

Legal instruments



Principles concerning missing persons and the presumption of death

Recommendation CM/Rec(2009)12
and explanatory memorandum

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Principles concerning missing persons and the presumption of death

Recommendation CM/Rec(2009)12
adopted by the Committee of Ministers
of the Council of Europe
on 9 December 2009
and explanatory memorandum

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*Principes concernant les personnes disparues et la présomption de décès
(Recommandation CM/Rec(2009)12 et exposé des motifs)*

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1. Recommendation CM/Rec(2009)12, adopted by the Committee of Ministers on 9 December 2009.
2. This document contains the text of Recommendation CM/Rec(2009)12 and its explanatory memorandum.

Introduction

Due to unprecedented mobility caused by the development of travel and prolongation of stays in foreign countries, as well the increased risk and occurrence of terrorist attacks and man-made or natural disasters, as a consequence, among other things, of climate change, there is a need to supplement and, where legislation already exists, to further harmonise the legislation in member states on the presumption of death of missing persons. There also continue to be other circumstances in which people go missing in the Council of Europe member states, such as armed conflicts.

At present, the International Commission on Civil Status (ICCS) Convention relating to the establishment of death in certain cases (Convention No. 10, the "Athens" Convention) of 14 September 1966 governs situations in which the death of a missing person can be regarded as certain. However, there are no international provisions on the civil law aspects of missing persons whose death cannot be considered as certain.

Therefore, the Working Party on Missing Persons (CJ-FA-GT1) set up under the authority of the European Committee on Legal Co-operation (CDCJ) was given the task of drafting a recommendation aiming at providing governments of member states with assistance in dealing with all cases of missing persons and issuing a declaration of presumed death. It takes into consideration that a fair balance must be struck between the interests of missing persons and of those with a legitimate interest in having their death declared.

The recommendation, as prepared by the working party, was adopted by the Committee of Ministers on 9 December 2009.

Recommendation CM/Rec(2009)12

of the Committee of Ministers to member states on principles concerning missing persons and the presumption of death

*(Adopted by the Committee of Ministers on 9 December 2009
at the 1073rd meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its member states, in particular by promoting the adoption of common rules in legal matters;

Noting that due to unprecedented mobility caused by the development of travel and prolongation of stays in foreign countries, as well as the increased risk and occurrence of terrorist attacks and man-made or natural disasters, due among other things to climate change, there is a need to supplement and, where legislation already exists, to further harmonise the legislation in member states on the presumption of death of missing persons;

Noting that there continue to be other circumstances in which people go missing in the Council of Europe member states, such as armed conflicts and situations of generalised violence;

Having regard to the Final Declaration and Action Plan adopted at the 3rd Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), in particular concerning the need to continue to develop family law as a focus point of the Council of Europe;

Having regard to the United Nations International Covenant on Civil and Political Rights (1966);

Having regard to the United Nations Convention on the Rights of the Child (1989);

Having regard to the United Nations International Convention on the Protection of All Persons from Enforced Disappearance (2006);

Having regard to the importance that should be attached to the international obligations of member states concerning missing persons, in particular under international criminal and international humanitarian law;

Appreciating the work of the International Committee of the Red Cross (ICRC) in this area;

Taking into account the relevant case law of the European Court of Human Rights;

Building on the Council of Europe's past experience in this field, namely Recommendation No. 646 (1971) of the Consultative Assembly of the Council of Europe on action to be taken in tracing missing persons and Recommendation No. R (79) 6 of the Committee of Ministers of the Council of Europe to member states concerning the search for missing persons;

Having regard to the Convention relating to the establishment of death in certain cases prepared by the International Commission on Civil Status (ICCS Convention No. 10) and signed in Athens on 14 September 1966, at present the only international legal instrument dealing with civil law aspects of the question of missing persons;

Noting that this convention deals only with cases where death can be regarded as certain, and consequently does not cover cases of missing persons whose death can be regarded as likely or as uncertain;

Acknowledging that legislation in this area has recently been adopted or proposed in some member states;

Considering nevertheless that a great number of member states remain devoid of legislation on this subject;

