

Presumption of Death in Scotland

This leaflet is intended as an introduction to administering a missing relative's affairs when it is believed that the missing person may have died. It has been written as a guide for families in Scotland, and should not be taken as legal advice. Separate information is available on our website for families in England and Wales.

Background

Only a small fraction of people who go missing never return. Yet those who are not found often leave behind family members that may eventually need, or want, to administer their missing relative's affairs.

In Scotland there is a court process through which an application can be made for a missing person to be declared dead. If successful, the court decree that results from this enables any property, money and other possessions to be administered and, if relevant, dissolves any marriage or civil partnership.

Why is this process in place?

When a person dies in normal circumstances, the death is registered by the Registrar of Births, Deaths and Marriages following the presentation of a medical certificate stating the cause of death. A Death Certificate is issued, providing legal recognition that the person has died. This process both ends any marriage or civil partnership they had, and enables their loved ones to apply for 'Confirmation' in order to deal with the deceased's affairs – this is a legal process that authorises an executor to collect and distribute a person's assets.

When a missing person is thought to have died, there is not a body or medical certificate to show this, and therefore the system works differently. Instead, you will need to raise an action of declarator of the death of that person and satisfy the Court that the missing person is likely to have died. If this is successful, the court will grant a decree and notify the Registrar General for Scotland who will then enter the details in the appropriate register. This court decree both ends the missing person's marriage or civil partnership, and allows the family to apply for Confirmation.

Who can apply to a Scottish court?

You can apply to a Scottish court if the missing person was domiciled in Scotland, or living in Scotland for one year before they went missing, or if you are the spouse or civil partner of the missing person, and you are domiciled in Scotland, or you were living in Scotland for one year before you make the application.

When can I raise an action of declarator?

Many people are familiar with a so-called 'seven year rule' when dealing with presumption of death. The significance of this time period stems from the way in which courts assess the likelihood that the missing person has died. Although the seven year period is important, there are cases in which a person may be presumed dead much sooner – or indeed later – than seven years.

For seven years after a person has last been seen, the court presumes that they are still alive. After seven years, a court may allow for a missing person's affairs to be dealt with, provided that: there are persons who would be likely to have heard of the missing person during that period; those persons have not heard of the missing person; and reasonable attempts have been made to find them. If there have been indications that the person has been alive within the seven years however, the passing of time, in itself, will not be enough for the court to assume that the missing person is dead.

There are exceptions to this seven year time period. Relatives of people who disappear in circumstances which present an immediate threat to their life may apply to a court to administer their affairs much sooner than seven years. This may be appropriate, for example, if a person goes missing at sea or if there is other evidence which would indicate that the person is dead.

If you are unsure of how this seven year period impacts on your relative's circumstances, you may want to seek advice from a solicitor or legal advisory organisation. Missing People's guidance sheet '[When can a missing person be declared dead: The seven year rule?](#)' may also be helpful.

What happens when an action of declarator is raised?

An action for declarator can be raised in the court under the Presumption of Death (Scotland) Act 1977. The court will look at the evidence presented to it and will grant a decree if it is satisfied that the missing person is more likely than not to have died (i.e. on the balance of probabilities).

If you decide to raise an action, you will need to gather this evidence. While you may need to seek legal advice as to what evidence is relevant in your circumstances, this will include any evidence suggesting that the missing person has died, and /or how they have not been heard from for at least 7 years. This may also include evidence of the search for your relative, such as statements from the police and newspaper clippings.

If the court grants a decree, it will state the date and time of the presumed death. Where it is not certain when the missing person is likely to have died, the court will find that they died at the end of the period of time in which the missing person's fate was uncertain. This is also the case if you are applying on the basis that the person has not been known to have been alive for a period of seven years.

Do I need a legal advice or a solicitor to help raise an action of declarator?

You will probably need the help of a solicitor to prepare an application, along with the evidence needed to support the application.

If possible, it might be helpful to try and find a solicitor who has experience of dealing with presumption of death, or similar, applications and has the expertise to deal with your case. If you would like help finding such a solicitor, the Law Society in Scotland may be able to assist you. You can contact it via www.lawscot.org.uk or on 0131 226 7411.

It may also be useful to discuss with the solicitor how much the application is likely to cost in advance of starting the process, and to get this in writing along with the basis on which you will be charged – hourly, etc. This should help you to understand the likely cost of making an application.

Who can support me through this time?

Missing People recognises that administering a missing relative's affairs can be both daunting and upsetting. Our team is available around the clock if you would like to talk about how you are feeling throughout this process, and can be reached on 116 000 or at 116000@missingpeople.org.uk.

For professional advice, or advice tailored to your circumstances, you may wish to contact a solicitor or legal advice service.

For a copy of this guidance via post, please call 116 000.

Missing People would like to thank the Big Lottery Fund for supporting the work of the charity.



First Published: September 2012

For further information and guidance on the issues addressed in this guidance sheet, or for support relating to any aspect of someone going missing, call Missing People's free and confidential 24 hour helpline on 116 000 or email 116000@missingpeople.org.uk

Whilst this information has been provided in good faith, it should not be taken as legal advice. For information tailored to your circumstances, please contact your police force, solicitor or an advisory organisation as appropriate to your query.

Please let us know whether this guidance has been useful, either by answering a few short questions at <https://www.surveymonkey.com/s/MissingPeopleGuidance> or by emailing your comments to policyandresearch@missingpeople.org.uk