CHANCERY BAR

Guardianship of the Property and Affairs of Missing Persons

RESPONSE TO THE CONSULTATION PAPER

18 NOVEMBER 2014

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,200 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. The Companies Court itself deals with some 12,000 cases each year.

3. Our members offer specialist expertise in advocacy, mediation and advisory work including across the whole spectrum of company, financial and business law. As advocates members are instructed in all courts in England and Wales, as well as abroad.

4. This reply to the consultation by the Ministry of Justice on guardianship of missing persons' property and affairs has been produced by a sub-committee consisting of Guy Adams, Paul Greenwood, Sandradee Joseph, Alexander Learmonth and Katherine McQuail.

Q.1

No. We agree in principle with the appointment of someone with powers of management over the property and affairs of missing persons, because there are practical problems caused by a disappearance which cannot be readily addressed as matters stand. However, we disagree as a matter of principle with granting unlimited powers of management over the property and affairs of someone who is presumed to be both alive and capable.

The powers of the Court of Protection are not a good analogy. In that case the Court exercises a *parens patriae* jurisdiction to protect those incapable of managing their own affairs. It is wrong as a matter of principle for the State to exercise such a jurisdiction over the affairs of someone who is, on the face of it, capable of managing their own affairs, but has chosen not

to do so. Rather, the justification for the appointment is the fear that the person who has disappeared is in fact incapable or dead and the interests of the missing person, their dependants and/or the beneficiaries of their estate will not be adequately protected in the meantime. Where the person has just "disappeared" the situation is, *ex hypothesi*, a temporary state of affairs, which may be voluntary.

Accordingly we believe that the proposals go too far. The appointment should be in the nature of a receiver and manager of the the missing person's estate for limited purposes only, pending (a) the return of the missing person, (b) the appointment of a deputy, if the missing person later turns out to be incapable, or (c) the appointment of a personal representative, if the missing person later turns out to be dead or presumed dead.

Q.2

No. We do not agree because, in essence, this provision is for the preservation of property (*i.e.* during a temporary absence), as specified clearly in the consultation, and meeting legitimate claims on the estate of the missing person from creditors and family and other dependents. The power of the appointee should, therefore, primarily be for those purposes i.e.: to preserve the estate; pay creditors; make reasonable interim financial provision for any family and other dependents, who would be entitled to make a claim on the estate of the missing person in family proceedings or if the missing person were dead; and such other purposes as the court shall think fit taking into account any known wishes of the missing person.

We consider that the Court already has sufficient powers to appoint a receiver and manager of the missing person's estate under section 37 Senior Courts Act 1981, which confers power on the court to appoint a receiver whenever it appears to the court to be just and convenient to do so, and/or under its inherent jurisdiction.

The jurisdiction to appoint a receiver is very wide and can be exercised in relation to vulnerable adults or deceased persons in a wide range of circumstances, in order to protect their interests, promote their welfare, or preserve their estate - see per Munby J in *City of Sunderland v. PS* [2007] EWHC 623 (Fam) at [31] and *Re SA* [2005] EWHC 2942 (Fam); [2007] 2 FCR 563 at [77]; *Capewell v Revenue and Customs Comrs* [2007] 2 All ER 370, [2007] 1 WLR 386 per Lord Walker at [19]. The receiver is an officer of the court who derives his authority from the court's order appointing him. The duty of the receiver is to act impartially in accordance with the directions of the court in administering the property to which the receivership extends - per Morgan J in *Wood v Gorbunova* [2014] 1 BCLC 487 at [25].

We consider that in most cases of a missing person there will be circumstances in which the court can act under this jurisdiction, fearing the missing person's vulnerability or death. If however there were evidence that the missing person made a voluntary decision to leave, then such person does not want, need or deserve the assistance of the court, and those with

claims on such person would have standing to apply for a receiver and manager in aid of their claims in the usual way.

We have knowledge of a case where the Court of its own motion appointed a receiver where a person went missing after some sort of nervous breakdown and could not be contacted, but there was evidence that indicated he was still alive. Moreover, after his reappearance, the Court authorised the receiver to pay him a monthly stipend for his maintenance.

Q.3

No. We consider that the jurisdiction would be best exercised by the Chancery Division of the High Court. We agreed that these issues are serious and unusual, which means it would be best dealt with in the High Court. The Chancery Division, with its experience of exercising jurisdiction in relation to both vulnerable adults (including through its judges sitting as judges of the Court of Protection) and the estates of deceased persons is well placed to dovetail the interim appointment in relation to missing persons with such other established jurisdictions. The Chancery Division is familiar with making and regulating the appointment of receivers and managers and dealing with any breach of such an appointee's fiduciary duty.

All that is required therefore is that the procedural rules of the Court provide properly for these claims. This will not only clarify the proper procedure but also have the effect of publicising the existence of the jurisdiction more widely. We consider that, since the appointment will be in the nature of an interim measure in circumstances where proceedings cannot be served on the missing person, Part 69 Civil Procedure Rules should be amended to include a new rule to provide the framework and guidance for such an application, which would be made under CPR Part 8. Such a new rule would both advertise the availability of the jurisdiction and regulate its application. Helpfully, it would obviate the delay and expense of enacting primary legislation.

The rule should however avoid being too prescriptive, and leave matters so far as possible to the discretion of the court. We are concerned, for instance, about the proposed requirement to wait for 90 days before an application should be made. We note that paragraph 49 of the consultation (Irish Law) makes reference to “at least 90 days, the missing person has not contacted any person…” and we speculated that the reason might be to bring it in line with the other jurisdictions. However, there may be rare cases where measures need to be taken urgently, and where there is evidence that the person has gone missing, but no conclusive evidence of death. In the procedural rule, we would qualify “at least 90 days” by adding “save in exceptional circumstances.”

The consultation suggests, at paragraph 92, that the jurisdiction might be exercisable in relation to a missing person who owns real estate in England and Wales but who is not habitually resident or domiciled. However, we are not convinced that owning real estate in

England and Wales is a sufficient reason to justify the court's intervention except for the purposes of preservation of the estate and any such appointment should be so limited. If the jurisdiction went beyond this, complex conflicts of laws issues would arise, particularly as other countries develop their own similar jurisdictions.

Q.4

No. We do not consider that the criteria need be specified; rather, well-established principles as to the suitability for such an appointment can be applied. In particular paragraphs 96(b) and (d) would be difficult for a court to assess and are unnecessary if, as we propose, the appointment is only for limited specified purposes.

Q.5

Yes, but with further considerations. There may be cases where it will be appropriate to apply ex parte; the chancery courts deal with applications such as this routinely. We agree with the circumstances under which the court can make the appointment of guardian, which are outlined in paragraph 90 of the consultation.

Q.6

No. We consider that the terms of the appointment are best left to the entire discretion of the court, which can establish appropriate terms as a matter of practice, drawing on established practice in relation to analogous appointments. We believe that section 61 Trustee Act 1925 should apply to such appointments such that the office holder can be relieved of liability where he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust.

We leave Q.7 to Q.11 to those best placed to answer them.

18 November 2014