

Missing Persons - a map of legal issues for family and friends

Missing Persons – Who can Assist You?

People go missing for many different reasons, in a wide variety of contexts and for varying periods of time. The experience of having someone go missing is one that is shared by parents, children, siblings, extended families, friends and significant others across all ethnic and cultural groups and social classes. Where some people have control over the circumstances of their disappearance, others do not. The Family and Friends of Missing Persons Unit [FFMPU] acknowledges the diversity of experiences in this area and promotes and respects the rights of families and friends to receive accurate information and support. Similarly, the Unit acknowledges the rights of all individuals to pursue the lifestyle of their choice and to have their rights to privacy and confidentiality upheld.

How can this information help me?

When a person goes missing for a significant period of time, there are a number of legal and social issues for family and friends to address. Many of the issues are complex legal matters. For this reason the FFMPU strongly recommends that family and friends seek appropriate qualified legal advice before deciding how to proceed with matters relating to a missing person's estate or affairs.

The following information has been developed to provide something of a map to help with the consideration of issues and to highlight where to go for more help. The information is organised in sections as follows:

- **Choosing Legal Advice**
- **Preliminary Legal Advice**
- **What about other kinds of support?**
- **The NSW Supreme Court**
- **The Guardianship Tribunal and Protective Commissioner**
- **Mortgage and Property Issues**
- **Centrelink**
- **Rental Accommodation**
- **Roads and Traffic Authority**
- **NSW Police Missing Persons Unit**
- **General Issues**

Choosing legal advice

The Law Society of NSW operates a Solicitor Referral Service 02 9926 0300 or on 1800 422 713 (toll free) or <http://www.lawsociety.com.au/specialists>. This service can refer you to private firms of solicitors in your local area who are experienced in wills and estates. It can also provide you with a list of accredited specialists in wills and estates. Contact them and ask to be sent a list of Solicitors in your local area. From this list you can choose a solicitor who is experienced or who has a special

interest in the area of managing the estates or affairs of a missing person. This is important as the issues can be complex and could require specialised knowledge in the field.

Alternatively, you may have your own Solicitor whom you feel comfortable to use.

It is quite acceptable to ask your Solicitor whether he or she has experience in the area, and what kinds of legal action you can take, the pros, cons and approximate cost of each course of action. You may also be able to negotiate payment options with your Solicitor, or have an initial session or consultation at a reduced or negligible cost. For a selection of other questions you can feel comfortable asking your solicitor contact the legal aid web page 'questions you should ask your lawyer' at <http://www.legalaid.nsw.gov.au> or telephone the Legal Aid Commission on Sydney 9219 5000 or 1800 806 913 (toll free) to request a copy of the brochure.

If you feel unhappy with the advice you have been given by a Solicitor you can make a complaint or seek further advice from the Office of the Legal Services Commissioner on 1800 242 958 (toll free) or 9377 1800.

Preliminary Legal Advice

Depending upon where you live, you may like to access some preliminary free legal advice. The following contacts are places you can call to obtain some basic free legal advice.

Law Access NSW 1300 888 529 is a free service providing a single point of access to legal and related assistance services in New South Wales. LawAccess NSW helps people find the information and services that are best able to assist with legal problems and questions. This may be a good place to start for information, referrals and advice, in some cases regarding the management of legal issues if a family member or friend is missing.

Hours Mon – Fri 9:00-5:00

Tel 1300 888 529

TTY 1300 889 529 lawaccess@agd.nsw.gov.au

Email

Website: <http://www.lawaccess.nsw.gov.au>

The Legal Aid Commission <http://www.legalaid.nsw.gov.au> provides general preliminary legal advice and help to people who have made an appointment at a city location. Telephone to make an appointment.

Hours (all offices): Mon-Fri 9.00am - 5.00pm

Head office: 323 Castlereagh Street Sydney 2000

Tel: 02 9219 5000

TTY: 02 9219 5700

Fax: 02 9219 5935

- The Legal Aid Commission has branch offices in Bankstown, Blacktown, Burwood, Campbelltown, Coffs Harbour, Fairfield, Gosford, Lismore, Liverpool, Manly, Newcastle, Orange, Parramatta, Penrith, Sutherland, Tamworth, Wagga Wagga and Wollongong.

