



Ministry
of Justice

Guardianship (Missing Persons) Act 2017

Code of Practice

June 2019



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Guardianship (Missing Persons) Act 2017 Code of Practice

Presented to Parliament pursuant to Section 22(7), Guardianship
(Missing Persons) Act 2017

June 2019



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Foreword

The disappearance of a loved one is a deeply traumatic experience for their family and friends. As well as coping with the shock and anxiety of the situation itself, as time passes more practical problems emerge – such as paying bills on behalf of the missing person.

The Guardianship (Missing Persons) Act 2017 fills a gap in the legal process, and enables a trusted guardian to manage the financial and property affairs of a missing person. The legislation emphasises that the guardian’s touchstone must always be to act in the missing person’s best interests.

The need for this Code of Practice was established in the Act – to help applicants, guardians, families and friends of the missing person to understand what guardians can and should do – and some things they shouldn’t.

It is also designed to assist those working with guardians and families – such as the financial organisations holding their accounts; and the lawyers and charities advising and supporting them. Many of those stakeholders have assisted us in compiling this Code, and we are very grateful for the expertise and experience they have shared.

The Code covers all stages of the guardianship process – helping people decide whether it would be the best step in their situation, everything involved in making an application to the court, and the challenges likely to be encountered once appointed.

The Code cannot cover every situation or hope to answer every question a guardian or family will have, but it does try to address what we think will be the most important and common questions. The Government will be keeping the Code under review, and listening to the comments of those using it.



**Rt Hon David Gauke MP,
Lord Chancellor and Secretary of State for Justice**

1 Introduction

- 1.1 The disappearance of a loved one causes distress and disruption to the lives of their family and friends. It leaves their property and financial affairs unmanaged and causes emotional and practical difficulties for everyone affected.
- 1.2 The Guardianship (Missing Persons) Act 2017 ('The Act') filled a gap in the existing law, and provides a legal remedy. It empowers the court on an application by an interested person to appoint a trusted person to be the guardian of the property and financial affairs of the missing person.
- 1.3 The aim of the legislation and this Code of Practice is to help the individuals left behind to deal with the practical financial and property-related difficulties caused by the disappearance.
- 1.4 The position of guardian of the property and financial affairs of a missing person is a new legal status. It enables the person appointed by the court to manage the property and financial affairs of the missing person in the missing person's best interests. This means that the property and financial affairs can be looked after and used for the benefit of the missing person and the family members and others left behind.
- 1.5 This Code of Practice is designed to offer guidance on how guardianship works. It is intended to assist the following groups in particular:
 - families and friends of missing people who want to consider whether or not it would be useful and appropriate to appoint a guardian in their case;
 - individuals asked to, or considering being, a guardian;
 - those acting as guardians; and
 - financial and other organisations who will come into contact with guardians dealing with a missing person's affairs.
- 1.6 The Code supplements the Act and related secondary legislation, including the regulations relating to supervision and registration of guardians by the Public Guardian and the rules of court and practice direction governing how court proceedings relating to guardianship are to be conducted. Depending on their circumstances individuals may wish, or need, to take legal advice.
- 1.7 Giving a person control of the property and financial affairs of another person is an important and significant act that is not to be undertaken lightly. A person appointed to take control of another person's property and financial affairs will be taking on a position of great trust and responsibility. They will be legally accountable for their actions. To safeguard the interests of the missing person the system of appointment

and the system of supervision will be demanding. The Code of Practice is intended to help guardians perform their duties properly and confidently. The Act requires guardians to have regard to the Code, and the court will consider the Code and failure to comply with it in determining issues on guardianship.

1.8 A list of the legislation and relevant publications with website links appears in the annex to this Code.

1.9 The table below is a list of key terms used in the Code of Practice and the Act. Words in the text that are included in the glossary are identified by the symbol “*” for ease of reference.

Glossary

Absence Condition	The absence condition is the requirement that the missing person be missing for a continuous period of 90 days before the application for a guardianship order was made. See Section 3 (2) (b) of the Act, unless applicants make the urgency condition.
Agent	A person authorised to act on behalf of another person (“the principal”) under the law of agency. A person appointed agent is subject to legal duties under the law of agency to act in favour of the principal. See, for example, fiduciary duties below. A guardian will be deemed the agent of a missing person. A guardian’s authority to act for the missing person will be defined by the Act and the terms of the court order making the appointment.
Attorney	A person appointed by a General Power of Attorney/Lasting Power of Attorney/Enduring Power of Attorney to act on behalf of another. (See MCA: Powers of Attorney below).
Authorised insurance company	A person or European Economic Area (EEA) (investment, credit or financial) firm who, under Part 4 of the Financial Services and Markets Act 2006, has permission to carry out contracts of insurance and related activities.
Authorised deposit taker	A person or EEA (investment, credit or financial) firm who, under Part 4 of the Financial Services and Markets Act 2000, has permission to accept deposits.
Beneficiary	A person who receives or is entitled to a benefit or advantage from something, for example under the terms of a will.

Best Interests	Guardians are required to act in the best interests of the missing person. Decisions by guardians must therefore be made in the best interests of the missing person. Section 18 of the Act explains how the best interests of the missing person should be assessed. See also paragraphs 4.29-4.51 of the Code.
Case Management Directions	Instructions issued by the court to parties to the litigation, instructing them how to prepare the case and what to do, for example as to the production of evidence or the service of notice of proceedings. Directions may be decided at a case management conference, but can also be issued without a meeting between the parties and the court.
Code of practice	The Lord Chancellor is required to publish one or more codes of practice under section 22 of the Act. The Code is intended to provide statutory guidance to guardians and anyone making an application under the legislation.
Codicil	An addition to a will, that explains, modifies or revokes it. It must be signed by the person making the will and attested by two witnesses (just like the original will).
Court of Protection	A specialist court that makes decisions on financial or welfare matters for people who can't make decisions at the time they need to be made because they lack mental capacity (see below).
Delegate	Where one person or organisation asks or authorises another to perform a task or responsibility for them.
Deputy	A person appointed by the Court of Protection under the Mental Capacity Act 2005 to make decisions on behalf of a person who lacks capacity to make decisions (see Mental Capacity Act 2005, section 16(2)).
Domiciled	Common law concept describing the connection between a person and a country with which he or she has a permanent connection. It is different from the concept of habitual residence. A person is in broad terms domiciled in the country to which he or she feels the most permanent connection.
Exemption	Where a fee is waived due for those with low income, for example where they are in receipt of certain benefits. For guardianship applications it is the missing person's means rather than the applicant's means which will be assessed. The qualifying criteria for exemptions from court fees and OPG fees are specified in legislation, and available on the gov.uk website.

Fiduciary duty	<p>The duty imposed on a person in a fiduciary relationship (such as a trustee or agent) with another. A fiduciary duty is the legal duty to act in the best interest of another and exercise the highest standard of care.</p> <p>The fiduciary duty means guardians must not take advantage of their position. They should not put themselves in a position where their personal interests conflict with their duties. They should also not accept a third-party commission in any transactions.</p>
Filing an application at the court	<p>Giving the application and related papers to the court for placing on the court record.</p>
Full and half siblings	<p>A brother or sister of the missing person who either has both same parents (full sibling) or shares one parent (half sibling).</p>
Guardianship Order	<p>The order made by the court appointing a guardian under the Act.</p>
Gift	<p>An item or benefit given willingly to someone without payment or other consideration. Section 6 of the Act sets out when a guardian may make a gift. Gifts for these purposes include payments for the living expenses of the missing person's dependants.</p>
Guardian	<p>The person appointed by the court under the Act on the terms specified in the court order, allowing them to act as an agent for the missing person and manage their property and financial affairs as designated in the order.</p> <p>Guardians must act within the terms of the legislation and the court order which appoints them, and must act in the best interests of the missing person.</p> <p>Guardians are appointed for up to four years, but may be reappointed.</p>
Habitual resident	<p>Habitual residence is used in some cases instead of domicile as a test for establishing a sufficient link between a person and a country. To establish habitual residence a person will have to show that he or she is usually resident in the relevant country. Strong indicators of habitual residence include making a place their home by having stable employment, settled accommodation and strong personal ties.</p>

Intervene (in Law)	Where a third party (an intervenor) joins as a party to a case that was started by others due to the interest they have in the subject matter of the case. This could include the Public Guardian exercising their supervisory role in relation to guardians.
Lien	A right to keep possession of another's property pending discharge of a debt.
Mental Capacity	The ability of a person to make their own decisions in law. Decisions made by a person lacking the required degree of mental capacity are not binding. The Mental Capacity Act (MCA) 2005 sets out the law in this area.
MCA: Powers of Attorney	Lasting Powers of Attorney and Enduring Powers of attorney are legal documents that someone ('a donor') makes to confer the power on someone else ('an attorney') to make decisions for them. They can sometimes be used before a person has lost capacity, but are generally created in case of a future loss of mental capacity.
Missing person	<p>Section 1 of the Act defines when a person is a missing for the purposes of the Act.</p> <p>A person is missing if they are absent from their usual residence and daily activities; and they satisfy one of the following: (a) their whereabouts are either unknown or not known sufficiently precisely for them to be contacted for the purpose of making decisions about their property and financial affairs; or, (b) they are unable to make or communicate decisions about their property and financial affairs for a reason beyond their control (other than illness, injury or lack of mental capacity).</p> <p>It applies to those kidnapped or held hostage as well as prisoners abroad unable to communicate decisions about their financial and property affairs.</p>
Office of the Public Guardian (OPG)	Executive Agency of the Ministry of Justice. Headed by the Public Guardian and supervisory authority for guardians of missing people and Mental Capacity Act deputies.
Practice Direction	A statement connected to the rules about court procedure. It sets out further detail and provides greater clarity about a specific procedure to be followed in a case. Practice Directions are issued by the head of the court or division to which they relate.

Presumption of death	The Presumption of Death Act 2013 created a procedure by which the High Court may declare a person to be legally dead for all purposes, including where there is no direct evidence.
Property and financial affairs	The matters in respect of which a guardian may be appointed under the Act. See paragraph 4.10 of the Code.
Public Guardian	The Public Guardian is appointed by the Lord Chancellor under the Mental Capacity Act 2005. Supported by an Office (OPG), the Public Guardian registers all lasting and enduring powers of attorney and supervises deputies appointed by the Court of Protection thereby protecting people in England and Wales who lack capacity to make certain decisions for themselves. Under the Act, the Public Guardian is given duties which include to maintaining a register of guardians, supervising guardians, and responding to concerns about the actions of guardians.
Register	The Office of the Public Guardian (OPG) will be required to establish and maintain a register of all Guardianship Orders, including variation orders and revocation orders. The register will include information about the Orders. The Public Guardian is already required to establish and maintain registers of deputies and powers of attorney.
Regulations	A type of secondary legislation made by the Government or a regulatory agency of government, usually subject to approval by Parliament, and having the force of law. Regulations set out the terms under which legislation is implemented and how it should be conducted.
Remissions	In this context where a court or other fee is reduced due to the financial position of the person responsible for paying it.
Revocation Order	An order made by the Court to remove a guardian from their duties. See section 13 of the Act.
Rules of Court	The rules that govern how courts operate, and which parties using the court must follow and comply with. Rules of court are supplemented by practice directions (see above).
Service	This is the procedure by which a party in a case formally informs other parties of legal action, enabling them to respond to the proceeding before the court, body, or other tribunal. Service is performed by delivering a notice or set of court documents to the person to be served in the way required by rules of court.
Sufficient interest	See paragraphs 4.21-4.28 of the Code.

