



**An Bille um an Dlí Sibhialta
(Daoine Atá Ar Iarraidh), 2016
Civil Law
(Missing Persons) Bill 2016**

*Meabhrán Mínitheach
Explanatory Memorandum*



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Purpose of the Bill

The purpose of the Civil Law (Missing Persons) Bill 2016 is to make specific provision in law where a person who is observed to be missing from his or her normal patterns of life, where those who are likely to have heard from the missing person are unaware of his or her whereabouts and where the circumstances of the person being missing raise concerns for the persons safety and well-being.

The primary purpose of the Bill is to deal with the civil law status of missing persons. It puts in place a statutory framework which would provide for the making of a presumption of death order in respect of two categories of missing persons. The first category is where the circumstances of the disappearance indicate that death is virtually certain. The second category is where both the circumstances and the length of the disappearance indicate that it is highly probable that the missing person has died and will not return, which is where the disappearance occurred in dangerous circumstances or in other circumstances in which loss of life may be presumed.

The Bill is intended to clarify the legal position when a person is missing, who is entitled to apply to the Court for an interim manager to be appointed to manage the missing persons estate and what procedures must be complied with before the Courts will issue a presumption of death order. It also places obligations on those who are appointed to manage the estate of the missing person including the requirement to effect a policy of insurance.

Section 1: Interpretation

This section contains some key definitions of terms used throughout the Bill. The definition of “missing person” that a missing person should be defined, for the purposes of legislation dealing with the civil law aspects of missing persons, as a person who is observed to be missing from his or her normal patterns of life, where those who are likely to have heard from the missing person are unaware of his or her whereabouts and where the circumstances of the person being missing raise concerns for the person's safety and well-being.

Section 2: Persons who may apply for orders under this Act

This section is concerning the persons who may apply for an order under *section 3* of this Bill for interim, limited, management of the property of a

missing person; and that the same persons may apply for a presumption of death order under *section 4* of this Bill.

Section 3: Order for interim management of property of missing person

Subsection (1) pending the enactment of adult capacity legislation, an application to appoint an interim manager to manage the property of a missing person should be made to the Circuit Court. Such an application does not require that the applicant establish that the missing person is presumed dead.

Subsection (2) provides that a County Registrar may, subject to appeal to the Circuit Court, appoint a person as interim manager, provided that this is limited to matters such as accessing a bank account in order to pay utility bills or to make a repayment on a loan or mortgage.

Subsection (3) provides that an order to appoint an interim manager may only be made where: (a) it is not known whether the person is alive; (b) reasonable efforts have been made to find the person; and (c) for at least 90 days, the person has not contacted (i) anyone who lives at the person's last known home address or (ii) any relative or friend of the person with whom the person is likely to communicate.

Subsection (4) provides that, prior to making any order, the Court may serve notice on any person who may be affected by the appointment, including where the interim manager is given a power of sale.

Subsection (5) provides that the interim manager must act in the best interests of the missing person at all times, that the order will specify the exact powers and type of actions that the manager is to have, and that the appointment is for a period of up to 2 years, which can be extended for a further 2 years.

Subsection (6) makes provision that the manager must file annual accounts with the Court.

Subsection (7) provides that, in the event that the interim manager becomes aware that the missing person is in fact alive, the manager must apply to court for an order discharging his or her appointment.

Section 4: Presumption of death order in respect of missing person

Subsection (1) provides that there should be a statutory framework to provide for making presumption of death orders.

Subsection (2) makes provision concerning the detailed list of matters which an applicant must include in a sworn affidavit when applying for a presumption of death order. This must include: (a) specific evidence tending to indicate that the missing person is dead, including, (i) the circumstances surrounding the disappearance of the missing person, (ii) absence of communication with people who would be likely to hear from the missing person, including last known correspondence or communication, and (iii) the length of time since the disappearance; (b) the date when the missing person was last heard from; (c) evidence of advertising for information concerning the whereabouts of the missing person, including where relevant by using the internet and social media (unless there are exceptional reasons for not doing so, explained by the applicant); (d) where relevant and practicable, evidence from a searching organisation that confirms that attempts were made to locate the missing person but were fruitless (whether by affidavit, statutory declaration or, in the case of searches outside the State, in accordance with the 1961 Hague Convention on Proof of Foreign Public Documents (the Apostille Convention) or the 1987 EC Convention on Proof of Documents in the European Communities); (e) the full background relating to the disappearance of the missing person,

including the missing person's age and health (including mental health); if) where relevant and practicable, evidence of corroboration from a family member of the missing person (if the applicant is not a family member); (g) where relevant, the next-of-kin entitled to distribution of the assets of the missing person on his or her death; and (h) a declaration by the applicant of his or her belief that the missing person is dead.

