

The Presumption of Death **Steve Fossett & Celebrity Estates In The News**

By Robert L. Moshman, Esq.

What happens to the estate of someone who is missing? When will a missing person be presumed dead for legal purposes? What happens if a person who has been legally declared dead then returns? The recent declaration of death for adventurer Steve Fossett helps illustrate some of these issues.

Living on the Edge

On February 15, 2008, a probate court in Cook County, Illinois, declared Steve Fossett (age 63) dead. His estate was, according to court papers, in excess of “eight figures in liquid assets, various entities, and real estate.” Fossett had been missing since September 3, 2007, when he flew off alone in a single-engine plane in the Nevada desert.

Name an adventure or extreme sport and Steve Fossett’s name inevitably comes up. He circumnavigated the earth in planes, hot-air balloons, boats, and cross-country skis, and had set 116 world records, 60 of which still stand.

While at Stanford University, Fossett swam across San Francisco Bay to Alcatraz on a dare and tried to hang a “Beat Cal” banner. Not only did he take part in the Boston Marathon, but also the Ironman Tri-Athalon in Hawaii, a 100-mile ultra marathon through the Rocky Mountains at high elevation, the 1,165-mile Iditerod Trail Sled Dog Race, the 24-hour Le Mans car race, and the 6,000-mile Paris to Dakur off-road auto rally. He swam the English Channel and climbed the highest mountains on six continents.

Fossett may be best known for flying solo around the world, non-stop, in a hot-air balloon in 2002, on his sixth try. During his fourth attempt, his balloon caught fire and plummeted more than five miles into shark-infested waters in the Coral Sea, 500 miles off the coast of Australia.

Had Fossett not been such an adventurer, he would be remembered for his unique success in the financial markets. After building a fortune worth millions from trading soybean futures, he formed Marathon Securities and Lakota Trading that rented exchange

seats on the Chicago Exchange. By 1997, those rented memberships accounted for more trades than any other clearing firm. Fossett then used this model successfully on other exchanges.

Asset Management in Absentia

What happens when there are assets worth tens of millions of dollars and the owner's whereabouts are unknown? This is a nightmare scenario. Just having a valid last will and testament isn't the entire solution since the owner may not be deceased.

Despite the resilience of Steve Fossett, he was human. Optimally, even someone who does not engage in extreme risks should have basic financial planning documents in place to cover periods of mental or physical incapacity. Such documents can range from a simple power of attorney to more sophisticated trusts. Additional documents such as a health proxy and living will may be equally critical when a person no longer possesses the mental capacity to make health-related decisions.

Guardianship for minors may be covered by testamentary provisions, but in the event of some physical or mental incapacity or if the testator is simply missing, the existence of a valid trust that names guardians and which supplies assets for the care of the minors can streamline the process of placing someone in charge while following the grantor's own preferences.

In the absence of valid documents establishing control over assets, a court may be asked to step in and establish a conservatorship. This is a more burdensome and expensive proposition since it essentially renders every transaction part of an extended legal proceeding with court oversight.

The case of Britney Spears having her father named as her conservator illustrates other potential downsides to not having advance directives of some kind in place. For Ms. Spears, the choice of her father as conservator by her family and the courts may be diametrically opposed to her own preferences.

If opposing sides are vying for control over a person and a pool of assets, such as the \$50 to \$150 million net worth of Ms. Spears, a contested proceeding can be expensive, divisive, and splashed all over the press.

Missing Persons

Sometimes people fake their own deaths to escape marriage or criminal prosecution or to collect life insurance. In a recent case, John Darwin escaped financial difficulties and was believed lost at sea. His wife collected on two insurance policies. But five years later, Darwin returned "smelling dreadful" and ultimately was discovered and arrested.

People also fake their death for relatively trivial matters. Former congressional candidate Gary Dodds was recently convicted of faking his own death in New Hampshire, with the possible motive of gaining a sympathy vote. (He came in third place anyway.) A woman in Des Moines, Iowa, recently allegedly faked her own death to avoid paying traffic tickets. There is even a recent case in which a woman faked her own death to extricate herself from a church group that was apparently too clingy.

The practice has become so commonplace as to have generated a neologism, i.e., “pseudocide,” as well as “how to” books on the subject such as “Get Lost!” and “How to Disappear Completely and Never Be Found.” Typically, faking one’s own death can range from a misdemeanor (such as for false swearing) to a felony (such as fraud).