Recognising that there are considerable disparities between the legislation of member states, it being often unsuited to the situation of persons with a legitimate interest in the declaration of presumed death, by imposing numerous constraints upon them and consequently placing them in a vulnerable position before the declaration of presumed death has been made;

Considering the length of waiting periods before the certificate of presumed death can be issued;

Considering that the harmonisation of the rules and practices in force is therefore of great importance, from a legal point of view, to everyone concerned;

Taking into consideration that a fair balance must be struck between the interests of missing persons and of those with a legitimate interest, particularly as regards property and inheritance rights, pension and life insurance rights, the right to enter into a new union (remarriage, registered partnership or similar union existing in certain member states), legal affiliation and parental rights;

Considering that the introduction of the notion of disappearance and of presumption of death or, as the case may be, the improvement of the existing legislation on this topic would be of great benefit, in particular to family members who have a legitimate interest, as well as to the missing person, as it would clarify their respective legal position and status,

Recommends that governments of the member states take or reinforce all measures they consider necessary with a view to the implementation of the principles contained in the appendix to this recommendation.

Appendix to Recommendation CM/Rec(2009)12

Part I – Definition

In this recommendation, a “missing person” is a natural person whose existence has become uncertain, because he or she has disappeared without trace and there are no signs that he or she is alive.

Part II – Governing principles

Principle 1 – Cases where a declaration of presumed death in respect of a missing person may be issued

A declaration of presumed death of the missing person may be issued if, in the light of all the circumstances of his or her disappearance:

- a. death can be taken as certain;
- b. it is reasonable to conclude that the death of the missing person is likely;
- c. although the missing person’s death is uncertain, his or her disappearance cannot be reasonably attributed to any cause other than death.

Principle 2 – Competent authority

An authority competent to issue a declaration of presumed death with regard to a missing person ("competent authority") may be designated:

- a. where the missing person was a national of the state to which the competent authority belongs, or was domiciled or had his or her habitual residence in its territory;
- b. where the person concerned was reported missing in the territory of that state;
- c. where the person concerned was reported missing during a voyage of a vessel or aircraft registered in that state.

Principle 3 – Requesting person, body or authority

A request for a declaration of presumed death may be lodged by any person or body demonstrating a legitimate interest or by an authority designated by the state for this purpose.

Principle 4 – Waiting period for lodging the request

1. Where, in the light of all the circumstances, the death of the missing person can be taken as certain, the lodging of the request mentioned under Principle 3 should preferably be possible without a waiting period.
2. Where the circumstances of disappearance of the missing person are such that it is reasonable to conclude that his or her death is likely, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be one year at the most.
3. Where the death of the missing person is uncertain, the time which must have elapsed from the disappearance, or from the receipt of the last news that the person was alive, for lodging the request should preferably be seven years at the most.

Principle 5 – Date and hour of presumed death

The date and, if possible, the hour of presumed death of the missing person should be determined by referring to any evidence or indication relating to the circumstances of the case.

Principle 6 – Effects

1. By operation of law, the declaration of presumed death should have all the legal effects of death.
2. Nevertheless, member states may make such exceptions to this provision as they consider strictly necessary. These exceptions should be limited but may cover matters such as marriage, registered partnerships, legal affiliation, property rights and inheritance rights and should aim at maintaining a fair balance between the interests of those concerned, including the person whose presumed death is declared.

Principle 7 – Return of the person whose presumed death has been declared

1. Should the person, in respect of whom the declaration of presumed death has been issued, return, or where there is information establishing that he or she is still alive, member states should prescribe measures aiming at annulling the decision declaring this person's death.
2. A request for annulment of a declaration of presumed death may be lodged by the person whose presumed death has been declared or by any person or body demonstrating a legitimate interest, as well as by an authority designated by the state for this purpose.
3. Member states may make provision for the protection of persons who may be adversely affected by the annulment of the decision.

Principle 8 – Transcription of decisions

A decision declaring the presumed death of the missing person or a decision on annulment, referred to in Principles 2 and 7 respectively, should be transcribed in the relevant registers of the state where such a decision was pronounced.

Principle 9 – Procedural aspects

1. Access to proceedings and their duration should balance the concerns and needs of all those having a legitimate interest in the declaration of presumed death, as well as of the missing person. This should also apply to proceedings concerning annulment.