Subsections (3) and (4) provides that, for the purposes of this legislation, there are two categories of missing persons: those who go missing in circumstances (whether arising, for example, from a civil accident or arising from a violent incident) where their death is virtually certain; and those who go missing in circumstances (for example, mountain-climbing or other dangerous activity) that their death is highly probable.

Subsection (3) provides that a coroner may make a presumption of death order where death is virtually certain.

Subsection (4) provides that the Circuit Court may make a presumption of death order where death is highly probable. The general effects of the presumption of death orders are dealt with in *section 5* of the Bill.

Subsection (5) provides that, prior to making an order under this section, the coroner or, as the case may be, the Court may serve notice on any person who may be affected by the making of the order.

Subsection (6) provides that, in determining whether a presumption of death is to be ordered, all the circumstances surrounding the absence of the missing person must be taken into account, including: (a) the time, location, and circumstances of the disappearance, (b) where relevant, the abandonment of valuable property, (c) where relevant and practicable, the extent and nature of post disappearance searches, (d) the presence or absence of a motive for the missing person to remain alive but disappear, (e) where relevant, evidence suggesting that the disappearance was a consequence of foul play, (f) where relevant, the time between a life assurance policy being obtained on the life of the missing person and his or her disappearance, and (g) where relevant, any prior history of fraud involving the missing person.

Subsection (7) (a) provides that, subject to complying with the requirements already set out in this section, there should be no minimum waiting period before an application can be made to obtain a declaration of presumed death order.

Subsection (7)(b) provides that where, because of a person's absence from the State or otherwise, it remains uncertain for a period of at least 7 years as to whether the missing person is alive, it should continue to be presumed that the person is dead: this also retains the longstanding 7 year common law presumption of death rule. The combined effect of *subsections 7(a) and 7(b)* is to confirm the existing law that those left behind need not necessarily wait for 7 years before applying for a presumption of death order, and also that after 7 years absence, where it is uncertain that the person is alive, it can still be presumed that he or she is dead.

Subsection (8) provides that a specific date of death be identified in a presumption of death order. It follows from the different circumstances in which a coroner or, as the case may be, the Circuit Court, makes a presumption of death order.

Subsection (8)(a) provides that where the coroner or, as the case may be, the Circuit Court, makes a presumption of death order and is satisfied that the missing person has died on a specific date, the order must include a finding as to the date and time of death and, where it is uncertain when, within any period of time, the missing person died, the order must provide that he or she died at the end of that period.

Subsection (8)(b) provides that where the coroner or, as the case may be, the Circuit Court, makes a presumption of death order and is satisfied that the missing person has not been known to be alive for a period of at least 7 years (in other words, in situations where the 7 year rule in *subsection 7 (b)* of this Bill applies), the order must include a finding that the missing person died at the end of the day occurring 7 years after the date on which he or she was last known to be alive. Specifying the date of death is important in terms of all the consequences that follow from a declaration of death, including the payment of any life assurance policy, succession law and the related distribution of the property and estate of the person.

Section 5: General effects of presumption of death order

Subsection (1) provides that a presumption of death order made by a coroner under *section 4* of this Bill has the same legal effect as a standard declaration of death made under the Coroners Act 1962. *Subsection (2)* provides that the making of a presumption of death order by a coroner under *section 4* of this Bill would authorise the applicant to register the death of the missing person in the Register of Deaths provided for in Part 5 of the Civil Registration Act 2004. This would, in turn, allow the applicant to obtain a death certificate for the missing person, which would have the same legal consequences that arise as if it were known for certain that the person had died. As the notes to *sections 4(3)* and *(4)*, above, point out this reflects the current position where coroners have made declarations of death in respect of missing persons under the Coroners Act 1962.

Subsection (3) provides that a presumption of death order made by the Circuit Court under *section 4* of this Bill has the same legal effect that arises from issuing a standard death certificate under the Civil Registration Act 2004.

Subsection (4) provides that a Register of Presumed Deaths should be established under the Civil Registration Act 2004. *Subsection (5)* provides that the making of a presumption of death order by the Circuit Court under *section 4* of this Bill would authorise the applicant to apply to register the death of the missing person in the Register of Presumed Deaths. This would, in turn, allow the applicant to obtain a death certificate for the missing person, which would have the same legal consequences that arise on the death of any person.

Subsection (6) provides that a presumption of death order made by a coroner or by the Circuit Court under *section 4* of this Bill has the effect that a marriage or, as the case may be, a civil partnership with the missing person has come to an end.