The Presumption of Death

Some missing persons never return. There are more than 2,600 American servicemen listed as MIA from the Vietnam War, 8,900 from the Korean War, and 80,000 from World War II. There are also notable civilian mysteries.

On August 6, 1930, New York Judge Joseph F. Crater left the Billy Haas’ chop house on West 45th Street, hailed a cab, and was never seen again. He was declared dead in absentia in 1939.

Aviator Amelia Earhart’s plane disappeared over the Pacific on July 2, 1937. She was declared dead on January 5, 1939.

Michael Rockefeller, the youngest son of Nelson Rockefeller and great-grandchild of John D. Rockefeller, fell from a canoe amidst crocodiles and cannibals during a research expedition to New Guinea in 1961. His body was never found. He was declared dead in 1964.

Jimmy Hoffa was last seen getting into a car in the parking lot of a Michigan restaurant on July 30, 1975. He was declared dead in 1982.

Natalee Holloway disappeared in Aruba on May 30, 2005, after last being seen in the company of several young men. She has not been declared dead.

Some time after 1800, seven years became the benchmark for the presumption of death in American jurisprudence. But when the missing person was in a “specific peril,” death may be presumed sooner.¹

The Living Dead

The unexpected return of someone who has been declared dead poses numerous problems. Property may have new owners. Spouses may remarry. Inheritance rights

become uncertain. This is the premise of the movie *Cast Away* with Tom Hanks, but it is not a new concept.

Enoch Arden, the 1864 epic 7,222-word poem by Alfred Lord Tennyson is about a shipwrecked sailor. After 3,866 words, Enoch's lonely wife has a dream that Enoch is dead and marries Enoch's best friend. But Enoch lived! In fact, he returns after 10 years only to see through a window that his family is happy without him. He never reveals himself and dies of a broken heart. It is a poignant decision:

Stagger'd and shook, holding the branch, and fear'd, To send abroad a shrill and terrible cry, Which in one moment, like the blast of doom, Would shatter all the happiness of the hearth. He therefore turning softly like a thief. Lest the harsh shingle should grate underfoot, And feeling all along the garden-wall, Lest he should swoon and tumble and be found, Crept to the gate, and open'd it, and closed, As lightly as a sick man's chamber-door, Behind him, and came out upon the waste. And there he would have knelt, but that his knees Were feeble, so that falling prone he dug; His fingers into the wet earth, and pray'd. 'Too hard to bear! why did they take me hence? O God Almighty, blessed Saviour, Thou That didst uphold me on my lonely isle, Uphold me, Father, in my loneliness A little longer! aid me, give me strength Not to tell her, never to let her know. Help me not to break in upon her peace. My children too! must I not speak to these? They know me not. I should betray myself. Never: not father's kiss for me—the girl So like her mother, and the boy, my son.'

This is the heartbreak that justifies waiting before declaring someone dead. There are between 60,000 and 100,000 persons in the category of “the living dead” in the United States who find themselves in the legal morass of trying to re-establish their identities, recover assets, and claim inheritance rights. Agencies such as Social Security erroneously declare the death of about 35 people per day.²

Modern Challenges

New challenges were posed to the legal presumption of death by the terrorist attack of September 11, 2001, and the tsunami of 2004. Some American jurisdictions, such as Pennsylvania, where Flight 97 crashed, have amended “specific perils” to include terrorism.

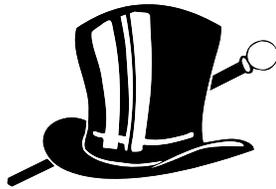
In November, 2007, a draft study was issued by the 47-member Council of Europe. Its forward states:

“In the light of increased globalisation (sic) and mobility by reason of European citizens' travel and residence in foreign countries, as well as the increased risk of terrorist attacks and natural disasters, there is a need for further harmonization (sic) of the legislation of member states in respect of missing persons and the presumption of death. At present the only international instrument dealing with missing persons is the Athens Convention.”³