The Legal Aid Commission provides a free legal advice service at all its offices. Legal representation is available in many areas of the law, subject to means and merit tests. See the section on legal aid further on in this document. Appointments must be made for advice. An interpreter will be provided if needed. The Sydney office will give family law advice without an appointment.

Community Legal Centres: <http://www.nswclc.org.au> is a helpful website listing contacts for community legal centres. Another is: <http://www.austlii.edu.au/au/other/clc/>.

Community Legal Centres can provide free independent legal advice. They may not have specialised knowledge available in wills and estates but they could help to point you in the right direction. For details of your nearest Legal Centre you can either find them in the telephone book, or you can telephone the NSW State Office of the Combined Community Legal Centres Ph: 02 9318 2355.

Aboriginal Legal Services: <http://www.coalsnsw.com.au> there is an Aboriginal women's legal centre, based in Sydney, which offers a state-wide service. There are also other ALS offices located in others areas of the State

What about other kinds of support?

Before moving on to discuss legal matters in more detail, it is important to note that the social and personal issues involved when a relative or friend goes missing are significant. These issues are likely made more difficult by the complex legal processes involved with managing a person's estate or affairs. If you are facing difficult decisions, such as whether or not to go to the Supreme Court, it may be helpful to talk to an independent person. Counselling is one way of exploring the decisions and issues that you face.

- Families and Friends of Missing Persons Telephone Support and Counselling Service provides information, referral, support and counselling service 24 hours a day, 7 days a week including public holidays. 1800 227 772 (toll free)
- Grief Support Inc is a 24 hour confidential telephone support service 02 9489 6644
- Lifeline – is a national 24 hour telephone counselling service 131114

The NSW Supreme Court

The most usual way to legally manage the estate of a missing person is to apply to the Supreme Court for a Grant of probate on presumption of death with leave to administer the estate. This means, in legal terms, that the person's estate, both real and personal property, including cars, superannuation entitlements and any other assets are dealt with as if the person was deceased.

This is understandably a difficult issue for many family and friends of missing persons. However, the premise is that no one can deal with the assets of another person without their prior consent.

If, prior to their disappearance, the missing person had given power of attorney to either the [Public Trustee](#) or another person, solicitor or relative, for example, then some matters can be resolved using this authority.

Can I apply through the Supreme Court for a Grant of probate on presumption of death without using a Solicitor?

It is possible to do this, as evidence to satisfy the criteria listed overleaf could be collected by families. However it is strongly recommended that initial legal advice be sought before making such application. The sources listed previously in "Choosing Legal Advice" could help with this process.

Alternatively you could contact the Supreme Court on 9230 8087 and discuss the option of making your own application with the Duty Registrar. The Duty Registrar may assist with procedural advice but will not give legal advice.

Basically, there are three options available if you want to make an application through the Supreme Court to obtain a Grant of Probate on presumption of death:

1. Select a Solicitor to make the application for you;
2. Engage a solicitor for a preliminary one off consultation, to advise you only on how to make application; or
3. Make your own application independent of a Solicitor.

What happens at the Supreme Court?

The Supreme Court is able to make an order to deal with a missing person's assets when it is satisfied that the missing person is no longer alive. The order made is a grant of probate on presumption of death with leave to distribute the estate. The principles which apply stem from the 1937 case of [Axon v Axon](#) which says that where a person has not been seen or heard of for at least 7 years by those people who in the common course of affairs would be likely to have been communicated with, then in the absence of evidence to the contrary, it ought to be found that he is dead. Of course, in appropriate circumstances, an inference of death may be made where less than 7 years has elapsed.

The Court makes the order based on the evidence before it. Some cases are quite straightforward, especially if the person was lost in an accident (for example at sea or an air crash) but others are more complicated. The Court will need significant evidence before considering making such an order.