The Act	Guardianship (Missing Persons) Act 2017.
The 2005 Act	Mental Capacity Act 2005.
The 2007 Regulations	Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007.
Trust corporation	A trust corporation is in general terms a corporation set up to carry on trust business. In practice they are often banks and financial institutions, but can also be charities or legal firms. There are technical requirements that a corporation must satisfy to be a trust corporation. Trust corporation status confers certain legal advantages, for example, acting as Court of Protection deputies and attorneys.
Trustee	A legal person (such as a person or a charitable organisation), to whom property is transferred to be administered for the benefit of beneficiaries (see above) designated by the terms of the trust. The trustee must act in accordance with the terms of the trust.
Urgency condition	The urgency condition (in guardianship cases) is only met if the court is satisfied that the absence condition (see above) is not met but a decision is or is likely to be needed before it would be. See section 3 (3) of the Act.
Variation Order	An order made by the Court to vary the terms of a guardian's powers and duties. See section 12 of the Act.

2. Code of practice - general

2.1 This section describes the nature and purpose of the Code of Practice.

What is a Code of Practice?

2.2 A Code of Practice is a form of guidance that is intended to guide the people using it to make the appropriate decisions rather than giving them instructions as to what to do.

How should the Code of Practice be used?

2.3 The Code of Practice is intended to help prospective guardians with the application process, and serving guardians to carry out their responsibilities properly, and also to assist people, businesses and organisations dealing with guardians or who are interested in the affairs of the missing person to understand their role.

2.4 The guardianship Code of Practice is statutory. The Act provides that guardians must have regard to it; and, in any court or tribunal case where compliance with the Code may be relevant, the court or tribunal must take the Code into account.

Does this Code of Practice do away with legal advice?

2.5 The Code does not replace or do away with the need for legal advice. There is no requirement to retain the services of a legal professional to make or participate in an application for a guardianship order or an application related to a guardianship order. A guardian does not need to be legally qualified.

2.6 It is for the individuals concerned to decide whether to consult a lawyer or any other professional. Most will charge for their advice, but free legal advice can be obtained from bodies such as Citizen's Advice or a Law Centre. Advice on court forms and completing them can be found on the gov.uk website.

2.7 General guidance following appointment can also be obtained from the Office of the Public Guardian - <https://www.gov.uk/government/organisations/office-of-the-public-guardian>.

2.8 Charities operating in relation to missing person cases may also be able to give advice to individuals.

3. Why was guardianship created?

- 3.1 This section of the Code of Practice explains why the Guardianship (Missing Persons) Act 2017 was created.

What is the problem that the Act addresses?

- 3.2 Under the common law of England and Wales, when individuals disappear they are assumed to be alive unless it is proved otherwise. In the absence of a declaration of presumption of death their property is effectively left ownerless. This can also occur where somebody is kidnapped or held hostage, or where they are imprisoned abroad with no means of communicating decisions about their property and financial affairs. The Act enables people to manage the missing person's assets, preventing property falling into disrepair and dependants facing legal and financial problems because they no longer have access to the financial support that the missing person provided.
- 3.3 The absence of the missing person can also cause problems for their creditors, who may not be able to obtain payment because of the disappearance, and for businesses and institutions holding the missing person's assets or liabilities, who are faced with the difficulties of dealing with those left behind, who are not able to gain access to fund or to settle liabilities.

How does the Guardianship (Missing Persons) Act 2017 solve these problems?

- 3.4 The Guardianship (Missing Persons) Act 2017 ("the Act") creates a new legal status – guardianship of the property and financial affairs of a missing person. It provides a legal framework to manage the property and financial affairs of a missing person in his or her best interests. The framework is, however, inspired by and builds on both the common law relating to agency and the procedures established under other statutes, particularly the Mental Capacity Act 2005 as it relates to deputies appointed by the Court of Protection, and the Presumption of Death Act 2013.

When can a missing person be presumed dead?

- 3.5 The Act provides a way to manage the property and financial affairs of the missing person in cases where that person is thought to be alive.
- 3.6 The Presumption of Death Act 2013 created a court-based procedure for obtaining a declaration from the court that for all legal purposes a person was to be considered dead. The court will make the declaration if it is satisfied that the missing person has died or has not been known to be alive for a period of at least seven years

- 3.7 It is for the individuals concerned to decide whether a guardianship or presumption of death application should be made at any time. This will depend on the circumstances of the missing person's disappearance, but also reflect the family's preferences.

4. Key concepts

- 4.1 This section explains some of the key concepts in in the Act: including the terms “missing”, “property and financial affairs”, “sufficient interest”, “best interests”, and “conflict of interest”.

What does “missing” mean under the Guardianship (Missing Persons) Act 2017?

- 4.2 The concept of being “missing” is central to the working of the Act. It is defined in section 1 of the Act. Unless a person is missing a guardian cannot be appointed. If a person ceases to be missing a guardian must take steps to end the guardianship. The Act says that an application cannot be made if the person has not been missing throughout a period of 90 days ending with the day on which the application is made (however, see paragraph 5.7 on urgent applications).
- 4.3 A person is “missing” for the purposes of the Act in two circumstances only. In both circumstances, the individual must be absent from their usual residence and activities. For this purpose, it does not matter that a person is absent for reasons beyond their control. A person being detained in prison, for example, would be considered absent from their usual residence and activities, but such a person is not necessarily missing for the purposes of the Act. It does not apply in instances of detention where the detained person remains able to make and communicate decisions.
- 4.4 In the first of the two circumstances, the person is **both** absent from their usual residence and activities **and** the person’s whereabouts are unknown or not known precisely enough to enable contact to be made to obtain decisions. This is expected to apply in most instances which we typically consider cases of missing persons; where a person has simply disappeared without explanation. It will not apply where a person is absent from their home and activities, but their whereabouts are known (for example, on a long holiday, to convalesce after hospital care or as a result of lawful domestic imprisonment).
- 4.5 The second circumstance of the two is likely to be of more limited application. It occurs when, for reasons beyond his or her control, a person is **both** absent from their usual residence and activities **and** is unable to make effective decisions or to communicate such decisions, or both. This might, for example, be because the person is a victim in a hostage or kidnap situation; or, in situations, where a person is imprisoned abroad in circumstances where they are unable to have any contact with their family or friends and unable even to obtain consular assistance from the relevant embassy; they are effectively unable to communicate their wishes or deal with their affairs in any manner at all.

Ralph has been detained in a prison in a country with a totalitarian regime (with repressive state controls and freedom of expression not permitted) which is refusing to allow his family or UK consular staff access. His detention has been set as being for an indefinite period, and he has no contact with the outside world.

His family decide to seek a guardianship order to enable his financial affairs to be managed, as there is no indication of any short-term alternative.

Mike works in a small humanitarian charity, operating mainly in developing countries. Mike is single and his parents are both deceased. Before he went away he was in regular contact with his sister, Lynne. Lynne has not heard from Mike for a couple of weeks, but she knows he is working in remote areas without communication equipment so is not overly concerned. A few weeks later Lynne is contacted by the Foreign and Commonwealth Office. She is told that Mike has been kidnapped and is being held to ransom by a criminal gang which attacked the charity's office. The gang are in negotiation with the specialist police force working on the case.

Before Mike left, he was paying a mortgage on a flat and had some investments that he made using inheritance from his parents. Lynne does not want these investments to depreciate, nor the flat to be repossessed. She uses a letter from the FCO and specialist police as evidence that Mike is missing, assisting with her application to become Mike's guardian to manage his flat and financial affairs.

- 4.6 The second circumstance does not apply in instances of detention where the detained person remains able to make and communicate decisions, which would be the case in most instances of imprisonment. Similarly, it does not apply where the person is prevented from making or communicating the necessary decisions regarding his or her property and financial affairs simply by reason of illness, injury or a lack of mental capacity, as would possibly be the case in a hospital stay for treatment, or where a person is in a coma or vegetative state, or, resident in a supported home for people with learning difficulties that affect mental capacity. In these instances, it may be better to make a Lasting Power of Attorney or appoint a deputy.

Neighbours of Gabrielle have noticed that she has been absent from her home for three continuous weeks, with no explanation of her whereabouts. After growing more concerned, they contact her workplace and her sister and mother, who confirm that they have not heard from her in those three weeks. In this instance, Gabrielle could be missing under the first category of the definition.

On checking with the police, Gabrielle's sister finds that Gabrielle has travelled to the Middle East and been taken hostage by a militant group of terrorists who have just made a ransom demand. There is video footage that establishes Gabrielle is alive and held in an identifiable location. The kidnappers do not allow Gabrielle to talk and so she cannot give instructions. Gabrielle could satisfy the second category in the definition.

Had Gabrielle had dual citizenship and instead of being held hostage been detained in a prison by State authorities in a country that did not recognise her British citizenship, she would not be able to obtain visits from the local British consulate. This could leave her unable to give instructions even if her whereabouts were known. In these circumstances, Gabrielle could also satisfy the second category in the definition.

- 4.7 The definition of when a person is to be treated as “missing” for the purposes of the Act is complicated, but all the cases will have in common that a person is absent from their usual residence and activities. To persuade the court that a person is missing (as defined by the Act) and has been so for the requisite period of time, the applicant for a guardianship order will have to gather evidence to support the application. This may take several forms, with different evidence proving different aspects of the definition of “missing” in the Act. But, in most cases it will be helpful if a police report of the disappearance can be provided. This is because, in England and Wales, the disappearance of an individual will usually result in the missing person’s absence being reported to the police. The police then carry out certain investigations and make a formal record of the disappearance.
- 4.8 The police force responsible for making such a record will usually be the police force from where the person has gone missing. If the person has gone missing abroad, the evidence may have to be obtained from the police force in the place where the disappearance occurred, but the UK police force for the area in which the family of the missing person is resident may be able to assist as it is required to make an investigation into the disappearance as well.
- 4.9 The UK Missing Persons Unit (UKMPU) also keeps records of missing person in the UK and British citizens missing abroad. The Unit may be contacted by telephone or e-mail as follows: **0800 234 6034** or email address of **ukmpu@nca.gov.uk**. The unit’s website can be found at: <http://missingpersons.police.uk>.

What does the term the property and financial affairs of a missing person mean?

- 4.10 Property includes all kinds of assets and liabilities. Assets might include land, houses, flats and other buildings; possessions, such as cars, furniture, art, jewellery; intangible assets, such as patents and copyright, liens* and potential rights of action; investments, loans, balances in bank accounts and cash. Liabilities might include outgoings, such as mortgage and insurance payments, debts, standing orders and direct debits to utilities’ suppliers, subscriptions for publications and memberships the guardian may be given authority over some or all assets owned by the missing person.
- 4.11 Some liabilities may be short term, such as consumer debts; others, such as purchase agreements or mortgages, may be planned to last for many years. Creditors may be understanding (and a sensitive approach would be seen as good

practice) while others may want to be repaid immediately. Some may have already started to take action with a view to forcing repayment before the guardian is appointed. All these debts and liabilities form part of the property and financial affairs of the missing person.

- 4.12 The assets and liabilities may be personal or owned in connection with a business. In most instances a guardian will not be involved with the missing person's business, but where the missing person is a sole trader it will be harder to disentangle personal and business finances and the guardian may need to become involved. Normally, even if the missing person held a senior employment role in a company, it is unlikely the guardian would become involved in any capacity in that business.
- 4.13 Financial affairs include all issues relating to money and money's worth. These might include payment of debts, making investments, managing property and running a business as a sole trader or sole director/shareholder of a limited company. 'Financial affairs' in this context would not normally relate to partnerships, public limited companies or large corporations.
- 4.14 Guardians may be appointed to act on behalf of a missing person but this will never extend beyond the financial element into welfare or health decisions. So, although a guardian may be able to make payments such as school fees or private medical fees for a child of the missing person or the care home fees of a dependant adult, he or she will not have any parental responsibility for the child or the personal care of the dependant adult.

Elizabeth has been missing for one year. In her absence, her two sons are under the care of her mother. Elizabeth's brother, Pascal, has been appointed as her guardian of her finances and property. One of Pascal's responsibilities as guardian is to continue to pay Elizabeth's sons' school fees. In his capacity as guardian, Pascal has to assess whether paying the fees is in Elizabeth's best interests, but Pascal is not responsible for the welfare of the two sons and cannot make any decisions regarding their welfare.

Interests of third parties/Trusts

- 4.15 The interests of third parties, including co-owners, mortgagees and other creditors, in the missing person's property and financial affairs are not affected by the appointment of a guardian. A mortgaged property, for example, remains mortgaged to the same extent and on the same terms as before the missing person disappeared.

