

Presumed Deaths: What Relief is Available When Someone Goes Missing?

March 17, 2023 | by Einhorn Barbarito

Procedurally, when a practitioner has a client who needs to initiate a probate proceeding, the steps are fairly formulaic. However, even experienced practitioners can run into trouble when a potential client needs to gain access to the property of an individual who has disappeared.

Presumed death cases are exceedingly rare. Even more so in fact patterns where an individual just disappears. Tragically, most presumed death cases are the result of a catastrophic event, where the deceased was involved but a body cannot be located. For practitioners in the tri-state area, the attacks on September 11th come to mind when discussing presumed death cases. Malaysia Airlines Flight 370, which disappeared over the South China Sea, had three US Citizens onboard, whose bodies were never found.

The statutory language for Death Of Resident Or Nonresident Presumed After 5 Years' Absence Or Exposure To Specific Catastrophic Event can be found in N.J.S.A. § 3B:27-1. Part (a) of the law reads:

A resident or nonresident of this State who absents himself from the place of his last known residence for a continuous period of 5 years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier. N.J.S.A. § 3B:27-1(a).

Following the attacks on September 11th, the New Jersey Legislature added in the following catastrophic event clause:

A resident or nonresident of this State who is exposed to a specific event certified by the Governor as a catastrophic event that has resulted in a loss of life to persons known or unknown and whose absence following that event is not satisfactorily explained after diligent search or inquiry is presumed to be dead. The death is presumed to have occurred at the time of the catastrophic event. N.J.S.A. § 3B:27-1(b).

When there is a possible presumed death, there are two important dates, described in more detail below, which must be identified: (i) the date the person goes missing, and (ii) five years after the person goes missing.

The Date the Person Goes Missing

Legally, before an individual can be presumed dead, they are first categorized as an “absent person.” An absent person is any person who has disappeared or been confined or detained by a foreign power. N.J.S.A. § 3B:26-1. While confinement is easy to establish (e.g., imprisonment or prisoner of war), disappearance is not so easy to determine. There is no statutory definition of being disappeared, and there is no minimum timeframe required for an individual to be considered an absent person due to disappearance.

The statutory standard for New Jersey Police Officers and Government Departments likewise calls for the acceptance of reports of missing persons without delay, regardless of if the person has only been missing a short period of time. N.J.S.A. § 52:17B-213. Practically, an “absent person” is just a person who has disappeared.

How the Absent Person is Defined

If there is an “absent person,” a determination should be made whether the person just cannot be located or if there was a “special peril” or a catastrophic event. Essentially, “special peril” and catastrophic event have the same definition. The New Jersey Department of Environmental Protection defines a catastrophic event as “a natural or human-caused occurrence of limited duration and/or

significant magnitude to result in adverse impact to the infrastructure, public health, and/or the environment on a municipal, county, regional, state or multi-state regional scale.”

For the purposes of N.J.S.A. § 3B:27-1(b), the difference is that a catastrophic event has been certified by the Governor, while an absent person’s “special peril” was not.

Of note, the common law concept of special peril has been recognized by New Jersey Courts as early as 1862, with it more recently being renewed in In re Bencel's Est., 78 N.J. Super. 545, 189 A.2d 733 (App. Div. 1963). The court in Bencel's Estate, a case of a deep-sea fishing boat that went missing, recognized the “special peril” doctrine, holding evidence which included testimony as to finding burned wreckage from the deep-sea fishing boat was sufficient to establish presumptive death of a passenger by special peril.

Regarding death by a catastrophic event, there is no case law to suggest when the Governor can make the official determination of a catastrophic event. However, the determination is required for a presumption of death by catastrophic event.

Evidence Required for Proving Death Caused by Special Peril or Catastrophic Event

For those going through the process of a presumed death case, the main difference between special peril and a catastrophic event is the burden of proving death.

In a catastrophic event, the Governor has certified the event resulted in the loss of life. The proof points are that (i) the absent person was exposed to the event, (ii) the event was certified as resulting in the loss of life, and (iii) the absent person’s disappearance is not satisfactorily explained after a diligent search or inquiry.

As compared to a presumed death for an absent person who has experienced a special peril, it must be shown that the special peril was the direct and immediate cause of death. This is based on case law

from decades ago in In re Zwiebel's Est., 3 N.J. Super. 35, 65 A.2d 545 (App. Div. 1949) which found that a special peril was not established simply by finding the absent person's car abandoned near a bridge with no sign of him, even though he never returned home.

Presumed deaths, which have occurred from special peril or catastrophic events, are presumed to have occurred at the time of the event. N.J.S.A. § 3B:27-1(b).

What Happens When there is Neither Special Peril Nor a Catastrophic Event?

In the event there is neither special peril nor a catastrophic event, but there is still an absent person, it is still possible to immediately access to the absent person's property. If the property of the absent person would be "wasted or dissipated" or if the property is required for the support, care, and welfare of a person reliant on the property, the court can appoint a trustee over the absent person's property. N.J.S.A. § 3B:26-2. The trustee would be under the direction and control of the court.

Since N.J.S.A. § 3B:26-2 was revised in 1982, there is no longer a minimum time frame required for an absent person to be missing to gain access to their property. This was not always the case, as in the case of DeSena v. Prudential Ins. Co. of Am., 117 N.J. Super. 235, 284 A.2d 363 (App. Div. 1971), where the court required proof that the absent person had been missing for one-year before a trust over their assets could be granted.

Five Years After the Person Goes Missing

If the absent person was not exposed to special peril or a catastrophic event, there must be a period of five years for a legal presumption of death, at which any trust previously established by the court under N.J.S.A. 3B:26-2 can be terminated, and a probate proceeding can begin. While the absent person's estate might no longer have any property, depending on how long the trust was in place, an official declaration of death may allow the deceased's family to receive government benefits.

Additionally, life insurance and investment companies might not pay out any benefits until death has been established.

In extremely rare cases, a declaration of death is also required before a wrongful death claim can be brought. An example is Ahn v. Kim, 145 N.J. 423, 678 A.2d 1073 (1996), wherein five years after Dr. Ahn walked out the back door of a mental health clinic and was never seen again, his wife was finally appointed executrix of his estate, and she could bring a wrongful death claim against the clinic.

Takeaways

Probate proceedings can be very complex, undeniably more so when an absent person's estate is at issue. Having an understanding of the definitions in New Jersey can help affected families manage expectations of disposition of assets. While the estate of an absent person is not a typical scenario, trusts and estates attorneys are familiar with the statutes and applicable case law and can advise accordingly.