2. When publicity concerning the search for a missing person is deemed necessary during the course of proceedings regarding a declaration of presumed death, this should be carried out by any appropriate means, including new technologies, and taking into account the financial situation of the requesting person.

Explanatory memorandum

A. Relevance of the topic

1. The terrible tsunami disaster of 26 December 2004, the terrorist attacks of 11 September 2001, as well as armed conflicts, have made it clear that the legislation of Council of Europe member states deals with the subject of missing persons and the presumption of death in a wide variety of ways, which are often inadequate and unnecessarily onerous for the persons with a legitimate interest, in particular the husband or wife, the partner and the children of the missing person.
2. The recommendation defines “missing persons” in Part I as those persons whose existence has become uncertain, and in respect of whom a declaration of presumed death may be made. The recommendation does not, therefore, deal with persons who simply decided to leave their place of residence, even for a considerable period of time.
3. The only existing convention on the subject of missing persons and presumption of death is entitled the International Commission on Civil Status (ICCS) Convention relating to the establishment of death in certain cases (Convention No. 10) of 14 September 1966 (hereinafter referred to as “the Athens Convention”). This convention governs situations in which, in view of all the circumstances, the death of a missing person can be regarded as certain. In cases where the death of a missing person whose body cannot be located can be definitely inferred from the circumstances, this instrument provides an appropriate means of ensuring that the next-of-kin is issued with a document establishing the death without delay. Many member states of the Council of Europe which are not parties to the Athens Convention are equipped with such a provision within their laws; however, waiting periods envisaged by legislation often serve no valuable purpose. There are also member states whose legislation does not include such a provision.
4. There are no international provisions on the civil law aspects of missing persons whose death cannot be considered as certain. Criteria governing cases in which a declaration of presumed death can be applied for, the length of waiting periods related to proceedings and the legal consequences of such declarations vary considerably from one state to another. Therefore,

taking into account, among other things, the constant increase in travel and stays in foreign countries, as well as the genuine risk of the disasters and incidents described above and the disparities in the existing legislation between member states, it would be extremely useful to provide them with an international legal instrument allowing them to adapt or adopt legislation that deals adequately with the consequences of situations in which the death of a missing person cannot be regarded as certain.

5. An individual's actual existence must be legally established before numerous legal consequences attached to his or her personality can come into play. This is the function of the birth certificate. The possibility to establish and prove a person's death is equally important. This is often the only way to ensure the enforcement of the legal consequences of death. The death certificate serves this purpose by proving to all that the person in question died at the place, on the day and at the hour recorded in the certificate. Death is the precondition for the implementation of the law of succession, for the existence of an inheritance, a testator and an heir, and also for the payment of a survivor's pension or an insurance policy. It also automatically terminates marriage and registered partnerships or similar unions in some member states, and the corresponding system of marital/partnership property, enabling the survivor to enter into a new relationship without any risk of bigamy. A major problem therefore arises if no evidence can be provided of death because the person is missing and therefore his or her existence has become uncertain.

6. The Athens Convention provides adequately for situations in which a missing person's body cannot be found, but in which, all circumstances considered, his or her death can be regarded as certain. This does not mean that death is certain, although this certainty can now be provided by means of the identification techniques used in anthropology, dactylography, odontology, pathology, serology and DNA analysis. Thanks to advances in these fields, the numbers of missing persons following the tsunami disaster of 2004 were reduced from an initial estimate of many dozens in the Netherlands and Belgium to zero in the former country and to one in the latter. This meant that the authorities were spared the trouble of issuing pointless declarations of presumed death, and finally only had to issue standard death certificates.

7. The Athens Convention was useful in such situations as the 1977 collision between two planes on the ground in Tenerife (Canary Islands), when

nothing was left of the passengers and crew but charred remains which the techniques of the 1970s were unable to identify. The convention is also useful in cases like those of the many persons present in the "Twin Towers" in New York City during the terrorist attack of 11 September 2001 who were never found, but who were known to have been on the premises when the aeroplanes hit the towers.