Janice is the guardian for a missing person who is on a fixed mortgage rate which is expiring in two months' time. The home is occupied by two friends of the missing person who are lodgers, with no ownership role in the property. Janice has grounds for believing the missing person will return, and would not want their friends to be forced from the home. Janice decides to meet with the mortgage lender to discuss whether a new rate can be negotiated in the circumstances. The discussion will need to cover whether mortgage payments can continue to be covered (by the lodgers' rent), the commercial policy of the lender and what they will agree to, and for Janice to arrive at an objective view on what the best interests for the missing person will be served by.

- 4.16 Nor is the nature of the missing person's interest in the property changed by the appointment of a guardian. Property in respect of which the missing person has created a trust will remain trust property, although the missing person may still have some entitlement to that trust property, and that entitlement will be part of their property. A person entitled to the benefit of trust property is a beneficiary of the trust.
- 4.17 If the missing person is a beneficiary, the trustees will continue to owe the same duties to the missing person as before the disappearance. The duties of the trustees to other beneficiaries will not be affected by the appointment. A guardian will be able to act on behalf of the missing person in relation to the missing person's interest as a beneficiary under the trust.
- 4.18 In some cases, a missing person may have transferred money and assets to a trust for the benefit of named persons, perhaps family members, in accordance with the terms of the trust. The trust is not affected by the appointment of a guardian, unless the trust deed states that it is.
- 4.19 There are several different kinds of trusts. There may be trusts (bare trusts) where only the beneficiary can end the trust at any time (for example, A owns the property only at the behest of C). There may be trusts where a number of people are entitled to the trust property in question, whether in the same degree (for example, the property is held on trust for A, B and C in equal shares, where C is the missing person), or, in different degrees (for example, where the property is held on trust for C for life and then for A and B, where C is the missing person). In all these cases C's interest is still their property. The guardian can act on behalf of the missing person, C, in relation to it in the same way as C could have done.
- 4.20 There may also be trusts (for example, discretionary trusts) where the trust is for the benefit of a range of people (say, A, B and C) but none of them has an entitlement to receive anything until the trustees have decided to make a payment to them. If, C is a missing person, their guardian has capacity to act in relation to the trust property to the same extent as C.

What is meant by “sufficient interest” in the property and financial affairs of the missing person?

- 4.21 A person’s ability to make an application to the court under the Act or to intervene in proceedings related to guardianship under the Act may be dependent on the person being able to demonstrate to the court that they have a sufficient interest in the property and affairs of the missing person.
- 4.22 The sufficiency of any particular interest will depend on the specific circumstances of the application. The person claiming to be sufficiently interested will have to provide evidence to demonstrate that this is the case.
- 4.23 The sufficiency of an interest may vary depending on the remedy being sought. The more significant the remedy, the greater the interest required is likely to be. An appointment might be sought in respect of all the property and financial affairs of the missing person by his or her long-term cohabiting partner. He or she could be concerned that the house and other property of the missing person is properly looked after until their return. Their close involvement in the life of the missing person would be very likely to qualify their interest as sufficient even if there was no jointly-owned property. An appointment might also be sought by a business partner, who needs control of matters relating to the business. The sufficiency of the partner’s interest may, for example, justify an appointment of limited authority in relation to business, but not personal assets.
- 4.24 The Act considers certain people to automatically have sufficient interest for the purpose of making or taking part in an application (See section 6 of the Code for further details on making applications to the court). This includes:
- For applications for a guardianship order, a variation order, or a revocation order; applications for directions to the guardian; applications for a declaration as to the extent of the authority of the guardian; and applications for the provision of accounts and information:
 - the missing person (in practice he or she would have returned and be seeking a revocation order or an account from the guardian);
 - the missing person's personal representatives (who would be seeking an account from the guardian); and
 - the missing person's spouse, civil partner, parent, child or sibling (who could be interested in any of the applications mentioned). Sibling includes siblings of full and half-blood.
- (the Act does not refer to step-parents, step-siblings or step-children as automatically having sufficient interest, but depending on such a person’s relationship with the missing person, the court may agree that they are able to demonstrate it).

- Additionally, in relation to an application for a guardianship order, a person who was previously a guardian for some or all of the missing person's property and financial affairs at any time during the period of one year ending with the day on which the application is made.
- Additionally, the guardian in relation to an application for directions, variation order or revocation order.

4.25 In relation to interveners in applications for guardianship orders, variation orders, revocation orders and other proceedings relating to the exercise of the guardian's functions, anyone who is the spouse, civil partner, child or sibling (half or full) of the missing person is deemed to have a sufficient interest to intervene and may join in the court proceedings (referred to as "intervening") without having to get the court's permission to do so. Anyone else will have to get the permission of the court to intervene which means they must demonstrate a sufficient interest in the property and financial affairs of the missing person. See also section 6 in this Code on applications to the court.

4.26 The court must, for example, refuse to hear an applicant without a sufficient interest in the property and financial affairs of a missing person in relation to the following applications:

- applications for a guardianship order*;
- a variation order, or a revocation order*;
- applications for directions to the guardian;
- applications for a declaration as to the extent of the authority of the guardian;
- applications for the provision of accounts and information; and
- application for permission to intervene.

4.27 Individuals who do not automatically have sufficient interest under the Act, include for example those in co-habiting relationships with the missing person but not married or in a civil partnership, as well as close friends of the missing person. They will have to satisfy the court they have a sufficient interest in the property and financial affairs of the missing person before they can take part in the legal proceedings. The longer and deeper the relationship the easier it is likely to be to convince the court of a sufficient interest. Nonetheless, demonstrating a sufficient interest to make an application or to intervene is only one step in the procedure, it does not mean that the application or intervention will succeed.

Jen and Suki were co-habiting partners for 18 years with their children, living as a single household, and expecting to spend the remainder of their lives together up to the time of Jen's disappearance. They are not married or civil partners. Suki wants to be the guardian of Jen's property and financial affairs. She uses the longevity and closeness of their relationship to demonstrate that she has a sufficient interest in Jen's property and financial affairs to make an application.

Marie has lived next door to Marge, who is an elderly lady of independent means, but has no family and has gone missing. Marie has a history of caring for Marge and helping her with her financial affairs. Marie may be able to demonstrate a sufficient interest even though she has no family relationship.

- 4.28 The Public Guardian, who is responsible for the supervision of guardians, does not automatically qualify as having a sufficient interest, but is likely to be able to demonstrate sufficient interest to qualify if his wish to intervene relates to the performance of his supervisory functions.

What is the “best interests” principle and who does it apply to?

- 4.29 The Act provides that a guardian must act in what they reasonably believe to be the missing person's best interests. This is a key principle of the Act. Any act done for, or any decision made by a guardian on behalf of a missing person must be done, or made, in that person's best interests.
- 4.30 The court must be satisfied before appointing a guardian that the appointment is in the missing person's best interests and that the person proposed for appointment will, if appointed, act in the missing person's best interests;

Michael is George's brother and would like to apply for a guardianship order to manage George's financial affairs as he has been missing for 6 months. However, they have had a history of disagreements, particularly with regards to money. Before George's disappearance, Michael had stolen George's money to pay off his gambling debts. In this instance, the court may well not be satisfied (having been notified in evidence supplied by other family members) that Michael would manage George's finances in a way which would be in his best interests, and therefore might not appoint Michael as George's guardian.

- 4.31 The concept of a best interests' test is also used in other legislation, but in relation to guardianship has to be assessed in the light of the provisions of the Act. It cannot be assumed that because a course of action was in the best interests of, for example, a person lacking capacity under the Mental Capacity Act 2005, that the same course of action will be in the best interests of a missing person.

How are the missing person's best interests to be worked out?

4.32 Working out what is in someone else's best interests may be difficult, but the Act sets out certain steps to help guardians work out whether a particular action taken or decision made is in the missing person's best interests. This checklist is set out in section 18 of the Act. This framework is not exhaustive, but it provides that a guardian attempting to determine the best interests of a missing person must:

- Consider all the relevant circumstances of which the guardian is aware.
- Consider, so far as is reasonably ascertainable:
 - any relevant wishes and feelings expressed by the missing person at any time, including any relevant written statement made by the missing person;
 - the beliefs and values that would be likely to influence the missing person; and any other factors that the missing person would be likely to consider
 - the views of any persons of whom the guardian is aware with a relevant interest in the missing person's property or financial affairs.
 - the consequences of taking a proposed action.

4.33 Guardians must reach their own decisions. They do not have to decide a matter by reference to what they think the missing person would have been likely to decide had he or she been there to make the decision. They do need to decide it by considering the missing person's best interests. Nor are they required to consider any question as to whether or when the missing person might cease to be missing. They do not have to make a decision on the basis that the missing person might return sooner or later.

Claire has been acting as guardian for the property and financial affairs of her cousin Jasmine for two years. Acting in what she believes (having considered the relevant matters) is in Jasmine's best interests, Claire has taken the decision to sell Jasmine's house to increase the amount of money available for the maintenance of Jasmine's children. In making the decision, Claire set aside the possibility that Jasmine might return within three months before the cash situation become absolutely critical and would have found it convenient to live in the house. Claire was entitled to do this and will not incur liability for the consequences of not considering this factor if Jasmine were to return in two months and try to take action against Claire for selling the house.

4.34 The Act also provides that before taking a decision where it would be reasonable to expect the missing person to consult a particular person, the guardian must consult that person unless it is not reasonably practicable to do so.

What must be taken into account when trying to work out someone's best interests?

- 4.35 Because every case – and every decision – is different, the law can't set out all the factors that will need to be taken into account in working out someone's best interests. Section 18 of the Act sets out some common factors that must always be considered when trying to work out someone's best interests. These factors are summarised in the checklist set out at 4.32 above.
- 4.36 It is important not to take shortcuts in working out best interests, and a proper and objective assessment must be carried out on every occasion. If the decision is urgent, there may not be time to examine all possible factors, but the decision must still be made in what is considered to be the best interests of the person who is missing by reference to the checklist. It is necessary to keep notes of what was considered, including records of discussions and decisions. Ideally, notes of discussions should be agreed by everyone who took part. These will be required in providing reports and financial returns to the OPG in its supervisory role.
- 4.37 Not all the factors in the checklist will be as relevant to all types of decisions or actions.
- 4.38 What is in a person's best interests may well change over time. This means that even where similar actions need to be taken repeatedly in connection with the missing person's financial affairs, the missing person's best interests should be regularly reviewed.

Before her disappearance, Ines paid a monthly sum of £10 to a charity which provided direct and unconditional support to homeless people by providing daily shelter and food to those in need. As this was a cause Ines was passionate about supporting, acting in her best interests, Calum, her guardian, has continued these payments. However, after 12 months he decides to review all payments as with no apparent prospect of return Ines' funds are dwindling. Calum has concluded that it would be in her best overall interests to cancel the monthly payments to the charity. However, another guardian could have reached a different conclusion.

How does a decision-maker work out what 'all relevant circumstances' are?

- 4.39 The relevant circumstances will vary from case to case. When trying to work out someone's best interests, a guardian should try to identify all the issues that would be most relevant to the missing person and to the particular decision. Clearly, it is not always possible or practical to investigate in depth every issue which may have some relevance to the person who is missing or the decision in question.

How do the chances of a missing person returning affect working out what is in their best interests?

4.40 The Act provides that guardians are not required to consider whether or when the missing person might cease to be missing. This does not prevent them from taking this factor into account. The guardian can therefore assess each decision on its own merits without assuming that the missing person might cease to be missing sooner or later. A guardian considering how to invest might be attracted by a higher rate of interest offered by a slightly longer term deposit. The decision whether to tie the money up for an additional period can be made without considering if it is likely the missing person will cease to be missing within the period. Or it may involve reducing payments being made to those felt to be essential rather than just desirable.

How do a person's wishes and feelings, beliefs and values affect working out what is in their best interests?

