

Protecting the Estates of Missing Persons

**An addendum to the submission to the Victorian Law Reform
Commission's Review of the *Guardianship and Administration
Act 1986* (Vic)**

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community legal centre

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1. Introduction

The Loddon Campaspe Community Legal Centre made a submission entitled *Protecting the Estates of Missing Persons*¹ (the **Submission**) to the Victorian Law Reform Commission's review of Victoria's guardianship laws.

The Centre argued in its Submission that '*currently there are no provisions in Victorian legislation enabling a next of kin, family member or any other relevant person to act on behalf of a missing person where the missing person has not appointed a general or financial power of attorney. Neither the G&A Act or the Administration and Probate Act 1958 (Vic) provide protection for the estate of a person where a person is missing and is therefore unable to take care of their estates*'.

Since making its Submission, the Centre has become aware of section 24A of the *Administration and Probate Act 1958 (Vic)* (**Section 24A**) which deals with uncared for property. This addendum considers the application and limitations of Section 24A.

The Centre finds the Section 24A mechanism to be outdated, unnecessarily complex and underutilised by trustee companies to protect the estates of missing persons. The mechanism fails to serve the needs of missing persons and their families and friends who are often left to manage their affairs.

2. Uncared for Property - Section 24A

Section 24A enables a trustee company to make an application to the Supreme Court for an order authorizing the trustee company to do any act, matter or thing in relation to the property or affairs of the owner of the property where:

- (a) the owner of any property in Victoria is absent from Victoria and has no agent or attorney in Victoria with authority to take possession of and administer the property; or
- (b) it is not known who the owner of any property in Victoria is; or
- (c) it is not known where the owner of any property in Victoria is; or
- (d) it is not known whether the owner of any property in Victoria is alive or dead.

¹ 'Protecting the Estates of Missing Persons: A submission to the Victorian Law Reform Commission's Review of the Guardianship and Administration Act 1986 (Vic)', Loddon Campaspe Community Legal Centre, 14 May 2010.

2.1 What is Property?

Property is defined in the *Administration and Probate Act 1958* (Vic) (the **A&P Act**) as to 'include a thing in action and any interest in real or personal property'². A thing in action, also known as a chose in action, is described by the Oxford Australian Law Dictionary as 'all personal rights of property which can only be claimed or enforced by action and not taking physical possession'. It goes on to explain that 'the choses in action are not themselves the subject of the proprietary right; rather, it is what they certify that is the subject matter of the chose in action'³.

2.2 The Section 24A Mechanism

Section 24A enables a trustee company to apply to the Court for an order authorizing the trustee company to administer the property of a missing person which would appear to include real property, moneys held in bank accounts, debts owed by the missing person and legacies bequeathed to the missing person.

To commence an application under Section 24A, a trustee company (such as State Trustees) would make an *ex parte* application to the Supreme Court (most likely upon request of the next of kin of the missing person), submitting an affidavit outlining what is known of the missing person, any searches made for them, details of the missing person's property, why it is in the missing person's interests that the order be made and the specific powers of management or administration sought by the trustee company.

Arguably, a trustee company could make an application for a Section 24A order in the following circumstances:

- (a) when a missing person is to receive property – for example a distribution from a deceased relative's estate; or
- (b) where a missing person has tangible real or personal property and there is a need for action to be taken (for example, because the asset is deteriorating, or there are dependants/creditors).

The administration by the trustee company could be completed by:

- (a) an application to the Court by the trustee company to rescind the order;
- (b) the return of the missing person;

² Section 5, *Administration and Probate Act 1958* (Vic).

³ Oxford Australian Law Dictionary, Trischa Mann (Ed), Oxford university press, 2010, p103.

- (c) the issuing of a death certificate or application made to the Supreme Court (Probate) for Grant on the Presumption of Death; or
- (d) after the period in which a trustee company can hold property has passed (6 years in the case of State Trustees) the assets are moved to Unclaimed Monies.

2.3 The Origins of Section 24A

An examination of the origins of Section 24A reveals why under current legislation only a trustee company can make an application to manage a missing person's estate.

The power of the Public Trustee to manage the property of a person who could not be located was first introduced in Victoria by section 6 of the *Public Trustee Act 1948 (Vic)* (**Section 6**). The wording of Section 24A is an exact reproduction of Section 6, which since then has, with little commentary or review of its application, been carried into each form of superseding legislation.