8. However, the Athens Convention does not apply solely to the types of accidents and disasters mentioned above. For instance, the Court of Appeal of The Hague (The Netherlands) applied this convention to the case of a passenger on board a ship out at sea who was seen shortly before his disappearance and who was proven to have been suffering from psychological problems. The ship was thoroughly searched, in vain, and only the missing person's bathrobe was found on a chair on deck. As the stretch of sea in question was shark-infested and the coastguard had failed to find a body, the Court of Appeal of the Hague concluded that the person had fallen overboard and held his death as certain. Another example would be someone whose body cannot be reached due to inaccessibility or other natural conditions of a given area (and who might well only be found millennia later, like Ötzi the Iceman).

9. In cases where death can be taken as certain, there is no need for any waiting period before initiating a procedure with a view to obtaining the declaration of presumed death. In such cases, only a document which is fully equivalent to a death certificate is required. This latter requirement is also important because it exempts heirs from having to stand surety with a view to the return of assets or respecting other rules and regulations concerning the disposal of assets in case the missing person reappears.

B. More suitable provisions are also required in other situations of missing persons

10. In practice, there are many more specific situations of disappearance, which all have the common denominator that the missing person's death cannot be regarded as certain (that is, those which do not fall within the "Athens criterion"). There may be situations where death is likely or the disappearance of the person can not be attributed to any reason other than his or her death: cases vary from the man who just popped out for some cigarettes and never returned; the girl who headed off to the discotheque and never came back; the mountain hiker who suddenly gave his companions the slip

despite the fair weather conditions and was never seen again; the woman who was in an office building or a factory which was completely destroyed by an explosion or a terrorist attack, although it is uncertain whether she actually went into the building (although she did have an appointment there) or whether she left it in time (unavailability of entry-exit registration systems in such cases); a man who dived into the water in front of his friends and never re-emerged; and a woman who, when a residential area was destroyed by an explosion, made an identified phone call from a house in the area not a few minutes, but a whole hour previously; a man who has disappeared, but was very probably in an area affected by the tsunami on 26 December 2004: no one can be sure because no one can confirm it, although there is reliable evidence that he was in that area at the time.

11. The preamble of this recommendation has already indicated that one of the situations where people may go missing is during armed conflicts (either international or internal). These might be both civilians and military persons. Both categories are covered by this recommendation, although uniquely from a civil law perspective.

12. The recommendation therefore does not deal with the criminal law aspects of persons missing in armed conflicts, for instance accountability and/or impunity for the most flagrant crimes, including war crimes and crimes against humanity, such as forced disappearances. Similarly, the recommendation does not deal with search, tracing, medico-legal issues, compensation, etc. Such issues are dealt with by international criminal law and international humanitarian law, by international tribunals and international bodies, such as the International Committee of the Red Cross (ICRC), as well as by national legislation. The recommendation should therefore be regarded as complementary to those standards.

13. The recommendation aims at providing governments of member states with assistance in dealing with such cases of missing persons. Its principles could be of particular use in a post-conflict setting. However, its text is without prejudice to legal obligations of member states under international humanitarian law or international human rights law and should not be construed as a pretext for easily declaring someone as presumed dead. Consequently, the fact that the missing person has been declared as presumed dead is not in itself a justification for not continuing the search of the missing person or his/her remains.

14. It is clear that the situations of disappearance in which death cannot be regarded as certain vary widely, much more so than the specific categories of situation covered by the (often ad hoc) legislation of many countries. Appropriate provision is needed for all possible situations, striking an appropriate balance between the interests of the missing persons and their families. It is not enough for the missing person's assets to be properly managed by an administrator or any other system of supervision: the next-of-kin needs to be sure of ongoing provisions in terms of individual, family and property rights.
15. It is not unusual for the declaration of presumed death substantiating the presumed death of the person in question to be reserved in legislation for situations in which a person has gone missing. The circumstances under which the said declaration can be requested are mostly confined to those defined specifically in the relevant legislation.
16. In much legislation, a waiting period must be observed before applying to the judicial or administrative authorities for the said declaration. This is justified particularly because there is always a risk of fraud (examples of people pocketing insurance payments or the case of moonlight flitting, sometimes leaving large debts behind). However, the length of these waiting periods may seem unjustified and unreasonable, and in general, with regard to the legitimate interests of the surviving next-of-kin, they may appear to be too long or else may fail to take full account of the actual situation. Furthermore, it is usually unnecessary for legislation to impose mandatory investigations prior to the issuing of the declaration, in situations where death is virtually certain or likely. Nor do the courts have to be empowered to postpone the issuing of the declaration of presumed death for years to come. It is striking that in some national legislation, the waiting time for the declaration of presumed death is linked to the missing person's age, so that the latter must have reached a certain age in order for the declaration of presumed death to be issued at all. There is every reason for the new international legal instrument to cover not only adults, but also children.
17. The legal consequences of the declaration vary enormously from one country to another. Marriage is not universally dissolved by the declaration of presumed death. According to some legislation, the surviving spouse must also initiate divorce proceedings before he or she can enter into a new union (marriage, registered partnership or similar union). It should also be noted that there are often very long guarantee periods as regards