4.41 The Act requires guardians to consider, as far as they are 'reasonably ascertainable':

- any relevant wishes and feelings expressed by the missing person at any time, including any relevant written statement made by the missing person;
- the beliefs and values that would be likely to influence the missing person;
- and any other factors that the missing person would be likely to consider.

4.42 But the wishes and feelings, beliefs and values of the missing person will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the missing person's best interests at that time.

Ruth and Matt are brother and sister. When Matt went missing Ruth was appointed guardian of his assets. Ruth must, as the decision-maker, consider Matt's beliefs and values before deciding how to invest the assets. Matt previously voiced his strong support against diesel vehicles. After speaking to his friends Ruth also understands Matt was also very environmentally conscious. Taking this into account, when the family car needs replacing Ruth authorises purchase of a low carbon emission car in line with Matt's beliefs.

What is 'reasonably ascertainable'?

4.43 How much someone can learn about a person's past and present views will depend on circumstances and the time available, and the decision being made. 'Reasonably ascertainable' means considering all possible information that could be reasonably be expected to be obtained in the time available. What is available in an emergency will be different to what is available in a non-emergency.

What role do a person's past and present wishes and feelings play?

- 4.44 The person may have held strong views in the past which could have a bearing on the decision now to be made. All reasonable efforts must be made to find out whether the person has expressed views in the past that will shape the decision to be made. This could have been through verbal communication, writing, behaviour or habits, or recorded in any other way (for example, social media, correspondence, home videos or audiotapes).

Harry has been missing for eight months. Kaying, acting as guardian of Harry's financial affairs, considers it in Harry's best interests to settle some outstanding debts, but also continue paying into a savings account set up for Harry's nephew. Before he went missing, Harry often said how much he wanted to help his nephew. Kaying spoke to the Money Advice Service and sorted out a list of creditors, and was able to negotiate a deal to settle the debts, while preserving enough funds to continue annual payments to Harry's nephew. In this instance, Kaying is considering Harry's past views and using this to help make her decision.

- 4.45 These permanent sources could provide a lot of information about a person's wishes. A guardian should consider these types of evidence carefully. If their decision does not follow something a person has recorded, they should record the reasons why. They should be able to justify their reasons if someone challenges their decision.

What role do beliefs and values play?

- 4.46 Everybody's values and beliefs influence the decisions they make. Evidence of a person's beliefs and values can be found in the same sources as evidence of their wishes and feelings as well as in things like their:

- cultural background;
- religious beliefs;
- political views, or
- past behaviour or habits.

What other factors should a decision-maker consider?

- 4.47 The Act requires guardians to consider any other factors the missing person would be likely consider. This might include the effect of the decision on other people, obligations to dependants or the duties of a responsible citizen.
- 4.48 The Act allows actions that benefit other people, as long as they are in the best interests of the missing person. In deciding whether to do so, guardians will need to consider how the missing person would be likely to have responded to the needs of the person in question. However, benefitting other people is not in itself proof that the action is in the best interests of the missing person. Guardians will need to take their decisions in the light of all the circumstances, including the extent to which the missing

person's assets should be preserved for the future. This may require balancing immediate needs and long term possibilities.

Who should be consulted when working out someone's best interests?

- 4.49 The Act requires guardians to take into account, where it is reasonably practicable and appropriate to do so, the views of any persons that the guardian is aware may have a relevant interest in the missing person's property or financial affairs. The Act does not specify who these people may be. They might include family, close friends, anyone previously engaged in caring for the person, their dependants, or anyone who has taken an interest in their welfare. They must consult these people unless it is not reasonably practicable and appropriate to do so.
- 4.50 Guardians must be able to show they have thought carefully about who to speak to. If it is practical and appropriate to speak to the above people, they must do so and must take their views into account. They must be able to explain to the OPG (and potentially the court) why they did not speak to a particular person – it is good practice to have a clear record of their reasons. Record keeping will, in any event, be an important activity for guardians in submitting returns to the OPG in their supervisory role, or upon request from the OPG. There are no rules regarding how records should be kept. The main criteria are that they should be clear, accurate, well-ordered and readily retrievable. It will generally help in achieving these things if the records are completed as close in time to the events recorded as practicable.

Before he went missing three years ago, Mohammed had spent years building up an extensive coin collection. His sister Hana, who is Mohammed's guardian, has been considering whether it would be in Mohammed's best interests to sell his coin collection, which is costing money for insurance and storage. Before making this decision, as part of the best interests' thought process, Hana decided to consult their parents and siblings regarding what they think would be in Mohammed's best interests in this matter.

Hana decided that their parents and siblings were the most appropriate people to speak to as his family members are likely to be able to provide the most insight regarding his wishes and feelings towards his coin collection. They all agreed that Mohammed would go to considerable lengths to keep his collection intact and would not wish to sell it unless he was facing considerable financial hardship (which was not yet the case). Taking this into account, Hana decided that the collection should not be sold yet.

Hana decided that it was not necessary to consult his ex-girlfriend, as she had not been involved in Mohammed's life for many years.

Guardians should try to find out:

- what the people consulted think is in the person's best interests in this matter, and
- if they can give information on the person's wishes and feelings beliefs and values.

4.51 People who are close to the missing person, such as close family members and close friends, are likely to know them best.

How can guardians respect confidentiality?

4.52 Guardians must balance the duty to consult other people with the right to confidentiality of the missing person. If confidential information is to be discussed, a guardian should only seek the views of people who it is appropriate to consult, where their views are relevant to the decision to be made and the particular circumstances.

Reasonable belief about a person's best interests

4.53 The Act provides that guardians must act in what they reasonably believe to be the best interests of the missing person. Guardians must therefore be able to show that it was reasonable for them to think that they were acting in the missing person's best interests at the time they made their decision.

4.54 This does not mean that guardians can simply impose their own views. They must have objective reasons for their decisions – and they must be able to demonstrate them. They must be able to show they have considered all relevant circumstances and applied all elements of the best interests' checklist.

What problems could arise when working out someone's best interests?

4.55 It is important that the best interests' principle and the statutory checklist are applied in a flexible manner. Without flexibility, it would be impossible to prioritise factors in different cases – and it would be difficult to ensure that the outcome is the best possible for the missing person. Some cases will be straightforward. Others will require guardians to balance the pros and cons of all relevant factors.

What happens when there are conflicting concerns?

4.56 Guardians may be faced with people who disagree about a person's best interests. Family members, partners and carers may disagree between themselves. Or they might have different memories about what views the person expressed in the past. It may be that it is possible to resolve these differences but that is not critical to assessing the best interests in question. In weighing up different contributions, a guardian should consider:

- how long an individual has known the missing person, and
- what their relationship is.

But, the responsibility for the decision lies with the guardian, who must apply the best interests' checklist.

What if the guardian is uncertain what is in the “best interests” of the missing person?

- 4.57 Given the flexibility of the definition of “best interests” there are bound to be instances in which a guardian is uncertain how to act. The guardian may be able to reach a satisfactory decision by considering the issues with other interested people. The guardian might take legal or other professional advice or consult the Office of the Public Guardian, which can give general guidance, and this may be adequate. Ultimately, the guardian may apply to the court for directions as to whether or how he or she should act in a particular situation. This should, however, not be necessary on a very frequent basis.

Can it be in the best interests of the missing person to make payments or gifts that will reduce their wealth?

- 4.58 Whether a financial decision is in the best interests of the missing person will depend on the circumstances of the case, but there will be cases in which guardians can legitimately make payments by way of gift.

When Domenico went missing, his wife Sharon was appointed guardian. She had been the principal carer for their disabled son, Luca, whilst Domenico had been the family breadwinner and owner of the family home. Sharon knows that Luca will soon have outgrown some of the specialist equipment he needs around the home and that a significant sum will be needed to pay for replacements. She assesses Domenico's financial position and considers the priority that he had given to ensuring that Luca had the best possible provision over the years. She discusses her conclusions with their other adult children and together they decide that Domenico would have thought it in his best interests to ensure Luca had the new equipment. They also consider how the purchase would affect Domenico's financial situation in the light of his disappearance, where future income is uncertain. Weighing this all together Sharon decides that Domenico's best interests would still be best served by buying the equipment.

At the same time Sharon was asked to use Domenico's money to pay for the cost of a family holiday for one of her adult children. Domenico had generally been happy enough to make a contribution in the past. However, having assessed his financial situation and having discussed the proposal with all her adult children, she decided that it was not appropriate to reduce Domenico's funds in this way given the uncertainty of the future.

When John went missing two years ago his eldest son, Joe, became the guardian of his assets. The loss of John's income meant that the living expenses of the family would use up John's cash assets within a year. Joe assessed the overall state of John's financial affairs, looking at outgoings, income and assets and prepared alternative courses of action. He considered the factors that he thought would have influenced John had he been present – not least that he had been born in the house and had a strong pride in his family's presence there. He discussed the options and his conclusions with the wider family. Having weighed up all the factors, Joe decided to sell the family home. A sale would release a significant capital sum that could be invested, preserving John's wealth as far as practicable whilst ensuring John's family had sufficient money for their living expenses for the foreseeable future.

Can a guardian make a personal gain from actions taken on behalf of the missing person?

- 4.59 A guardian is appointed as an agent of the missing person. This means that he or she cannot profit personally from the appointment unless authorised to do so by the terms of the appointment.

Damien is a lawyer appointed as guardian. The court order provides that he may charge fees for his work as a guardian. If it had not done so he would only have been able to claim reasonable expenses in connection with the exercise of his functions as a guardian, such as travel expenses to attend at court.

Maja is the wife and guardian of the property and financial affairs of her missing husband. She applies to the court for directions as to whether she can use a considerable sum of his money for a luxury cruise. The court considered whether this would be in her husband's best interests. It concluded in the light of the evidence of their life together, including their choice of holidays, generally a fortnight in a caravan at the seaside, and the modest amount of assets left, that it would not.

- 4.60 The Act provides that in appointing a guardian the court must, amongst other things, have regard to whether there is a conflict between the proposed guardian's interests and the missing person's interests. The Act requires the court to consider, among other things, any connection between the proposed guardian's property and financial affairs and the missing person's property and financial affairs, and how any such connection might affect the proposed guardian's decision-making if they were appointed.

Iona has been missing for 9 months. The court is considering whether Alice (her best friend), the owner of a technology company that has recently been in financial difficulties, would be an appropriate guardian. The court may want to be sure that Alice will keep her financial affairs separate from Iona's.

- 4.61 It is likely that in some cases there will be a potential conflict of interest. A guardian may need to use the missing person's assets to meet living expenses for themselves and perhaps also for the children of the missing person. This may mean that the estate of the missing person has to be diminished and, in time, perhaps, exhausted. This may, however, be the decision that is in the best interests of the missing person as otherwise his or her family may have to live out the period of disappearance in poverty. The guardian in such cases may be the spouse or civil partner of the missing person or a long-term partner whose affairs are intrinsically connected to those of the missing person and may be dependent upon them.
- 4.62 The Act makes clear that there is not a conflict between the proposed guardian's interests and the missing person's interests **merely** because:
- the proposed guardian is the missing person's spouse, civil partner, parent, child, sibling or other relative;
 - was living with the missing person immediately before that person became a missing person; or
 - may benefit from being appointed as guardian, whether directly or indirectly.

Conflicts of interest

- 4.63 Conflicts of interest can arise in relation to both small and large financial questions. A guardian who is constantly using the missing person's funds for living expenses must still satisfy the best interests test.
- 4.64 To avoid inadvertent breach of duty and to provide proof that they have acted properly, guardians should keep the missing person's money and property separate from their own or anyone else's. There may be occasions where guardians and missing persons have agreed in the past to keep their money in a joint bank account (for example, if husband and wife). It might be possible to continue this under a guardianship order but in most circumstances, guardians will be very well advised to keep their finances and those of the missing person separate to avoid any possibility of mistakes or confusion.
- 4.65 Guardians should keep accounts of transactions carried out on the missing person's behalf. If the guardian is not a financial expert and the affairs are relatively straightforward, a record of income and expenditure (for example, through bank statements, bills and receipts) may be enough. The more complicated the affairs, the more detailed the guardianship accounts will need to be. Guardians will need to

make financial returns to the OPG in its supervisory role, and record and account keeping is a critical part of meeting this requirement.