The evidence that will go before the Court includes information about:

- The persons age, mental and physical condition;
- Terms of the relationship with spouse / partner and family;
- Circumstances of the disappearance;
- Evidence of any pertinent conversations by the missing person which may shed light on the disappearance;
- Extent and results of police searches and any newspaper or advertisements;
- Results of enquiries from the persons place of work and social, sporting connections;
- Issues relevant to the persons financial status and debts or insurance coverage;
- Bank account withdrawals or movements;
- Whether there is any reason for the person to evade discovery; and
- Results from tracing organisations such as the Police, Salvation Army, Australian Red Cross and Wayside Chapel, etc.

Once such an order has been made, it means that for legal purposes the person is deceased and their estate can be managed according to the Wills Probate and Administration Act.

It is likely that the Supreme Court would not make an order if it believes that there may be a reason the person has chosen to go missing or if there is inconclusive evidence.

What does it cost?

The Court filing fee payable is determined by the sworn gross value of the estate. These fees are subject to change and the current applicable fee may be found by telephoning the Probate Office on 9228 7377 or on the Supreme Court website <http://www.lawlink.nsw.gov.au/sc>. Legal costs are also calculated on the gross value of the estate.

Can I get legal aid for this?

There may be some provisions for families and friends through the [Legal Aid Commission NSW](#).

- To find a local Solicitor who is prepared to make the application to the Supreme Court and then make application for legal aid, subject to eligibility under the Legal Aid Guidelines.
- To approach the Legal Aid Commission directly for contact with a member of their civil litigation team, where a Legal Aid Commission Solicitor will handle the matter directly.

The determination whether a relative or friend is entitled to receive Legal Aid comprises assessment on the merits of the case, the means the person has to pay for the legal action and the current government policy in the area.

Legal aid is only available for these types of proceedings if the application is opposed and the applicant is at special disadvantage.

An applicant is at special disadvantage if he or she is under 18.

The other grounds of special disadvantage are if the person [applicant] has substantial difficulty dealing with the legal system as a result of one of a number of specified disabilities. The types of scenarios that would meet such criteria include a person with a substantial psychiatric condition or physical disability, mental illness or other incapacity. Severe depression, resultant from the disappearance of a family member, for example, could be argued to also meet these criteria.

Usually, however, the means testing of applicants would ensure that people who are not in a very low income group, eg. not receiving a pension, would find it difficult to have Legal Aid granted. Particularly if the predicted outcome of the case meant that there would be financial or material gain for the applicant.

Can the Supreme Court do anything else to help?

Again, the FFMPU recommends that you explore these options with your Solicitor. You need to talk to your Solicitor about other provisions for the management of a missing person's estate without making application for a Grant of probate on presumption of death. If there is a house or significant assets that are falling into disrepair, or there is an outstanding liability that is increasing, your Solicitor may be able to suggest some other way in which the court or legislation may be able to help with this.

What is Probate? Can it help me?

A Grant of probate on presumption of death may be made by the Supreme Court if there is a will. Application is made by the person named as Executor in the will.

This is often referred to as 'getting Probate' and provides the authority necessary to deal with the person's estate.

If there is no will or if the missing person had not named an executor, there are provisions within the legislation for this situation. An application can be made by spouse, de-facto spouse or children for the court to appoint the person applying as

an administrator and grant Letters of Administration. The estate is then distributed according to the rules of intestacy.

The Probate Office can be contacted (but cannot give legal advice) between 9am and 5pm on 02 9228 7377. There is a Duty Registrar available after 2.30pm.

The Supreme Court has a Duty Registrar available to assist with procedural advice between the hours of 9am-5pm daily and is located on level 5 Law Courts Building, Queens Square Sydney or on 9230 8087. The Duty Registrar **will not** give legal advice or complete forms on your behalf.

To lodge documents:

Level 5, Law Courts Building
Queens Square
SYDNEY 2000

To search probate records or to discuss a requisition:

Probate Office
Old Supreme Court Building
Level 1, King and Elizabeth Streets
SYDNEY 2000 9228 7377

To access legislation, forms and other information concerning the Supreme Court, including filing fees:

<http://www.lawlink.nsw.gov.au/sc>

I've heard of the Guardianship Tribunal – can they help?

Unfortunately, it is unlikely the Guardianship Tribunal can help in missing person's cases.