TECHNICAL REFERENCES

1. See, The missing insured and the life insurance death claim, by C. Edgar Sentell, available online at: <http://fdcc.digitalbal.net/documents/Sentell-w04.htm>. Seven years is an almost universal approach in the United States but there are a handful of states with variations, with some states adopting a five-year period by statute and four years in Minnesota and Georgia.
2. Carriere, Jeanne, "The Rights of the Living Dead: Absent Persons in the Civil Law," 50 La. L. Rev. 901 (1990). NBC and MSNBC, learned of hundreds of persons declared dead by Social Security while recently covering the odyssey of Laura Todd, who was declared dead by a typo eight years ago and still fights red tape.
3. Council of Europe's Committee of Experts on Family Law— Missing Persons. The Athens Convention of 1966, to which Netherlands, Greece, Portugal, Spain, and Turkey are signatories, merely includes a presumption of death for someone missing in circumstances where death is certain. Other nations require waiting periods ranging from five years (Netherlands) to 20 years (France). Germany has an approach based on the age of the missing person with a five-year wait for persons age 80 or more, 10 years for persons age 25 to 80, and 25 years for persons under age 25. The Council of Europe report suggests a three-tiered system with immediate declaration of death if there is certainty, a one-year wait where death is probable, and a five-year waiting period where death is uncertain.

Celebrity Estates In The News



PRINCESS DIANA'S ESTATE

After the death of Princess Diana in 1997, her estate paid eight million pounds of inheritance tax and left 12.9 million pounds to her sons. Last year, upon turning age 25, Prince William gained access to income accrued on his half of the remaining estate. Each half of the estate is now estimated to be about nine million pounds. Prince William has other assets from his grandmother and father, and he earns slightly less than 22,000 pounds annually from the army.

THE ASTOR ESTATE

John Jacob Astor was America's first millionaire and has the distinction of setting up our nation's first trust. Astor made a fortune trading furs and then real estate and opium. One of his descendants, John Jacob Astor IV, perished on the Titanic leaving the

majority of the family fortune (about \$200 million) to his son Vincent Astor, who later was named the 12th wealthiest American on the first Forbes list of the wealthiest.

In 1953, at the age of 62, Vincent Astor married Brooke Astor, whom he called Pookie. After Vincent's death in 1959, Brooke Astor carried on Vincent Astor's philanthropic goals until her death in 2007 at age 105.

In November, 2007, Brooke Astor's son, Anthony Marshall (83), was indicted for plundering her \$198-million estate. Marshall, a Tony-award-winning producer on Broadway, has denied the charges. One of Brooke Astor's former attorneys was also charged with complicity in the forging of Mrs. Astor's signature on the third codicil to her will. The codicil left the entire residuary of the estate outright to Mr. Marshall whereas the earlier versions of the will left him seven percent per year of the fair market value. The investigation was prompted by Marshall's son, Philip, whose accusations were supported by affidavits signed by philanthropist David Rockefeller and the wife of designer Oscar de la Renta.

FORFEITURE OF INHERITANCE

Pro wrestler Chris Benoit, possibly affected by steroid use, killed his wife and son and then himself. Under Georgia's forfeiture statute, Benoit is treated as having predeceased his wife and son so that he cannot benefit from his wrongful acts. But Benoit's mother-in-law seeks a determination of who died first. If Benoit's son died first, then a portion of her estate would go to his wife's mother. So far, the District Attorney of Fayetteville has said the wife was strangled first. If so, she was survived by her son and the estate of Benoit would benefit his children from a former marriage.

PATERNITY BY ESTOPPEL

As reported in the New York State Law Digest by long-time editor David D. Siegel, "How can we explain paternity by estoppel to a teenager who has just gotten an A in biology?"

In, *Shondel J. v. Mark D.*, 7 NY 3d 320, 820 NYS2d 199 (2006), a New York family court imposed paternity liabilities on a man who had been proven by a DNA test not to be the father. Invoking the best interests of the child and the principle of estoppel, the court ruled that the father, having assumed paternity and having formed a bond and provided support, must now continue in that role. The Appellate Division affirmed the trial court's order of filiation.

A divided Court of Appeals then affirmed. Two judges dissented because of the strong evidence of fraud on the part of the mother. The majority upheld the order, saying:

“In allowing a court to declare paternity irrespective of biological fatherhood, the Legislature made a deliberate policy choice that speaks directly to the case before us. The potential damage to a child’s psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given.”

Commenting, David Siegel asked whether modern judges are obliged to allow the father to bring a contribution action against the biological father.

COUNTING HEIRS

A project to identify approximately three million descendants of Chinese philosopher Confucius is expected to wrap up in 2009. No word on where the family reunion will take place but the group photo should be memorable.

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