcement authorities may choose to disappear and not contact family, friends or associates or use their bank accounts, but they might have been murdered or died of natural causes.

³ *Probate Rules 2015* (SA) Rule 28(7). In some cases there is a coronial enquiry, but this can take a long time and the finding may be open.

⁴ *Public Trustee Act 1995* (SA) s 9(2). The Court must first be satisfied that there are reasonable grounds to suppose that the person has died and has left property in South Australia and that the person died intestate (or no will has been duly provided within a reasonable time of the apparent death).

Remedial Legislation in Victoria and New South Wales

4. New South Wales and Victoria have legislated to allow a person with a proper interest to apply for an administration order after a person has been missing without trace for at least 90 days.⁵
5. In NSW, if the Supreme Court is satisfied that a person whose usual place of residence is in NSW is missing and it is not known whether the person is alive, all reasonable efforts have been made to locate the person, and none of the people with whom the missing person is likely to communicate has heard from the person for at least 90 days, and it is in the best interests of the missing person to do so, it may declare that the person is a missing person and appoint a suitable person or the NSW Trustee as manager of the estate. People who may apply for orders are the spouse or other relative, a business partner or employee, the Attorney-General, the NSW Trustee or any other person who has an interest in the estate. Part 5A of the Victorian *Guardianship and Administration Act 1986* is similar, but not identical.
6. In both States, the administrator may provide for the maintenance of the dependants of the missing person out of the missing person's estate. A note at the end of s 60AB of the Victorian Act explains the duties of the administrator thus:

‘an administrator acts in the best interests of the represented person by only taking actions necessary and desirable for the payment of the missing person's debts, the maintenance of the missing person's dependants and the care and maintenance of the missing person's estate.’

Reform

7. Legislation like this would be beneficial for the missing person's dependants, business partners and employees, creditors, and also the missing person, in the event that he or she re-appears, and ultimately for persons entitled to the estate if the missing person is declared or found dead.
8. However, the Institute is of the opinion that business partners and employees should not be given specific standing to apply. Rather, standing to apply should be limited to members of the missing person's family, the Public Trustee and any other person who has, in the opinion of the Court, a proper interest in having the estate managed.
9. Proceedings and orders for administration of a missing person's estate would be similar to proceedings under the *Aged and Infirm Persons' Property Act 1940* (SA) for orders for the protection of the estate of a person who is—

⁵ *NSW Trustee and Guardian Act 2009* (NSW) pt 4.4; *Guardianship and Administration Act 1986* (Vic) pt 5A.

‘in a position which in the opinion of the court renders it necessary in the interests of that person or of those dependent upon him that his property should be protected ...’⁶

10. Many of the existing provisions of this Act are appropriate, or could be adapted to a new missing persons’ jurisdiction.⁷
11. Generally, proceedings under the *Aged and Infirm Persons’ Property Act* are dealt with by the Supreme Court, and so it would be appropriate to vest jurisdiction for missing persons’ property in that court. Further, it would avoid having two different tribunals dealing with the estate if it is eventually found or declared that the person is dead and the probate jurisdiction of the court is invoked.
12. As remedial legislation of this type is intended for circumstances in which it is not known whether the person is dead, the Institute suggests that it would not be appropriate to include missing persons’ property jurisdiction in the *Administration and Probate Act 1919* (SA).

Recommendation

The Institute recommends that there be a legislated procedure whereby the Public Trustee, family members and other persons with a proper interest, may apply to the court for the appointment of an administrator to manage the affairs of a person who has been missing without trace for at least 90 days, with power to pay creditors and provide for the maintenance of the missing person’s dependants from the missing person’s estate.

⁶ *Aged and Infirm Persons’ Property Act 1940* (SA) s 7(1)(c).

⁷ For example, the definition in s 8 of who may apply for orders is appropriate for missing persons’ estates.