- 4.66 The best interests of the missing person will always be the guiding principle for such transactions and for any decisions made by the guardian. However, although a guardian may not generally make a profit from the exercise of their powers unless authorised to do so, a guardian may derive a benefit or profit from a transaction in which they have an interest other than as guardian. For example, a guardian may gain a personal profit from the sale of a property jointly owned by the guardian and the missing person, the sale of which is needed as mortgage payments can no longer be afforded due to the loss of the missing person's income or to pay off debts. The guardian's personal interests in relation to their own stake in the jointly owned property are not subject to the obligations of guardianship.
- 4.67 A guardian who was owed money by the missing person before the disappearance would, subject to the best interests' tests, be able to repay the debt from the assets of the missing person. It might, however, be necessary to show that there was no element of preferential treatment of the guardian against the other creditors.

5. Guardianship Orders

5.1 This section of the Code of Practice explains the concept of guardianship and the role of a guardian. It provides information and guidance for guardians and other persons on the general characteristics of guardianship orders. Guidance on how to apply to the court is set out in Part 6 of the Code.

Who can appoint a guardian?

5.2 Guardians of the property and financial affairs of missing persons can only be appointed by the court in accordance with the terms of the Act. The appointment is made by a court order known as a guardianship order. The terms of the appointment may be varied or revoked by the court.

Why are guardians to be appointed?

5.3 The Act empowers the court to appoint one or more persons to act as the guardian of the property and financial affairs of an individual, who is, due to being missing, not able to act in relation to his or her property and financial affairs. The role of the guardian is to be responsible for managing the property and financial affairs of the missing person with reference to that missing person's best interests.

Who can apply for a guardianship order?

5.4 Anyone over the age of 18 can apply for a guardianship order, and the applicant does not have to be the person who is the proposed guardian. However, the court will refuse to hear the application if it considers the applicant does not have a sufficient interest in relation to the missing person's property or financial affairs. The Act provides that the spouse, civil partner, parent, child and sibling of the missing person are automatically considered to have a sufficient interest, as well as a person who was a guardian of the missing person's affairs at any time in the year preceding the day on which the application is made. Other applicants, such as friends and cohabitants, will have to demonstrate to the court why they have a sufficient interest.¹

When can the court hear an application for a guardianship order?

5.5 The court will only hear applications where there is sufficient connection between the missing person or the applicant and the jurisdiction of the court (i.e. England and Wales). Therefore, the court will only hear an application for a guardianship order if one of the following applies:

- The missing person was domiciled* in England or Wales the day before he or she was first known to be missing (if he or she has been missing for two or more periods, the day in question is the day before the most recent disappearance). Domicile is a common law

¹ See paragraphs 4.21-4.28

concept used to connect a person to a legal jurisdiction, such as England and Wales, although the legislation makes it the United Kingdom in this context. It defines where a person is deemed to have his or her permanent home.

- If the missing person had been habitually resident* in England and Wales throughout the year ending on the day they went missing. Habitual residence is another legal concept that is widely used in establishing a connection between a person and a legal jurisdiction.
- If the applicant is the spouse or civil partner of the missing person and the applicant is domiciled* in England and Wales on the day the application is made or has been habitually resident* there throughout the year ending on that day.

5.6 These situations are essentially the same as those applying under the Presumption of Death Act 2013. There is no specific requirement that the missing person or the guardian is a British Citizen. .

Alex has been missing for one year. Alex is domiciled in Spain but had been working in England for five years, where he subsequently married his British wife, Fiona. Fiona would like to apply for a guardianship order to ensure that his property and financial affairs are being managed effectively. Although Alex was domiciled in Spain before going missing he was habitually resident in England before he went missing, and Fiona has been domiciled in England for over 30 years up to and including the date of the application. Even if Alex had not been habitually resident and had not qualified on domicile, Fiona's continuous residence over the last 30 years in England and Wales up to that date would qualify her. The application can therefore be heard.

When can the court make a guardianship order?

5.7 Once the court has been satisfied it can hear the case (see above), the court may make a guardianship order in two situations:

- The first is when the court is satisfied that:
 - the person in respect of whom the application is made is missing and has been missing for at least 90 days (including and ending with the day on which the application is made);
 - the appointment of a guardian is in the best interests of the missing person; and
 - there is a satisfactory person who could be appointed as guardian.
- The second is when a decision in relation to the property or financial affairs of a missing person is needed or likely to be needed urgently before the 90-day absence period requirement has been satisfied. In this case the 90-day requirement does not apply, but, the remaining requirements have still to be satisfied. This is known as the urgency condition. It might, for example, apply where there is an urgent business decision to be taken or a repossession order application to challenge.

How will the court know that the missing person has been missing for 90 days?

- 5.8 The applicant for a guardianship order will have to demonstrate that the missing person has been missing. To show this the applicant will have to produce evidence of absence from the usual place of residence and activities **and** either (1) that their whereabouts are unknown (or not known with sufficient precision); or (2) they are not able to communicate decisions. In most cases this would be a statement from the police confirming that the person is missing and that the disappearance has been investigated as the court is likely to expect there to have been a police investigation of some kind. This may require corroborative statements from friends and family, work colleagues and social acquaintances; and from remotely accessible service providers, such as banks and telephone companies. In cases of people missing abroad the Foreign and Commonwealth Office may be able to provide material setting out the known facts.

Kaito normally visits his mother every Sunday. However, Kaito has not visited her for over three months. Kaito also usually plays football for a local side on Sunday mornings and badminton on a Thursday evening but the clubs have not had any response from him for a similar period. His sister, Sally, who is applying to be guardian of his financial affairs, collects statements from her mother and the club secretaries to add to the evidence provided by the police missing person's report in respect of Kaito and by the corroboration of friends and colleagues that they have not been able to contact him over this period.

Who can be appointed a guardian by the court?

- 5.9 Only individuals aged 18 and over and trust corporations*, who consent to the appointment, can be appointed as guardians. The appointee does not have to be the person nominated in the application to the court. The guardian may be a spouse, civil partner, cohabiting partner or family member of the missing person or have no previous relationship to the missing person. Professionally qualified persons, such as lawyers or accountants, can be appointed, as can friends. The court may decide that the applicant is not the best person to act as guardian and appoint another person e.g. an intervener.
- 5.10 The missing person may be a child or young person under 18, although it should be noted that the guardianship process is designed for a missing person who has assets which need to be managed in their absence. The guardian does not need to have a direct personal interest in the missing person's property or financial affairs, but an individual is not prohibited from having some sort of interest or being appointed a guardian by virtue of having such an interest as someone supported financially by the missing person or, for example, being a creditor of a missing person.

- 5.11 The position of a guardian is, however, one of great responsibility and trust. The court must therefore be satisfied that the individual meets the requirements of the Act, is suitable to appoint, and will act in the best interests of the missing person.

Jake applies to be the guardian of Steven's assets after he has been missing for 4 months. Jake and Steven are brothers and live together. Jake is, however, viewed as financially irresponsible in his family and his uncle intervenes to argue that Jake lacks the financial skills and knowledge to be a guardian, suggesting instead a financially competent person is required. Steven's uncle suggests Steven and Jake's sister is appointed as guardian instead, and the court appoints her after being satisfied she is willing to act and is a suitable person.

What is a trust corporation*?

- 5.12 A trust corporation is in general terms a corporation set up to carry on trust business. In practice they are frequently subsidiaries of banks and financial institutions, but are also charities or legal firms. There are technical requirements that a corporation must satisfy to be a trust corporation. Trust corporation status confers certain legal advantages.

Can a guardianship appointment relate to the property and financial affairs of more than one missing person?

- 5.13 No, an order appointing a guardian may only relate to the property and financial affairs of one missing person.

Can two or more guardians be appointed in relation to one missing person?

- 5.14 Two or more persons may be appointed as a guardian in relation to the property and financial affairs of a missing person, regardless of whether an application was made for two guardians. Firstly, there may be circumstances in relation to a missing person's affairs that make it appropriate to appoint two guardians (such as one to look after their UK property and another their overseas property). Secondly, a court could determine two guardians would be more appropriate.
- 5.15 If two or more guardians are appointed, the appointments may be joint appointments in respect of all the property and financial affairs within the scope of the proposed appointment or may be separate appointments in relation to different parts of the missing person's property and financial affairs. For example, one person could be appointed to manage real estate assets, such as houses and flats, and, another to manage investments and savings; or, one might be appointed in relation to property in the UK and one in relation to property overseas.
- 5.16 Appointments combining these two arrangements in relation to different parts of the property and financial affairs are also possible. For example, there may be a joint

appointment in relation to investments and savings and a single appointment in relation to the management of other property.

- 5.17 The appointments may also be for different periods. This may be appropriate where it is clear that some assets will be sold in the short term and others will be retained.
- 5.18 Where there are two or more guardians responsible for different parts of the property and financial affairs, the guardians may be appointed on different terms. If the appointment is joint then the terms must be the same. Where guardians are to act jointly they must make decisions together and act unanimously in making their decisions and all of them will be bound by the terms of the appointment and any direction of the court.
- 5.19 The Act does not permit two or more guardians appointed in relation to the same missing person to be appointed as “joint and several” guardians (that is guardians who can act jointly or separately). If two or more are appointed in relation to the same subject matter they must always act jointly. This restriction avoids the potential for conflict if the guardians were able to act separately in relation to the same subject matter. However, two or more guardians appointed in respect of the same person can act separately provided that each have sole responsibility for different property or for affairs in question.

Joselyn is missing. His two sons, Max and Jamie are appointed by the court as joint guardians for three years in respect of all Joselyn’s property and financial affairs. They have to agree all decisions together. They cannot delegate their functions as guardian to one another.

Freddie is missing. His sons, Tom and Peter, are appointed guardians. Tom is to look after his father’s finances, whilst Peter is appointed to sell his house. Tom is appointed for four years, but Peter is appointed for 18 months. Tom and Peter can act independently of one another and do not have to act jointly. However, Peter cannot deal with his father’s finances, and Tom cannot deal with the house.

What conditions must be satisfied before a person can be appointed a guardian?

- 5.20 The court must be satisfied the prospective guardian is suitable to be appointed. The court must take into account the views of any persons of whom the court is aware that have a relevant interest in relation to the missing person’s property or financial affairs, where it is reasonably practicable and appropriate to do so. These persons might, for example, come forward as a result of the notices served by the applicant or the advertisement placed by him or her, but are not limited to these sources.

5.21 In deciding if a person is suitable, the court will consider:

- the proposed guardian's relationship with the missing person;
- the views of the missing person on the proposed guardian, so far as they are known to, or reasonably ascertainable by the court;
- whether the proposed guardian has the skills and knowledge necessary to carry out the functions proposed by the guardianship order;
- and any conflict between the proposed guardian's interests and those of the missing person.

5.22 In deciding whether there is a conflict of interest,² the court has to consider:

- any connections between the property and affairs of the missing person and the property and affairs of the proposed guardian; and,
- how any such connections might affect decisions that the guardian may take.

5.23 For the purposes of the appointment, there is no conflict of interest simply and only because the proposed guardian is:

- the spouse, civil partner, child, sibling or other relative of the missing person; or
- was living with the missing person immediately before the disappearance; or
- or may benefit from the appointment directly or indirectly.

5.24 The court must also decide that the person who is appointed will act in the best interests³ of the missing person. In reaching this decision the court must consider all the relevant circumstances and consider the consequences of the possible decision that it might reach (for example, comparing possible outcomes of different decisions). This may include appointing the applicant or a different guardian, making joint appointments or restricting the appointment to certain property, or not appointing a guardian at all.

5.25 The circumstances will vary from case to case, but so far as is reasonably ascertainable the court must consider any relevant wishes and feelings expressed by the missing person at any time, including any relevant written statement made by the missing person; the beliefs and values that would be likely to influence the missing person; and, any other factors that the missing person would be likely to consider. The applicant will have to consider and collect evidence of these matters in support of the application.