At the time of its first introduction in Victoria (in the *Public Trustee Act 1948 (Vic)*), Parliament described that the legislation would provide for 'instances where persons owning property in Victoria have left the State without making provision for the due care and management of their property... and efforts to trace their whereabouts prove unavailing but the circumstances surrounding their disappearance are such that an application to the Court to presume death of the owner would not be justified'⁴. Parliament described the need to protect property of this nature for the benefit of the missing owner and any of their dependants. The reasons why the Public Trustee (rather than, for example, a missing person's next of kin) would be appointed to manage the estate of the person were not discussed, other than to credit the origins of such a grant of power to New Zealand legislation; the *Public Trust Office Amendment Act 1904 (NZ)*.

Parliamentary debate of the *Public Trust Office Amendment Bill 1904 (NZ)*⁵ indicates that the legislation was a product of its time. The Public Trustee was deemed the appropriate appointee to manage the estate of a man in circumstances where a man 'clears out and leaves property of some kind... and a wife and child unprovided for'⁶. The legislation was developed in a bygone era where, the Centre suspects, all property within marriage legally belonged to the husband as it was considered improper that women own property. In 1904, when a man disappeared or 'cleared

⁴ Victoria, *Parliamentary Debates*, Legislative Council, 27 July 1978, 1838-1841, (The Hon. J. A. Kennedy, Minister of Public Works).

⁵ New Zealand, *Parliamentary Debates*, Legislative Council, 30 July 1907, 706-710, (The Hon. Dr Findlay, Attorney-General).

⁶ *Ibid*, at 706.

out', we suspect that it was considered the more appropriate that the Public Trustee manage a missing man's estate rather than his wife.

This history is interesting but it is also relevant. It appears that the imputed purpose of the *Public Trust Office Amendment Act 1904 (NZ)* of appointing the Public Trustee to manage the estate of a missing person was not considered when introduced into Australian legislation in 1948. There is a distinct lack of commentary about the section on each occasion it was sought to be introduced into superseding legislation. The Centre considers the reasons current Victorian legislation enables only a trustee company to make an application to the Court for an order to manage a missing person's estate now irrelevant and ought to be amended to reflect contemporary values and needs.

3. Limitations of Section 24A

After consideration of the legislative history and the contemporary utility of Section 24A, the Centre maintains that unlike the legislative amendments proposed by the Centre's Submission, Section 24A is wholly inadequate.

Section 24A fails to effectively protect a missing person estate for the following reasons:

(a) It provides no means for a family member or next of kin to apply to manage the estate of the missing person

Section 24A enables only a trustee company to make an application to the Supreme Court for an order to manage the estate of a missing person. This is in part due to the historical context at the time the legislation was first developed, and a failure to review its relevance, which the lack of applications by trustee companies to manage missing persons' estates seems to indicate. The Centre submits that it is no longer appropriate that only a trustee company be able to apply to manage the estate of a missing person. Rather, where there is a suitable family member or interested party willing to manage the estate, they should be allowed to make an application.

As described in its Submission, families and friends of missing people have expressed the importance of tidying up the affairs of the missing person where there is little else they can do to assist⁷. While the matters to be dealt with may appear insignificant for example, involving modest amounts of money or debt,

⁷ 'Protecting the Estates of Missing Persons: A submission to the Victorian Law Reform Commission's Review of the Guardianship and Administration Act 1986 (Vic)', Loddon Campaspe Community Legal Centre, 14 May 2010, p9.

like an outstanding phone bill, some unpaid invoices or a tax return, the process is significant to family and friends of the missing person in dealing with their ambiguous loss.

Section 24A is unlikely to provide adequate assistance to Mr Rosewall, whose experience was described in the Submission⁸. Mr Rosewall considers that an order appointing him as the administrator of his missing son's estate would enable him to redirect his son's mail to the address of the family home so they could firstly keep track of any bills and debts in his son's name, secondly, pay any outstanding debts from his son's existing account and thirdly, lawfully resolve a residential tenancy agreement. Section 24A would not assist Mr Rosewall in this respect, nor may it provide a trustee company with an order so general as to enable it to redirect the missing person's mail and generally keep informed of the missing person's debts and assets. Even if a trustee company could apply for a general order, we submit that it is simply inappropriate that a trustee company administer the affairs of the missing person when there are family members or interested persons who seek to undertake the role.

