

Presumption of Death: What Happens When an Individual Vanishes From Society?

By C. Raymond Radigan and Jennifer F. Hillman

Recently, there has been new attention placed on the decades old disappearance of Kathleen Durst who disappeared in 1982. At the time of her disappearance, there was speculation and suspicion surrounding her husband Robert Durst who was from a prominent New York family. No one has heard from Kathleen Durst in decades, yet she was still considered a missing person until recently. Earlier this year, the First Department issued a decision finding the date of Kathleen Durst's disappearance was the most probable date of her death. Finally determining that Kathleen Durst was dead, and identifying her date of death may have implications in contemplated and pending proceedings by her family.

RAYMOND RADIGAN is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act. JENNIFER F. HILLMAN is a partner at the firm where her practice focuses on trust and estate litigation. A special thank you to Gabriella Labita whose research paper was the basis for this article. She is a student at St. John's University School of Law.



By
C. Raymond
Radigan



And
Jennifer F.
Hillman

According to FBI statistics, 750,000 people are reported missing each year in the United States. USA Today, "**By The Numbers: Missing Person in the USA.**" Some of these disappearances are linked to mass fatalities or national disasters, while others may be associated with possible foul play. Regardless of the reason, when an individual disappears and their death cannot be confirmed, the family usually needs a death certificate or something similarly to file insurance claims, settle accounts or receive other benefits.

This article will review what occurs when a person is missing for an extended period of time.

Origins of the Presumption of Death and EPTL 2-1.7

As explained in *In re Boerum St.*, 11 Bedell 321 (1903), under common law and civil law in many juris-

dictions, a person was presumed to be living for a period of 100 years from the time of their birth. Some countries later modified this time period by statute. For example, one English statute exempted any person from penalty for bigamy if their spouse had been absent for a period of seven years. A similar English statute provided that parties to leases who were absent for more than seven years would be deemed deceased. Today, most jurisdictions have shortened the waiting period by statute and allow courts to dispense with the time period requirement all together if the missing person was exposed to a specific peril.

In New York, EPTL 2-1.7 governs presumption of death from absence. There are two routes that allow a court to presume death from a person's absence, which in turn permits the winding up and administration of the missing person's estate. Otherwise, one may have to resort to temporary administration proceedings for absentees pursuant to SCPA Article 9.

First, a court can declare an absentee legally dead if they were exposed to a specific peril. This concerns a disappearance

under circumstances that strongly point to immediate death. A party must show that the absentee was exposed to a specific peril (and not just an unexplained absence), and that a thorough search was made for them. If these elements are satisfied, the absentee's date of death may be considered to be the date they disappeared.

If there is no specific peril linked to the absentee, a person can be declared legally dead if he or she has been absent for a continuous period of three years provided: a diligent search was made for the person during the three year period; the missing person has not been seen or heard from by anyone during that time period; and the missing person's absence is not otherwise satisfactorily explained. If these elements are satisfied, the absentee may be deemed to have died three years after the date such unexplained absence commenced or an earlier date if another probable date of death can be established by clear and convincing evidence. A booklet issued by some courts titled "Guidelines for Guardian Ad Litem" provides helpful hints about how to satisfy the court that a diligent and thorough search was undertaken.

The person wishing to invoke the presumption of death from a period of absence bears the burden of establishing the facts that may give rise to the presumption by the heightened standard of clear and convincing evidence (meaning it is highly probable that the person is dead). It is not enough to assert that three years have passed. A person's absence can be explained by a variety of circumstances other than death, including a desire to conceal their identity, a rift with

family members or within a community, or the fact that the absentee was a "fugitive from justice." See *Gardner v. Northeaster Mutual Life Insurance*, 152 Misc 873 (Sup Ct Delaware Co 1934) *aff'd* 242 AD 886 (3d Dept 1934).

Even if an unexplained absence and unreasonable failure to communicate are sufficiently established, the presumption of death from absence will not arise unless the petitioner satisfactorily demonstrates that he or she has conducted a thorough and exhaustive search for the absentee in places and among individuals likely to have information about the missing person's whereabouts. For example, in *Cavanaugh v. Valentine*, the court found that a diligent and exhaustive search to find an absentee was made only after the petitioner made a report to the Bureau of Missing Persons, sought police aid, visited the morgue, searched in places the absentee frequented, and attempted to get information from the absentee's relatives and friends.

In the case involving Kathleen Durst, the petitioner submitted evidence that she disappeared without explanation, and without her car and personal effects, on Jan. 31, 1982, see *In re McCormack by Bamote*, 161 AD2d 612 (1st Dept 2018). The evidence showed that Kathleen Durst had previously been very close with her sisters and communicated frequently, and it was inconceivable that she would abruptly cease all communication with family and friends. The evidence also showed that Kathleen Durst was a medical student two months away from graduation at the time of her disappearance, and it would be incomprehensible that

she would walk away from her studies when she was so close to her goal. Based upon the unrefuted evidence, the First Department held that the clear and convincing evidence showed that Jan. 31, 1982, the date of her disappearance, was the most probable date of her death.

What Happens if an Absentee Is Located?

The presumption of death is only a presumption. If an absentee who was presumed dead later returns or is otherwise proven to be alive (the so-called "alleged decedent"), the presumption is nullified. Pursuant to SCPA 2226, if the "alleged decedent" returns, he or she has the right to any of her property that the fiduciary still has, as well as the right to compel an accounting and to enforce the decree made on the accounting. However, if the fiduciary accounted and the estate was fully distributed before the absentee returned, the absentee may not recover the property from the beneficiaries who received it. When the current version of SCPA 2226 was enacted in 1994, the Legislature noted that "[t]he distributees receiving the money after a final accounting are more entitled to protection than the missing person who shows up after a three- or five-year absence," see Second Report of the EPTL/SCPA Legislative Advisory Committee (App. 22A); see Turano, Margaret, McKinney's Cons Laws of NY, SCPA §2226. This now conforms with SCPA §911 concerning determination and distribution of an absentee's estate.