² See paragraphs 4.63-4.67

³ See paragraphs 4.29-4.51

Hamad is appointed guardian of Faye's affairs. Before Faye went missing they lived together. Hamad also owns an IT business, which is suffering financial hardship. If Hamad is appointed there appears, on the evidence, to be a significant risk that he would use Faye's assets to support his business. In fact, Faye had always been at pains to keep her money away from his business. The court may conclude that in this case Hamad is likely to act in his own best interests not Faye's. The court might decide to appoint an independent person, perhaps making enquiries of family members or a professional representative.

How long can a guardianship order last? Can the order be renewed?

- 5.26 The period for which the guardian is appointed will be stated in the court order. The maximum is four years from and including the date of the order of appointment. An initial guardianship order for a period of less than 4 years could be extended by seeking a variation order, but only to a maximum of 4 years from the date it was originally granted. However, this will not prevent the court from making further guardianship orders, including orders reappointing a person as guardian, in respect of the missing person. If a further guardianship order is required, the re-application process mirrors the original application process, and all stages must be completed again, including advertising the application. The court will want to be satisfied that there are grounds for re-appointment of a guardian, and that it is the best interests of the missing person.
- 5.27 There is no limit on the number of times that a guardian may be re-appointed in principle. If there is to be a re-appointment the procedure should start during the later period of guardianship (a rule of thumb would be no later than six months before the end of the period covered by the order). While this is not essential, re-applications which are not made in a timely way risk there being gaps when there is no guardian.
- 5.28 The ability to make a new appointment does not mean that the court will continue to make guardianship orders indefinitely. At some point the court may suggest that the Presumption of Death Act process may be appropriate.
- 5.29 Guardians and other interested persons, such as friends and family, should consider when an appointment is nearing its end whether it would be in the best interests of the missing person to seek a new guardianship and if so who might be appointed. The most critical factor will be whether it is in the best interests of the missing person. Each situation will be different, and factors will include the likelihood of the missing person's return, the family's wishes, and the property and financial affairs to be managed.
- 5.30 The appointment of a previous guardian on the expiry of a term will require another application to the court, just as for the initial appointment. If an application is made, the court will need to satisfy itself that a further guardianship order is justified, taking

account of all factors, and that it is in the best interests of the missing person. An order will not be granted unless the court is satisfied that there is a suitable person to be the guardian, aged 18 years or more (or a trust corporation), who consents to the appointment, and, who, if appointed, will act in the best interests of the missing person – just as with the first application. Evidence from the previous conduct of a guardian may, however, make the proof of the grounds easier.

When does the appointment of a guardian take effect?

- 5.31 The guardian is appointed for the period specified in the order made by the court. The terms of the order will define when the guardianship will commence.
- 5.32 The court may specify a date from which the authority of the guardian to act starts, and guardianship will commence on that date. In setting the date the court will have regard to the period of time that the Public Guardian will require to satisfy itself that any security ordered by the court for the proper performance of the guardian's duties is in place.

What is the legal relationship of the guardian and the missing person?

- 5.33 A guardian is the agent* of the missing person in respect of the property and financial affairs included in the scope of the appointment. The guardian's powers as agent are defined by the Act and the terms of the guardianship order. Being an agent means that the guardian has legal duties to the person they are representing. It also means that when guardians carry out tasks within their powers, they are not personally liable to third parties, although this may not be so if they act outside their powers (see paragraphs 5.92-5.96 below).
- 5.34 As the guardian is the agent of the missing person, their appointment does not affect the powers of the missing person to act in relation to his or her property and affairs. These powers remain alongside the new powers of the guardian in theory, and depending on the wording of the court order. If the missing person returns and the guardian becomes aware of this, the guardian must apply to the court for a revocation order, ending their appointment. Until a revocation order is made the guardian would in such a case still be legally entitled to act for the missing person, but only subject to the best interests' principle which would require the guardian to consult with the missing person as to how the guardian should act.

What is the legal effect of the guardian being the agent of the missing person?

- 5.35 The application of the law of agency means that guardians must carry out their duties carefully and responsibly. As agents they are subject to duties:
- to act with due care and skill (duty of care);
 - not to take advantage of or profit from their situation without authorisation;

- not to delegate* duties unless authorised to do so;
- to act in good faith;
- to respect the person's confidentiality;
- comply with the directions of the court;
- to keep accounts⁴; and
- to familiarise themselves with the property and financial affairs for which they are responsible.

5.36 These duties deriving from the general law of agency are explained in the following paragraphs. Guardians are also subject to other duties derived from the Act and the other legislation. These are described after the agency duties.

5.37 *Duty of Care*: 'Duty of care' means applying a certain standard of care and skill, including taking and considering expert advice when appropriate. The level of care and skill depends on whether the guardian is paid for their services or holds relevant professional qualifications. Guardians who are not being paid must use the same care, skill and diligence they would use when making decisions for themselves or managing their own affairs. If they do not, they could be held liable for acting negligently. However, carelessness in managing one's own affairs does not justify carelessness in managing those of the missing person. If it would be reasonable to expect a person with the guardian's background and qualifications to take professional advice, a guardian should do so, irrespective of whether the individual guardian in question would take advice on the same issue in relation to his or her personal affairs. Such advice might be taken from a lawyer or other professional with relevant expertise, an advice agency or a relevant charity.

5.38 A guardian who claims to have particular skills or qualifications must show greater skill and care in those particular areas than a person who does not make such claims.

5.39 If guardians are being paid for their services, they are expected to demonstrate a higher degree of care or skill when carrying out their duties. A solicitor appointed as guardian would, for example, be expected to bring a higher degree of legal skill than a person not legally qualified. Guardians whose duties form part of their professional work (for example, solicitors or accountants) must display normal professional competence and follow their profession's rules and standards.

5.40 *Fiduciary Duty**: this duty means guardians must not take any advantage from their position unless authorised to do so. They should not put themselves in a position where their personal interests conflict with their duties. For example, a guardian buying a property that they are selling for the missing person should be sure that a full market price is being paid and would be well advised to market the property

⁴ Both as agent and for supervision purposes for the Public Guardian.

openly. It may even be sensible to obtain express authorisation from the court for such a purchase. Guardians who buy a property from the missing person must be able to demonstrate why it was justified and in accordance with the best interests' principle.

5.41 Guardians should be alert to potential conflicts of interest.

5.42 Guardians may be entitled to remuneration for their services if this is authorised by the court. They are in any case entitled to be reimbursed from the missing person's assets for their reasonable expenses incurred in connection with their functions. In general, guardians should not accept a third-party commission in any transactions without authorisation from the court. Guardians who do so must be able to demonstrate why it was justified and in accordance with the best interests' principle.

5.43 Some guardians may be entitled to draw on the assets of the missing person for their own living expenses, because they were dependent on the missing person, but these must still be demonstrably in the best interests of the missing person. Guardians will need to be able to account for and justify expenditure, particularly if they are the beneficiary, and will need to include this in the report to the Public Guardian.

Sally is married to James and has been appointed as his guardian. Before James went missing, she had stayed at home to raise the children whilst he worked. Without his salary, she has no income, but is enquiring about eligibility for benefits. She and the children need to access savings and investments in James's name to cover their living expenses. Her appointment as guardian does not prevent her receiving this benefit. She must, however, still assess whether the particular decisions made in relation to the expenditure are in James's best interests.

5.44 *Duty not to delegate*: A guardian may seek professional or expert advice (for example, investment advice from a financial adviser). But they cannot give their decision-making responsibilities to someone else, unless they are expressly authorised by the court to do so. The court can grant such powers in the terms of the guardianship order. A person applying to be a guardian, who is aware of discretionary management arrangements put in place by the missing person in relation to certain financial investments could in their application request that the court consent to the continued delegation of this function.

Kelechi, who is the guardian of Janice's property and financial affairs, has decided, having taken advice and consulted appropriate advisers, to sell an investment property to clear off Janice's short term debts and repay the mortgage on the property. She may delegate administrative tasks connected with the sale, for example, the marketing and selling of the house to an estate agent, but the decision whether to sell at a price is in the best interests of the missing person is for her to make and cannot be delegated.

She was aware when she applied for appointment as guardian that Janice had given ABC, investment managers, control of her investment portfolio of stocks and shares and had been very happy with the service they provided and the returns they had obtained. Being unfamiliar with financial investments, Kelechi had obtained the permission of the court to continue this delegation, settle her debts and retain a lump sum for her possible return.

5.45 *Duty of good faith*: Acting in good faith means acting with honesty and integrity.

Piotr has been missing for a year. Suzy, his sister, has recently become the guardian of his assets. Suzy must act in good faith as a guardian. She seeks professional advice from a financial adviser and ensures Piotr's money is kept separate from her own. A friend suggests to Suzy that she should invest her own and Piotr's money in the friend's business. Suzy is happy to invest for herself, but having taken advice decides Piotr's best interests mean he would not have invested. Suzy would not be acting in good faith if she invested his money in the friend's business.

5.46 *Duty of confidentiality*: guardians have a duty to keep the missing person's affairs confidential, unless:

- before they went missing, the person agreed that information could be revealed where necessary;
- there is a legal requirement to do so; or
- there is some other good reason to release information (for example, if it is in the public interest or in the best interests of the missing persons, or where there is a risk of harm to the missing person concerned or to other people).

5.47 In these circumstances, it may well be advisable for the guardian to get legal advice.

5.48 *Duty to comply with the directions of the court*: the court may give specific directions to guardians about how they can use their powers. It will also order guardians to provide reports (for example, financial accounts or reports on the property and financial affairs of the missing person and their stewardship) to the Public Guardian at any time or at such intervals as the court directs. The Public Guardian may also require the production of information and accounts as specified in regulations.

5.49 *Duty to keep accounts*: a guardian is expected to keep, and periodically submit to the Public Guardian, correct accounts of all their dealings and transactions on the person's behalf. If the guardian is not a financial expert and the affairs are relatively straightforward, a record of income and expenditure (for example, through bank statements, bills and receipts) may be enough. The more complicated the affairs, the more detailed the accounts will need to be. These financial accounts should be complemented by records of decisions taken and the reasons for those decisions.

These records should include details of the persons consulted and any advice taken. They will help the guardian respond to the usual request of the Public Guardian for the completion of a standard report form detailing the missing person's income and expenditure and any decisions made during the reporting period.

- 5.50 *Duty to keep the person's money and property separate*: guardians should usually keep the missing person's money and property separate from their own or anyone else's. This is to avoid mistakes or confusion in handling the person's affairs. Sometimes there may be good reason not to do so (for example, a husband might be guardian of his wife's finances and they might have had a joint account for many years), but even in these cases the guardian must be able to account for the money expended.

Raj is the guardian of the assets of his sister, Cathy, who is missing. Cathy was an experienced investor in stocks and shares. Raj has no experience of owning or managing investments. On his appointment Raj took steps to find out what Cathy owned and how she had managed her investments in the past. He took advice from a legal adviser as to how he should carry out his responsibilities. He opened separate bank accounts for his guardianship and informed all the holders of the investments of his appointment. He held an initial review with a financial adviser and discussed the proposed strategy with other family members. He then implemented the strategy and kept all Cathy's money and investments separate from his own, taking further advice as major decisions had to be made. He kept a careful record of the transactions made and the reasons for them. He paid for the advice taken using Cathy's money, but received no personal benefit from his activities other than reimbursing some necessary incidental expenditure on travel to consult a lawyer. He reported to the Public Guardian on his administration of Cathy's affairs in a timely and appropriate fashion.

Duty to familiarise themselves with the property and financial affairs

- 5.51 Guardians must familiarise themselves with the property and financial affairs of the missing person covered by the terms of the court's order. The Public Guardian is likely to ask for an inventory of assets in the course of supervision. This include items of value, such as cars, valuable collections or artworks. Guardians must also ensure that items of value are insured. It is understood that the guardian may only be able to access some of this material after they are appointed.