(b) It requires an application to the Supreme Court, rather than a Tribunal.

The Centre submits that it would be more appropriate for a Tribunal (rather than a Court) to hear the application for an order as the cost of application is lower and the rules of evidence do not apply, enabling a Tribunal member to inform himself/herself fully of what is in the best interests of the missing person.

In addition, the Centre submits that as Tribunal Members of the Victorian Civil and Administrative Tribunal are accustomed to determining who is the most appropriate person and/or body to be appointed administrator of the affairs of a person with impaired decision-making ability, it is appropriate that Tribunal Members be given additional power to determine who is the most appropriate manager of a missing person's estate.

(c) It requires a trustee company, such as State Trustees to be sufficiently convinced to make an application

Trustee companies are private companies, except State Trustees which is a State-owned company, which take a percentage of the amount managed as a fee for service. It is inappropriate that an application for an order for the

⁸ Ibid, pp 4-5.

administration of 'uncared for property' is only able to be made by trustee companies because:

- convincing a trustee company to initiate the application introduces another hurdle in the process;
- a trustee company may be unlikely to make applications on behalf of missing persons whose estates are small; and
- the application of a management/administration fee is not appropriate when there may be suitable family members or friends who could administer the estate.

(d) It does not provide a trustee company with the ability to apply for an order for general powers of administration

A trustee company can apply to the Supreme Court for an order to do any act, matter or thing in relation to the property or affairs of the owner of the property. The authorization always relates back to the property and does not appear to extend to the broader affairs of a person. Examples of such affairs could include a residential tenancy agreement, contracts for services such as utilities and the receipt of postal mail. It is uncertain whether a trustee company would be able or inclined to do such things such as redirect a missing person's mail to keep abreast of their debts or negotiate the termination of the missing person's rental tenancy agreement.

(c) The power granted is not prospective

An application could only be made for the administration of property known at the time of the application, not property that the trustee company becomes aware of after the application is made. In relation to property known after an order is made, a further application for administration of that property would need to be made by the trustee company⁹.

(d) The process is inaccessible to the family and friends of missing persons.

This is demonstrated by the fact that State Trustees, the largest administrator of estates in Victoria, has not in the past 15 years made an application or received

⁹ Based on information provided to the author by State Trustees Client Services department on 21 June 2010.

a request from a missing person's next of kin to make an application for an order to manage a missing person's estate under section 24A¹⁰.

(e) It is at odds with accepted legal practice for the administration of estates where a beneficiary cannot be found

The existence of section 24A suggests that in a case where a trustee of a will cannot find a named beneficiary, the trustee could request that a trustee company make an application to the Court for an order to administer the missing beneficiary's interest granted to him/her by the deceased willmaker. This would have the effect of releasing the trustee from his/her liabilities as trustee and appears, on its face, to be an appealing course of action for a trustee faced with this situation.

However, this process is at odds with accepted legal practice for the administration of estates where a beneficiary cannot be found. Ordinarily, reasonable enquires would be made by a trustee (or their legal representative) to locate a beneficiary. Where these enquiries fail to locate a beneficiary, after the expiration of the required period (6 years from the grant of probate) a trustee must sell, call in or otherwise convert any property into unclaimed money and pay the money to the Registrar of Unclaimed Money.¹¹

Furthermore, the lack of applications made pursuant to Section 24A suggests that it is not a procedure utilised by the legal profession. This apparent lack of use and the dearth of judicial consideration or legal commentary on the issue suggests a lack of knowledge about section 24A and its operation in the legal profession, the impractical nature of the provision and/or concerns about its appropriateness.

4. Conclusion

Section 24A of the A&P Act fails to offer adequate means to manage the estates of the missing persons. It is inaccessible to family and friends of missing persons who are concerned to protect the missing person's affairs and the reasons for limiting applications to trustee companies have become irrelevant. A sensible and sensitive approach would involve the introduction of specific legislation that enables family or friends of missing persons to apply to the Victorian Civil and Administrative Tribunal for

¹⁰ Based on information provided to the author by State Trustees Client Services department on 21 June 2010.

¹¹ *Unclaimed Money Act 2008* (Vic), Division 2.

an order to manage the affairs of a missing person. Such legislation would be practical, accessible and appropriate in the circumstances.

For these reasons, *and the reasons outlined above, the Centre maintains the position and recommendations outlined in its Submission of 16 May 2010.*