the restoration of assets in case the missing person reappears, and that the missing person's spouse is often also required to stand surety for this potential restitution.

18. In general, this recommendation seeks to strengthen legal certainty for persons whose fate and whereabouts are unknown, as well as for the persons with a legitimate interest.

19. It is, however, without prejudice to the concept of absence which appears in the legislation of several member states.

C. Towards further European harmonisation

20. The Athens Convention is available for cases of missing persons whose bodies cannot be found, but whose death can be regarded as certain. All other conceivable situations of disappearance where death cannot be regarded as certain vary so widely that a simpler, broader approach, leaving more leeway for the judge's or administrative authorities' appraisal of the individual case, would seem necessary. In practical terms, the following are the main categories of situations of missing persons, the second and third categories being in need of a solution:

- a. where death can be regarded as certain (Athens Convention);
- b. where it is reasonable to conclude that death is likely;
- c. where, although death is uncertain, the fact that the person concerned is missing cannot reasonably be attributed to any cause other than his or her death.

21. As far as situations other than those where "death can be taken as certain" are concerned, states should adopt legal provisions that cover property and inheritance rights in addition to family law considerations. Where assets are concerned, there should be provisions enabling them to be returned if the person in question comes back, without unnecessary long periods for which the persons with a legitimate interest are required to stand surety.

22. The present recommendation provides guidance to states in all three situations, where "death can be taken as certain", as well as where "it is reasonable to conclude that the death of the missing person is likely" and where, "although the death of the missing person is uncertain, the disappearance of the person concerned cannot be reasonably attributed to any cause

other than his or her death". By doing so, the recommendation seeks to be complementary to the Athens Convention.

23. The present recommendation does not preclude states from applying provisions that make it easier to issue a declaration of presumed death. In this respect particular attention should be paid to paragraph 13 above.
24. Nevertheless, states should bear in mind the need for appropriate measures to be considered for the protection of those concerned, including the person presumed dead, those family members who have a legitimate interest or any other person affected by the effects of the decision.

Comments on the principles

Part I. Definition

25. Part I of the appendix to the recommendation contains the definition of a missing person, as understood in the context of the recommendation.
26. A definition of "missing person" for the purpose of this recommendation has been included as there are many different situations in which persons go missing. The recommendation does not deal with persons who have simply decided to leave their place of habitual residence, even for a considerable period of time, or, for example, patients who do not re-enter the psychiatric hospital where they have been long-term residents. It should be emphasised that many people go missing, but that only some of them do not, at any moment, come back. The recommendation therefore deals with persons in respect of whom a declaration of presumed death can be made because there are no signs that they are still alive. The definition refers to natural persons, both adults and children, since they can also be missing persons (cf. paragraph 16 above).

Part II. Governing principles

Principle 1 – Cases where a declaration of presumed death in respect of a missing person may be issued

27. The circumstances in which a person's continued existence has become uncertain, and which could be construed as signifying disappearance, vary greatly in practice. Sometimes little more information is available other than the fact that the person concerned has gone missing and no further news

of him or her has been received, whether directly or through other persons or sources.

28. Legal presumption of death should not, therefore, be restricted to cases of natural and man-made disasters, terrorism, armed conflicts, or any other circumstances that would imperil the life of the missing person (and where the death of the missing person, if it is not already taken as certain, can be regarded as likely). Such a presumption should also cover situations in which, although his or her death is uncertain, the fact that the person concerned is still missing, after a certain period of time has elapsed, cannot be reasonably attributed to any other cause than his or her death.