Section 6: Insurance against claims

This section provides that the court may order that an applicant for appointment as interim manager or an applicant for a declaration of presumed death take out an insurance policy in order to provide an indemnity against claims that may arise after the distribution of the missing person's assets has occurred; and that if the missing person had a life insurance policy, the insurer may require the person who receives the proceeds of the policy to take out an additional insurance policy.

Section 7: Dissolution and Variation Order and consequences of return of missing person *Subsection (1)* provides that a missing person in respect of whom an order has been made under *section 3* or *section 4*, and who subsequently returns to the State, may apply to the Circuit Court for an order dissolving or varying the terms of any such order.

Subsection (2) provides that, subject to the specific provisions of this section of the Bill, a variation order does not have any effect on rights to,

or in, any property acquired as a result of any order made under *section 3* or *section 4* of this Bill.

Subsection (3) provides that, where the Circuit Court makes a variation order, it must make such further order, if any, in relation to any rights to or in any property acquired as a result of the declaration of presumed death as it considers reasonable in all the circumstances.

Subsection (4) provides that: (a) a variation order is not to have any effect on any income accrued between the time of the making of an order under *section 3* or *section 4* of this Bill and the variation order, and (b) where a third party acquires rights to or in the property of the missing person, in good faith and for value, the missing person who has returned may not bring a claim for the property against the third party.

Subsection (5) provides that notwithstanding the generality of *section 5(6)* of this Bill (that a presumption of death order made under *section 4* of this Bill brings a marriage or, as the case may be, a civil partnership to an end), a missing person in respect of whom an order has been made under *section 4* and who returns to the State may apply to the Circuit Court for a declaration that a marriage or, as the case may be, a civil partnership that subsisted at the time the order was made continues to have effect, and in determining that application the Court may, in its discretion, make such order as, in the Court's view, appears just.

Section 8: International aspects of missing persons

Subsection (1) provides that where a citizen of Ireland goes missing while outside the State, the Circuit Court may make (a) an order for the interim management of the property of the missing person in the form provided for under *section 3* of this Bill, and (b) a presumption of death order in the form provided for under *section 4* of this Bill; and that the provisions of *sections 1* to *7* that relate to the application for, the making of and the effects of such orders are to apply in an application under *subsection (1)*.

Subsections (2) and *(3)* provides that, in respect of a person who is ordinarily resident or habitually resident in Northern Ireland for 12 months or who has been habitually resident or ordinarily resident in this State for 12 months and who disappears while in the State, or is believed to have disappeared in the State, an application may be made to the Circuit Court by any interested person who has been habitually resident in the State for 12 months for (a) an order for the interim management of the property of the missing person in the form provided for under *section 3* of this Bill, and (b) a presumption of death order in the form provided for under *section 4* of this Bill; that the provisions of *sections 1* to *7* that relate to the application for, the making of and the effects of such orders are to apply in an application under *subsection (2)*; and that an application under *subsection (2)* maybe made by a spouse or family member of a missing person where that missing person is a victim of violence within the meaning of the Criminal Justice (Location of Victims' Remains) Act 1999.

Subsections (2) and *(3)* ensure that this Bill mirrors the comparable provisions in the Presumption of Death Act (Northern Ireland) 2009.

Subsection (4) provides that, in any application under *subsections (1)* or *(2)*, the Circuit Court may, where relevant, recognise any orders made in any other State in connection with the disappearance of the missing person, subject to relevant rules concerning proof of foreign documents, including those in the 1961 Hague Convention on Proof of Foreign Public Documents (the Apostille Convention) and the 1987 EC Convention on Proof of Documents in the European Communities.

Section 9: Jurisdiction of Circuit Court

This section provides that (in line with the position under family law legislation) the jurisdiction of the Circuit Court concerning both interim management orders and presumed death orders is to be concurrent with the High Court; that, where the rateable valuation of any land to which an application relates exceeds €254, the Circuit Court must, on the application of an applicant, transfer the proceedings to the High Court, but that any declaration or decision made in the course of such proceedings before the transfer shall be valid unless discharged or varied by the High Court; and that the jurisdiction conferred on the Circuit Court may be exercised by the judge of the Circuit in which the missing person was ordinarily resident or carried on any business, profession or occupation before he or she went missing.

Section 10: Presumption of death and ending of civil partnership

This section provides that, to complement the provisions in this Bill that a declaration of presumed death should have the effect that a marriage or civil partnership has come to an end, appropriate provision should also be made in the relevant provisions of the Family Law (Divorce) Act 1996 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

Section 11: Short title and commencement

This is a standard provision setting out the short title and commencement arrangements.

Senator Colm Burke,

Iúil, 2016.