What other duties will a guardian be subject to?

- 5.52 A guardian will be subject to any duties imposed by the guardianship order, the Act or any secondary legislation made under the Act and the general law, for example in relation to data protection.

5.53 The duties specified in the order will be particular to the guardian in question and will depend upon the circumstances of the case.

5.54 The Act imposes some duties applicable to all guardians:

- A guardian must act in what he or she reasonably believes to be the missing person's best interests.
- Before taking a decision, if it would be reasonable to expect the missing person to consult a particular person, the guardian must consult that person unless it is not reasonably practicable to do.
- A guardian must keep records of the exercise of functions as a guardian, including accounts relating to the exercise of those functions.
- On ceasing to be a guardian, the guardian must give a copy of their records to such persons as the court directs. When giving such a direction, which may include restrictions and conditions, the court must have regard to the confidentiality of missing person's affairs, and the need to impose only such requirements which are reasonable in all the circumstances. The guardian will also be required to report to the Public Guardian, who may require records and supporting documents and a final report.
- A guardian who has reasonable grounds to believe that the missing person is no longer missing must apply to the court for the revocation of the order as soon as reasonably practicable. This may, amongst others, be the result of reports from third parties or the guardian meeting the missing person.
- A guardian (or other person) becoming aware that a guardianship order has been revoked by the death or presumed death of the missing person must inform the Public Guardian as soon as reasonably practicable. The Public Guardian may request a final report.
- The guardian must also have regard to the content of this Code of Practice or any other code issued under the Act.

5.55 Guardians will also be subject to duties imposed by the Public Guardian deriving from the function of registering and supervising guardians. These will include: supplying records and accounts; providing reports during and after the guardianship; responding to requests from the Public Guardian for information and explanations; ensuring an appropriate level of security for the proper performance of the guardian's duties is maintained (if assets are found to be larger than anticipated, the Public Guardian may apply for a higher security); and keeping the Public Guardian informed of any change in contact details of the guardian. Some of these duties will be specified in the regulations to be made under section 58 of the Mental Capacity Act 2005: for example, in relation to the provision of reports to the Public Guardian.

What powers does the guardian have in relation to the property and financial affairs of the missing person?

5.56 The overall intention is that in relation to the property and financial affairs for which a guardian is responsible under the order, the guardian should in a sense “stand in the shoes” of the missing person. This means that the guardian could make decisions on the same things as the missing person would have if they were not missing, albeit they must act in the missing person’s best interests. However, the appointment does not detract from the ability of the guardian to act in their own right, having regard to the terms of the order. The court may however impose restrictions and conditions in the guardianship order and the guardian must act in accordance with the proper performance of the duties imposed by the appointment.

5.57 The Act states that the rights and powers of a guardian may include:

- selling, letting or mortgaging the missing person’s property;
- making investments;
- executing deeds and other documents;
- recovering money owed to the missing person;
- discharging debts and other obligations of the missing person (whether legally enforceable or not);
- resigning trusteeships held by the missing person;
- bringing or conducting legal proceedings; and
- making a gift out of the missing person’s property.

Are there any decisions that the guardian cannot take on behalf of the missing person?

5.58 Yes. Restrictions and conditions may be specified in the guardianship order. There are also general restrictions on a guardian’s power – for example, to make gifts and to act as a trustee. A guardian cannot make a will or codicil for the missing person. These are discussed in the following paragraphs.

When can a guardian make a gift?

5.59 The general rule is that a guardian may only make a gift out of the missing person’s property if authorised to do so by the guardianship order. Even if there is authority to make the gift the guardian will still have to comply with the best interests’ test.

5.60 There is no general restriction on who may receive a gift from a guardian or on the amount that can be given.

5.61 The term gift* is not defined in the Act, but generally understood to be a present given. It might be for a birthday or at Christmas, Eid, Diwali, Hanukkah or Chinese

New Year or similar occasions. The gift may have no end purpose in mind, but it might be money for living expenses, school fees or health care. A gift can include:

- making an interest free loan from the person's funds, as the waived (dropped) interest counts as a gift;
- creating a trust of the person's property; or
- selling a property for less than its value.

5.62 Some gifts may have tax consequences.

5.63 The authorisation in the order may be to make the gift in contemplation (for example on customary occasions, such as birthdays; or regular charitable donations), to make gifts of value or a description which includes the gift in contemplation, or, to make gifts generally. A guardian proposing to make a gift should consider the terms of the guardianship order and the means of the missing person. A guardian may need to consider whether a direction from the court is necessary to clarify how the guardian ought to act in a particular situation.

5.64 A guardian who lacks authority to make a gift may wish to consider whether any express authority should be sought from the court for the proposed gift under a variation order. The cost of making the application would have to be weighed under the best interests test against the benefit of being able to make the gift.

5.65 A person applying for the appointment of a guardian should consider whether there are gifts that ought to be authorised; and should seek a guardianship order with appropriate terms; perhaps including a condition or statement about future provision of gifts for the needs of specified persons and the right for the guardian to make specified types of gifts.

5.66 There is no general prohibition on a guardian making gifts to themselves or their dependants. However, such gifts are likely to be closely scrutinised as a guardian is not generally entitled to profit personally from the appointment unless authorised by the court order, and a court would ultimately assess such gifts against the criteria of the missing person's best interests.

5.67 The requirement for a specific authorisation in the guardianship order to give gifts does not, however, apply in relation to a gift made for the maintenance or benefit of a dependant of the missing person. A gift in that category would, subject to the terms of the guardianship order, only be subject to the best interests' test. A dependant is a person who, if the missing person were not missing, would reasonably rely on the missing person to provide for his or her maintenance, such as a child.

5.68 Maintenance is also not defined by the Act, but is generally taken to mean meeting a person's financial needs. Payments for the maintenance of a dependant might not be gifts in the usual sense of the word as they may be driven by a sense of obligation rather than a voluntary gratuitous decision. Such payments for maintenance, whether

of a dependant or not, that were not gifts, would be subject to the best interests' test. They would – of course – also be subject to the size of the missing person's estate and the status of their continuing income stream.

- 5.69 Ultimately, the right of a guardian to make a gift will depend on the circumstances of the case, but, subject to the terms of the guardianship order, guardians have wider powers in relation to maintenance payments, which are not gifts, and gifts for the maintenance or benefit of dependants than they do in relation to gifts generally.
- 5.70 Even if the missing person used to give birthday and Christmas presents to individuals regularly, the guardian will only be able to do so if authorised by the terms of his or her appointment and the gifts satisfy the best interests test. Charitable donations will be subject to the same tests.
- 5.71 Unless the guardianship order imposes a requirement to make gifts a guardian is under no obligation to do so. Guardians should not be pressured into giving gifts.
- 5.72 In considering the best interests test in relation to proposed gifts guardians will need to consider all the circumstances and apply the test in the same way as for other decisions, but may find it helpful to ask themselves:
- did the missing person usually make gifts of this kind or value?
 - would the gift affect the missing person's ability to meet financial obligations and the requirements of their dependants now or in the future?
- In short, one of the factors a guardian should consider is whether a gift can be comfortably afforded? If not, there would generally have to be a particularly compelling reason why it should be made.
- 5.73 Gifts are financial transactions and guardians should keep careful records of the gifts made and the reasons and justifications for them.

Theresa has been missing for several months. Her eldest son Michael is acting as a guardian for her assets. The guardianship order states that Michael may give Christmas and birthday gifts to Theresa's young children to a value equivalent to the gifts she has given them in the past.

Theresa has a five-year old son, Jacob. If Theresa was not missing, Jacob would solely rely on her to provide for him. In his role as guardian, Michael may use Theresa's assets to pay appropriate amounts for Jacob's living expenses (subject to the best interests' test). These payments for food and accommodation would not need to be expressly authorised in the guardianship order because they would be either maintenance payments or donations for the maintenance of a dependant.

Michael, in his capacity as guardian, will be able to give Christmas and birthday gifts to his siblings under 18 years of age, but will need to consider the value of gifts given in earlier years in deciding what to buy.

Patrick is Joe's guardian. The men, who are in their early 60s, have been close friends since childhood. The court order authorises the making of gifts generally. Patrick has been made redundant and is struggling financially. Joe was comfortably off when he disappeared. Patrick wants to take money from Joe's savings to sort out his financial problems. Joe has helped Patrick out like this in the past. Patrick feels strongly, based on assurances from Joe over the years that, if Joe were present, he'd be happy to help Patrick now. The amount in question would reduce Joe's savings significantly.

Patrick reads the court order and decides that he has authority to make gifts. He then applies the best interest checklist and realises that making the gift could compromise the ability of Joe's estate to meet the cost of Joe's responsibilities, including to his children and grandchildren. Patrick is concerned as a result of his discussions with Joe's family and friends that the gift might be seen as providing him with a significant personal profit from his appointment. He is also conscious that although Joe had always said he could rely on him, Joe had never actually advanced him any money when he had been on hard times in the past. It becomes clear to Patrick that a gift to himself would at the least be controversial and could lead to him being held responsible for the loss to the estate. He realises that taking the gift might provide evidence that when faced with a conflict between his own interests and Joe's, he would place his own interests first. One option open to him would have been to apply to the court to ask it to determine the matter. He considers whether to apply to the court for permission to make the gift, but anticipates that other people will challenge the application, making the proposition troublesome and expensive. After thinking it over in the round, Patrick decides not to go ahead with the gift to himself.

Can a guardian make a will for the missing person?

5.74 A guardian cannot make or alter a will for the missing person, whether by way of a new will or a codicil*.

Can a guardian see a copy of a will made by the missing person?

5.75 A will only takes effect on the death of the person making it. However, the last will and earlier wills made by a missing person may give useful insights into their wishes, beliefs and preferences, and assist the guardian in making decisions. Anyone holding the will should disclose a copy to the guardian unless the missing person previously gave instructions for the will not to be disclosed, or they have cause for concern about the guardian; in which case the person holding the will should contact the Public Guardian. A guardian should not simply assume that because a person is named to benefit in the missing person's will, that it is in the missing person's best interests to make the gift or a payment to the named person. Such a decision should be arrived at by considering all the relevant circumstances (see also the section of this Code on making gifts, starting at paragraph 5.59).

Can a guardian be refused sight of a will made by the missing person or other confidential documents?

- 5.76 A guardian is the court appointed agent of the missing person.
- 5.77 In general, the guardian should have access to relevant information about the missing person they have been appointed by a court to serve. Data Protection legislation provides for data access requests to be made on behalf of people unable to ask for themselves. 'Relevant information' here may mean information that will inform the guardian about the previous beliefs and wishes of the missing person.
- 5.78 However, there may be protection of personal data issues that justify the withholding of information in some cases. Some individuals and organisations may therefore need to make a decision on data protection principles in terms of handling requests for personal data regarding the missing person from a guardian. Guardians may also make an application to the court – for example to seek access to the missing person's will.

Can a guardian exercise a missing person's powers as a trustee?

- 5.79 The purpose of appointing a guardian is to manage the missing person's property in their best interests. To achieve this, it is not necessary to permit or require the guardian to exercise powers that the missing person had in relation to other people's property. The extent to which a guardian can substitute for the missing person in that person's capacity as a trustee is therefore limited by the Act.
- 5.80 A missing person may be a trustee*. Trusts serve numerous purposes. For example, the trusts in question may be family trusts, where the missing person may be a beneficiary, or charitable trusts, where the beneficiaries are defined by the objects of the charity. The law automatically imposes a trust in certain situations, most commonly where two or more people own land jointly. In the common context of a jointly owned home, the legal joint owners are trustees in the eyes of the law, whether they hold the property for their own benefit, the benefit of others (or themselves and others). See further below at paragraphs 5.86-5.91. The law relating to trusts can be complex and guardians may need to seek legal advice.
- 5.81 A guardian cannot act as trustee in place of the missing person unless the trust is solely for the benefit of the missing person. A bare trust of this kind can be brought to an end by the missing person (or guardian) at any time. The trust property can be treated for the purpose of the guardian's powers as the missing person's even though technically the property is in the name of the trustee. Where such arrangements exist and the guardian wishes to end the trust to gain control over the assets in question, the guardian will have to demonstrate the nature of the trust to any third party, such as a bank, holding the assets.
- 5.82 In the case of property held on bare trust where the missing person is not a trustee, the easiest course would be for the trustees to wind up the trust and transfer the assets to the missing person. The question of the trust will then fall away.