29. Where a state comprises several territorial units, each of which has its own legislation, different arrangements may be made in respect of presumptions of death and their operation in each territorial unit.

Principle 2 – Competent authority

30. The competent authority might in some states be a judicial body, and in others, an administrative body.

31. Competence to decide on the declaration of legal presumption of death in respect of persons who are not nationals of the state, but who are domiciled or have their habitual residence in its territory, is patent and already embodied in the legislation (under private international law) of many states. The provision under *b* covers persons reported missing while on holiday or those persons who are, for other reasons, staying in another state than that of which they are a national or where they have their habitual residence. The text of Principle 2 derives from Article 1 of the Athens Convention relating to the establishment of death in certain cases.

Principle 3 – Requesting person, body or authority

32. As a rule, under the legislation of many countries, the request for a declaration of presumed death may be lodged by persons demonstrating a legitimate interest. This may be an interest in the sphere of family law, that is an interest of persons closely connected with the missing person, such as the spouse or registered partner, but also that of persons with an inheritance-related interest (who are not necessarily family members), or another financial interest in the declaration of presumed death, such as creditors, the employer or employees of the missing person.

33. The request for a declaration of presumed death may also be made by an authority designated by the state for this purpose. As a rule, such competence is attributed to the public prosecutor. The competence of the authority designated by the state is founded, and already established in member states, on the fact that the remaining family members are not always emotionally capable of lodging the request themselves, as they would be compelled to acknowledge that a person very dear to them is declared dead.

34. Principle 3 does not prevent the competent authorities of member states from taking decisions by right of office, that is, without a formal request for a declaration of presumed death being made.

35. Given that any person demonstrating a legitimate interest may make a request for the declaration of presumed death, it is important that family members and others who have close personal links with the missing person are not left unaware of any proceedings underway and that they can be involved.

Principle 4 – Waiting period for lodging the request

36. In line with Article 1 of the Athens Convention, paragraph 1 states that where, in the light of all the circumstances, the death of the missing person can be taken as certain, there should preferably be no waiting period before a request for a declaration of presumed death is made.

37. According to the second paragraph, the waiting period to be applied by states should preferably be reduced to one year or less where the missing person's death cannot be taken as certain, but can reasonably be considered to be likely in the circumstances of the case. This shorter time is in accordance with the legitimate interests of "the beneficiaries", who are required to state the facts and circumstances establishing the probability of the missing person's death. Situations of disappearance such as sea, air, natural or man-made disasters and situations of armed conflict and generalised violence, may, if not already belonging to the category of "certain", as a rule, be deemed to belong to the category indicated in the second paragraph. While in these cases death is not certain, it may justifiably be considered likely. For examples of situations where death can be considered as likely, reference should be made to paragraph 10 above.

38. The third paragraph lays down a maximum waiting period which states should preferably apply in all cases involving a person's disappearance where there is no certainty as to that person's death, but where the fact that the person is missing cannot be reasonably attributed to any other cause than his or her death. The suggested maximum waiting period of seven years constitutes an attempt to determine a period of time that should reasonably be acceptable for all member states.

39. Leaving the waiting period to be determined by the competent authority in the absence of a maximum waiting period fixed by the legislator is not the best solution for "the beneficiaries": this would still have the consequence of imposing an unnecessary uncertainty upon such persons.

Principle 5 – Date and hour of presumed death

40. Similarly to Article 3 of the Athens Convention, the competent authority should determine the date (that is, the day) and, if possible, the hour of presumed death by referring to any evidence or indication as to the circumstances or time of death. In doing so, member states and the designated competent authorities should refrain from imposing mandatory investigations, in particular in situations where death is to be regarded as certain or likely. In situations where death is uncertain, it is sufficient for those who made the request for the declaration of presumed death to prove that there is no reasonable explanation for the fact that the person concerned is missing other than his or her death.

