

# **PRESUMPTION OF DEATH ACT 2013**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### ***Section 7: Other functions of court making variation order***

28. **Section 7** enables the court making a variation order to decide, when doing so, the domicile of the missing person at the time of presumed death (as to domicile, see note on section 1); and any question relating to an interest in property and arising as a result of the order (*subsection (1)*). As to “interest in property” see section 20(1) and the note to section 4 above.
29. *Subsection (2)* provides that when making a variation order the court must make such further order as it considers reasonable in relation to any interest in property acquired as a result of the declaration (*subsection (2)*). In doing this the court must have regard as far as practicable to the principles in section 8 (*subsection (4)*). However, unless the court considers that there are exceptional circumstances, the court can only make an order under *subsection (2)* if the application for the variation order was made during the period of five years beginning with the day the declaration that the application seeks to amend or revoke was made (*subsection (3)*). This is illustrated in the following example.
30. Example: if a declaration were to be made on 1 May 2015 and an application for a variation order was made in respect of that declaration on 1 May 2020, being the day after the day on which the five year period beginning on 1 May 2015 will expire, an order under section 7(2) can only be made if there are exceptional circumstances.
31. In addition to any direction contained in an order made in reliance on section 4(3) in connection with the original declaration, orders made under *subsection (2)* are subject to the following limitations.
32. They do not affect income accrued for the period from and including the date on which the declaration being revoked or varied was made to and including the date on which the variation order is made (*subsection (5)*). For example, if an order under section 7(2) directs on 1 May 2016 that a freehold subject to a lease acquired by X as a result of the original declaration made on 1 May 2015 should be transferred from X to Y, Y is not entitled to the rent that accrued in the period from 1 May 2015 to 1 May 2016 (inclusive).
33. They also do not affect or form the basis of a challenge to a related good faith transaction (defined in *subsection (7)*) or an interest acquired under such a transaction (*subsection (6)*).
34. A transaction is a related good faith transaction for the purposes of the Act if it is a transaction under which a person (A) acquired an interest in property in good faith and for value from another person (B) who had acquired an interest in the property or part of it as a result of the declaration being varied or revoked under section 5 or from another person (C) who had acquired the property in question or part of it from B or from a person deriving title from B (*subsection (7)*).

*These notes refer to the Presumption of Death Act 2013  
(c.13) which received Royal Assent on 26 March 2013*

35. *Subsections (8) and (9)* relate to the situation where a person (D) is a beneficiary under a trust as a result of an order under subsection (2). In this situation subsection (8) states that the trustee is liable to D for any loss he or she suffers because of any breach of trust relating to the property that is the subject of the order. Subsection (9) ensures that this liability is subject to any exemptions in legislation or the trust instrument. Legislation for these purposes includes subordinate legislation made under an Act and legislation made by the National Assembly for Wales (subsection (10)).
36. Trustee is defined in section 20(1) to include an executor, administrator or personal representative
37. The working of section 7 is illustrated in the following example.
- On 1 May 2016 Z was declared to be presumed to have died on 1 May 2015. This was the last day in the period of seven years beginning with the day after Z was last known to be alive (1 May 2008). Evidence emerges in 2017 that Z was alive on 1 June 2008 but otherwise nothing has changed. The court then makes a variation order deeming Z to be presumed to have died on 1 June 2015.
  - Z's will contained a gift of a tenanted freehold property, Whiteacre, to B or if B died before Z, to C. B died on 15 May 2015. The court makes an order under section 7(2) that Whiteacre should be transferred from D, who inherited it from B, to C.
  - D can be obliged to transfer Whiteacre to C, but does not have to account for the income received up to and including the date of the variation order.
  - If, however, D had sold Whiteacre to E, who acted in good faith, E's title cannot be challenged by C.
  - Z also left property in trust for B's children if B predeceased Z, but to C's children if he did not. B is, as a result of the declaration as varied, deemed to have died before Z. B's children are ordered to be substituted as beneficiaries of the trust in place of C's children. The trustees are liable to B's children for any breach of trust, subject to any trustee exemption clause in the trust instrument (the will) or statute.