The Guardianship Tribunal is a NSW Government body that can appoint guardians and financial managers for people 16 years and over who have a disability that makes them incapable of making decisions about their lifestyle and financial affairs.

Before the Guardianship Tribunal may make a guardianship or a financial management order, certain tests under the Guardianship Act must be satisfied.

There has to be proof that the person (who is the subject of the application) has a disability leading to a functional and decision-making incapacity. This incapacity will be manifested by inability to attend to activities of daily living and to make decisions about appropriate food, accommodation, community services and health care. An application has to be supported by medical evidence and corroboration from witnesses. There has to be evidence that the person is alive.

Before a financial management order may be made, the Tribunal has to be satisfied that the person, because of psychological, physical or other incapacities or disabilities, is unable to manage their financial affairs. They must need somebody else to manage those affairs on their behalf and it must be in their best interests that a financial manager is appointed for them. Financial management applies only when the person is alive. If there is no evidence that the person is still alive the Guardianship Tribunal cannot make a financial management order in relation to them. This matter was tested a number of years ago when the Tribunal refused to make a financial management order in relation to a person who had disappeared and in relation to whom there was no evidence that they were alive. Recently the Coroner declared that person to be deceased.

There are very rare circumstances where a person with a disability is taken by a known person, usually a family member, to a known place without their consent or when they are incapable of deciding whether they wish to move or not. In these circumstances it may be in the best interests of the person to make an application. In this situation it would be advisable to contact the Guardianship Tribunal's Inquiry Service to discuss making an application.

Phone: 02 9555 8500
Toll free: 1800 463 928
TTY: 02 9552 8534
Fax: 02 9555 9049

Address: Guardianship Tribunal
Locked Bag 9,
Balmain NSW 2041

E-mail: gt@gt.nsw.gov.au

Website: <http://www.gt.nsw.gov.au>

I've heard of the Protective Commissioner – can they help?

The Protective Commissioner can only assist you if the missing persons assets have already been the subject of a financial management order under the Protected Estates Act [1983] made by the Supreme Court or the Guardianship Tribunal, as above.

The Protective Commissioner will not be able to help you to deal with the estate of a missing person if a financial management order has not yet been made.

You must go FIRST to the **Guardianship Tribunal**

There are mortgage and property issues – how can I deal with this?

If the missing person had a mortgage over some real estate, as a relative there are options on how to deal with this.

If the family believe that the person is no longer alive and supportive evidence is provided by the police investigation, then an application can be made to the Supreme Court for a Grant of probate on presumption of death.

This will mean that the Executor of the Will can manage the estate. Please refer to the section on wills and probate legislation.

If it is unclear whether or not the person is alive and the family do not wish or are not able to proceed with an application for a Grant of probate on presumption of death from the Supreme Court, then the matter needs to be discussed with your lending institution or bank as soon as possible.

The FFMPU is currently obtaining information from the larger banking institutions on this issue and will update the map as soon as possible. In the meantime it is recommended that you contact the bank as soon as possible to discuss your situation.

How can Centrelink assist?

Centrelink can provide some assistance to family and friends of missing persons, however, it is subject to Federal Privacy legislation and the confidentiality provisions contained in both social security and family assistance law and cannot disclose information about one of its customers directly to family and friends. If a family member or friend is missing and you are concerned for their health or safety, you should initially report this to your local police station. Centrelink has arrangements in place with Police Missing Persons Units in each State to assist them in locating missing persons if they are Centrelink customers.

If you have lost touch with a friend or relative or if they are missing but you are not concerned for their health or safety, then Centrelink may be able to assist through its 'In-Touch' program. Through this program, Centrelink will write to the friend or relative (if they are a customer) and ask them to contact you. They are under no obligation to contact you if they do not wish to do so.

The In-Touch program is not used for business dealings or legal matters nor is it to be used as a post office facility. To enquire about the In-Touch program please contact your local Centrelink office or the Privacy, Security and Information Access Team in Canberra.

For general inquiries, contact your local Centrelink office.