41. The date and, if possible, the hour of presumed death is transcribed in the registers mentioned in Principle 8 below. The provision of Principle 5 forms a minimum requirement; it does not exclude other data to be determined by the competent authority (and subsequently to be transcribed according to Principle 8).

Principle 6 – Effects

42. The provision in paragraph 1 refers mainly, though not exclusively, to civil law and/or family law. It covers all three cases where a declaration of presumed death in respect of a missing person may be made, as mentioned in Principle 1.

43. In most member states the declaration of presumed death has similar legal effects to those of death on marriage or, where it exists, on registered

partnership or similar union. The termination of marriage/partnership also enables the survivor to enter into a new relationship without any risk of bigamy. In the same way, it leads to the opening of the succession, the payment of a survivor's pension or an insurance policy and the termination of the corresponding system of marital/partnership property.

44. Paragraph 2 provides member states with the possibility of making exceptions to the above principles. However, the present recommendation limits these exceptions, on one hand, to cases where death is likely or uncertain and, on the other hand, to the four following themes: marriage, registered partnership or similar union, legal affiliation, property rights and inheritance rights. It ensures that these exceptions maintain a fair balance between the interests at hand. By way of example, member states could decide that the bond of the person in respect of whom the presumed death has been declared ends upon remarriage of the surviving spouse and not on the day on which the declaration of presumed death is made. It is plain, in this case, that for the purpose of determining the status of children born after the disappearance, there should be special regulations ensuring the best interests of the child.

45. This recommendation does not prevent states from prescribing measures to facilitate the restoration of the missing person's assets (and, where applicable, of whatever has replaced those assets, or their yield) in anticipation of his or her possible return. The measures should be adapted to the category of cases as defined in Principle 1.

Principle 7 – Return of the person whose presumed death has been declared

46. In case of annulment of the declaration of presumed death, member states should ensure that its effects are regulated. For example, should the person return, member states are free to prescribe measures for ensuring the restoration of assets to the person in respect of whom the presumed death has been declared, taking into account the circumstances of the person's disappearance in order to strike a fair balance between the interests of all persons concerned.

47. Member states are also free to prescribe measures for the protection of persons who may be adversely affected by the annulment of the decision. An example of this could be a situation where the spouse of the person who has been declared presumed dead has remarried.

48. Where parental authority is not reactivated *ipso jure* on the missing person's return, there should be a possibility of bringing about its reactivation taking into consideration in particular the best interests of the child.

Principle 8 – Transcription of decisions

49. The text is taken from Article 4 of the Athens Convention. Transcription takes place in the relevant registers of the state where the decision of presumed death was pronounced. As a rule, the transcription will be made in the civil status registers. This principle takes into account that transcription in other registers such as civil population registers is also possible. Transcription aims at establishing legal certainty and at facilitating the proof of the presumed death or of the decision of its annulment.

50. Furthermore, in practice, there is the possibility that the decision on the declaration of presumed death and the decision on its annulment are made in different states. It would therefore be in the interests of all parties concerned, as well as legal certainty, that the decision of annulment be sent to the state in which the death has been declared in order to be transcribed.

51. This recommendation does not aim to settle questions of conflict of laws and transfrontier recognition of decisions taken. These matters are covered by the private international law of member states or international instruments.

Principle 9 – Procedural aspects

52. Although proceedings should be carried out expeditiously, they should also be thorough and should, in any case, take into account the concerns and needs of those having a legitimate interest in the declaration of presumed death, as well as the interests of the missing person. This also applies to proceedings concerning annulment.

53. Publicity will normally be needed, notably in situations where death is uncertain. When publicity concerning the search for a missing person is deemed necessary, it should be carried out by any appropriate means. The competent authority should therefore in particular make use of new technologies such as the Internet, and not automatically use the written press for publicity, particularly in view of the fact that such publicity is normally rather expensive.

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This recommendation deals with the issuing of a declaration of presumed death and provides guidance to states in the three following situations:

- when death can be taken as certain;
- when it is reasonable to conclude that the death of the missing person is likely;
- when, although the missing person's death is uncertain, his or her disappearance cannot be reasonably attributed to any cause other than death.

The recommendation seeks to strengthen legal certainty for persons whose fate and whereabouts are unknown, and for those with a legitimate interest in the declaration of presumed death.



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