You can write to the Privacy, Security and Information Access Team at:

GPO Box 7788 CANBERRA MAIL CENTRE ACT 2610

Or contact them on:

Telephone: 02 6244 5145

Facsimile: 02 6244 5163

As it is not a criminal offence to be a missing person, Centrelink will not do the following:

- Cancel the benefit of a missing person; or
- Tag the file of a missing person.

For general inquiries, contact your local Centrelink office.

Rental Accommodation – what can be done?

The *Residential Tenancy Tribunal Act [1987]* does not contain provision for the termination of a lease where there is no power of attorney granted. However, it is obviously possible to terminate a lease by negotiating that the landlord terminate the lease either as a result of non-payment of rent or through some other negotiation.

If it is unclear whether the person is alive and the Police or relatives do not wish or are not able to proceed with a Grant on 'presumption of death' by the Supreme Court then:

1. The relatives may wish to continue maintaining the rented accommodation.
2. If no one wishes to continue maintaining the rented premises then the Landlord can terminate the lease.
3. Relatives and friends should remember that if the missing persons property and goods are removed, it is good practice to maintain an inventory of all possessions removed.

Roads and Traffic Authority

The Roads and Traffic Authority [RTA] advises that when the Supreme Court issues a Grant on "presumption of death", the RTA's current policy "transfer of registration from deceased estates" would apply.

For further information contact a local RTA branch or telephone the RTA Call Centre on 132213.

NSW Police / Missing Persons Unit

Police will accept a missing persons case in the following circumstances:

"A missing person is anyone who is reported missing to police, whose whereabouts are unknown, and there are fears for the safety or concern for the welfare of that person. This includes anyone missing from any institution, excluding escapees."

A report will not be accepted for the mere purpose of family reunions, debt collection, or to locate a person for any other purpose (e.g. divorce proceedings, serving a summons).

When a report has been accepted, police are responsible for making enquiries to locate the person. The results of a police investigation provide evidence concerning the circumstances surrounding the disappearance and may indicate the current status of the missing person. Evidence arising from the police investigation is a key element in any future court proceedings (e.g. Coroner's Court) and may assist the family concerned with seeking an outcome through the Supreme Court.

It is therefore imperative that when you lodge a missing persons report, that you fully co-operate with police and disclose all known information. This will assist police in providing a full and thorough investigation, with the aim of locating the missing person as soon as possible.

It is important that contact is maintained with the investigating police. Normally, police at the station where the report was made conduct inquiries. However this may change depending on the location where the person disappeared.

Whilst Police may have their suspicions they are unable to provide a 'legal' finding of death, as this is the sole judicial role of the Coroner or the Supreme Court. However the results of their investigations may be used as evidence in any subsequent inquest or hearing

For further information, please contact the Missing Persons Unit on 1800 025 091 (free call).

Website: www.police.nsw.gov.au/missingpersons.

General Issues

At present, the only clear legal pathway for friends and families is the application for a Grant of probate on presumption of death. This means that all other issues such as superannuation, life insurance and so forth tend to rely upon the Grant on 'presumption of death' or the findings from a coronial inquest before claims can be processed. Since all policies are underwritten with different conditions, it is impossible to give detailed advice on specific matters relating to insurance or superannuation and so on. However, some general principles can apply for families communicating with government departments or financial institutions, etc.:

- Find out whom the appropriate person is to talk to in the agency about your situation. Ask them what evidence they require to respond to your request.
- Put your concerns and requests first in writing to this person; keep a copy of the letter you send.
- In the letter, give the person as much information as you can in simple factual statements. Include how long the person has been missing, what action has been taken, eg when you reported the person missing to the police. Include the reference number of this matter, if you can, or include any notices in the newspaper or referrals you have made to a tracing agency.

- You may need to include evidence that you have a right to access or manage an asset eg by being the person who would have inherited under intestacy rules for example.
- If you are denied your request, ask the agency to provide a written reason for its decision. This could help you appeal at a later stage.

Acknowledgement

The assistance and input of the following contributors is greatly appreciated and acknowledged:

- The Law Society of New South Wales
- The NSW Legal Aid Commission
- Law Access
- Centrelink
- Supreme Court of NSW
- Guardianship Tribunal
- NSW Roads and Traffic Authority
- Community Legal Centres
- NSW Police Missing Persons Unit