- 5.83 In the case of property held on bare trust where the missing person is one of the trustees, the proper exercise by the guardian of the powers of the missing person as trustee will depend on the proof that the missing person is the only beneficiary. It may be easier for the guardian to resign the missing person's trusteeship and for the remaining trustees to proceed with a transfer.
- 5.84 In the case of property held on trust where the missing person is a trustee, but is only one of the beneficiaries, the trust property is not owned by the missing person alone. This means that the guardian cannot act as trustee in relation to the trust property. The guardian can, however, resign the missing person's trusteeship. Doing so will avoid the need for the remaining trustees to remove the missing person as a trustee.
- 5.85 The guardian can represent the missing person in relation to the missing person's beneficial interest in the trust property (as opposed to acting in respect of the whole of the trust property).

What are the powers of a guardian in relation to a jointly owned home?

- 5.86 One of the most commonly encountered types of trust is the trust of land. This is because the law imposes a trust of land where land, including any house or flat, is jointly owned. A missing person who is joint owner of a house with their spouse, civil partner or co-habitant will therefore be a 'trustee' of the property. This could be problematic in the case of a missing person because trustees must act unanimously. A decision to sell or mortgage the home to raise money could therefore be hindered because the missing person cannot take part in the making of the decision and a guardian cannot act for the missing person in relation to property held on trust for another person (for example, his or her spouse, civil partner or co-habitant). If the continuing presence of the missing person as a trustee is creating problems for those left behind, the guardian can resign the trusteeship and thereby free the other trustee or trustees to deal with the property. Resigning a trusteeship of the trust of the family home will, however, not of itself enable a single remaining trustee, typically the spouse, civil partner or co-habitant, to proceed to sell or mortgage the property. This is because for these and other disposals of the property generating capital, a buyer will want a receipt from at least two trustees or a trust corporation.
- 5.87 If the missing person's assets include land which is registered at HM Land Registry, the guardian should apply to HM Land Registry to have their appointment recorded in the title register. If the land is unregistered, the guardian may apply to HM Land Registry for a caution against first registration, or for first registration of title. HM Land Registry produce a series of practice guides⁵. The guardian may also need to seek legal advice.

⁵ <https://www.gov.uk/topic/land-registration/practice-guides>

- 5.88 The process for resigning a trusteeship and obtaining a discharge from the family home trust will vary depending upon the circumstances of the case, particularly the terms of any trust deed.
- 5.89 In general, if there will be at least two trustees or a trust corporation to continue the trust after the resignation, a deed of resignation and discharge should suffice. In other cases, which will probably be the large majority, there would only be a single non-trust corporation trustee left after the resignation, which means a deed alone would not be effective. The appointment of a new trustee will be required, which must not be dated later than the resignation.
- 5.90 Ultimately, an application to the court could achieve the necessary result. Equally, however, the court may regard the missing person as a trustee who was incapable of acting as a trustee and that therefore the general power of appointment under the Trustee Act 1925 would apply. This power allows any continuing trustee to appoint a new trustee in writing.
- 5.91 To minimise the steps that have to be taken, applicants for guardianship orders should therefore consider whether there would need to be of the appointment of a further trustee of the family home, and ensure that when the missing person's trusteeship is resigned by the guardian that there are at least two continuing trustees who can sell or mortgage the property.

Sam and Niall are brothers who own a house in equal shares. When Niall goes missing Sam is appointed the guardian of Niall's assets. Sam needs to sell the house because he cannot keep up with the mortgage payments without Niall's income. It is in Niall's best interests that the house is sold as otherwise it will be repossessed. Sam can resign Niall's trusteeship but that will leave him as the only trustee. Sam therefore appoints in writing a solicitor who has advised him in the past as a second trustee in place of Niall, who is released from the trust by Sam on his behalf. This will enable the sale to proceed removing the threat of legal action by the mortgagee.

Jeremy and Joanna are husband and wife. They own a family home. Joanna disappears, Jeremy becomes guardian of her assets. His own income is insufficient to keep up the mortgage payments on the family home. Jeremy decides it is necessary to sell and, as guardian, that doing so is in Joanna's best interests. To complete the sale Jeremy must be joined by another trustee and Joanna must cease to be a trustee. There is, however, considerable disagreement in the wider family as to who should be appointed. Jeremy is unable to decide which potential appointee is in the best interests of Joanna, and does not wish to create new family problems. He decides that it is in Joanna's best interests that he apply to the court for her removal and the appointment of a new trustee who will not object to the sale and create issues for the other interested parties. He has in mind a trust corporation. Once the appointment has been made by the court, the sale can then proceed to completion.

When are guardians personally liable for their decisions?

- 5.92 A guardian is the agent of the missing person. The scope of the guardian's authority is defined by the guardianship order (potentially altered by any variation order) and the Act.
- 5.93 A guardian acting within the scope of their authority as agent and in compliance with their duties will not be personally liable for actions taken as guardian. The cost of any liability to the missing person or third parties incurred in these cases will be met by the assets of the missing person or be a liability to be met from it.

Dominic is a lawyer acting as a guardian for Kevin's assets. Kevin went missing six months ago. Dominic is concerned with selling some of Kevin's assets to meet some pressing bills, and faced with making difficult choices believes best interests will be served by the sale of Kevin's car which is parked on-street. Barry, Kevin's brother opposes the sale. Barry seeks revocation of the guardianship order. The court finds that Dominic acted properly and in accordance with the terms of the guardianship order and so refuses to revoke it, leaving Dominic to continue acting as guardian. The court is however satisfied that Barry's objections were reasonable and orders that the costs of the action for both parties be met from Kevin's estate

- 5.94 Third parties should check the scope of the guardian's authority from the guardianship order. Guardians should be ready to demonstrate and explain the scope of their authority to third parties. If not provided with a copy of the guardianship order by the person who applied for it, a guardian should obtain copies of the guardianship and any subsequent related orders from the court to provide to third parties. A fee will be payable for the copies.
- 5.95 A guardian acting outside the scope of their authority or in breach of their duties may be personally liable to the missing person or any third party for loss occasioned. However, the court may relieve the guardian of all or some of the liability, if it considers that the guardian behaved honestly and reasonably in doing so and the court considers that having regard to all the circumstance the guardian ought to be relieved of personal liability.
- 5.96 In considering whether to relieve a guardian in these circumstances, the court must have regard to the care and skill that it is reasonable to expect the guardian to have exercised in the circumstances. This will be a higher threshold for professionals, as they are likely to have specialist knowledge or experience. This would include professionals such as lawyers, accountants or financial advisers.

Will providing a security bond exempt a guardian from having to pay compensation?

- 5.97 This will depend on the terms of the bond and the reason the bond has been called in, but in most cases the bond issuer would expect to try to recover sums paid out under the bond from the guardian to recover losses incurred.

What can a person do if they are unhappy with a guardian's decisions?

- 5.98 Persons concerned that a guardian is not acting properly can take various forms of action against the guardian to hold them to account.
- 5.99 As a guardian is treated as the agent of the missing person, any acts outside their authority do not bind the missing person. This means it may be crucial to be able to define the scope of the guardian's authority. In some cases, this will be clear, but in others the guardian may want to discuss the proposal with other interested persons to help inform his or her view, to seek guidance from the Office of the Public Guardian, or to take legal advice.
- 5.100 The Act gives the court power to decide whether the guardian has acted within the scope of their authority and complied with his or her duties (for example, to act in what the guardian reasonably believes to be the best interests of the missing person). Applications to the court can, however, be costly and should be a last resort. The court can make a declaration about the guardian's authority in the course of proceedings or on application. If the court makes a declaration it may, in addition to any other powers it has, make:
- an order disallowing expenses incurred by the guardian or remuneration to which the guardian would otherwise be entitled;
 - an order requiring the guardian to make a payment of an amount determined by the court to the missing person or the missing person's estate; or
 - another order as the court considers appropriate for the purpose of compensating the missing person or the missing person's estate for any loss resulting from the action or failure in question.
- 5.101 The court may, on an application to review the authority of the guardian, order a person (including a guardian) to provide the applicant with accounts or other information relating to the person's exercise of functions as a guardian in the form and manner specified in the order, which may include conditions and restrictions. When considering such an application the court must have regard to the need to keep the missing person's affairs confidential, and the need to impose only such requirements as are reasonable in all the circumstances.

Charles went missing two years ago. As Charles' solicitor before he went missing, David is not satisfied that the guardian of Charles' assets is complying with the functions specified in the court order. He has made an application to the court to review the actions and authority of the guardian. In support of his application he has provided the court with evidence which he believes makes a case for the guardian having acted beyond his authority. The court then reviews David's application and evidence in support of his application and concludes that the guardian has not acted in accordance with some of the functions specified in the court order. The court therefore decides to vary the guardianship order to reduce his areas of authority.

5.102 These methods of holding the guardian to account are in addition to the supervision by the Public Guardian, who may investigate and deal with representations, including complaints, about the way in which a guardian is exercising his or her functions: this includes the Public Guardian making applications to court where necessary, for example, for the revocation of a guardianship order, for the court to give directions, or for a security bond to be enforced.

Do third parties have any protection if they don't know about a revocation or variation of a guardianship order?

5.103 Third parties (such as financial organisations or public utilities) may deal with a guardian when unknown to them the guardianship order has been revoked, whether by an order or not, or varied in a way that takes the dealing outside the authority of the guardian. The Public Guardian holds details of guardianship orders on its register, and can be asked to search it.

5.104 The Act protects third parties in these circumstances by providing that where a person deals with a guardian at a time when the guardianship order has been varied or revoked, but the third party does not know that, the transaction between them is valid as if the guardianship order had not been varied or revoked.

5.105 There may be situations in which the transaction between the guardian and a third party protected in this way is only part of a series of transactions and that subsequent owners of the property in question and the owners of any interests derived from it, such as mortgagees, lessees and tenants, may need to depend on the validity of the transaction between the guardian and another person.

5.106 In these cases, the ownership of something that was bought by one person ("the buyer") from another may depend on whether an earlier transaction between a guardian and another person was valid. To help avoid potentially extensive investigations by the buyer into the circumstances of the earlier transaction (involving the guardian answering the question of whether they had authority to sell the thing in question), the Act creates a 'conclusive presumption' in favour of the buyer. This would be a presumption that the person with whom the guardian dealt did not know of the variation or revocation of the guardianship order at the material

time (that is usually when the asset was sold by the guardian). The presumption applies if the transaction between the guardian and the buyer was completed within 12 months beginning with the day on which the guardianship order was made; or, alternatively, if, before the completion of the buyer's purchase, or within 3 months beginning with the day of its completion, the buyer makes a statutory declaration that he or she did not at the material time know of the variation or revocation of the guardianship order. Similar provisions have operated successfully for many years in relation to powers of attorney.

Can a guardian seek guidance as to how to act?

- 5.107 Guardians may be faced with difficult decisions about how to act and whether they have authority to act. A guardian should consult other potentially interested parties and may wish to take legal advice as to whether a proposed course of action would be within his or her power. The Office of the Public Guardian can give guidance, but cannot offer legal advice on specific cases or give someone 'permission' to act in a certain way. Ultimately, the guardian can apply to the court for directions as to how or whether to act and about the scope of his or her authority. The court may make a direction of this kind on its own motion without any party having made an application if it considers it appropriate or necessary to do so. Where a court considers making such a direction or other order (in exercise of powers under the Act) it will decide whether and how much notice should be given to interested parties and whether there should be any advertisement.

Can the terms of a guardianship order be varied?

- 5.108 During the period of a guardianship order, events may occur that indicate the terms of the order are no longer appropriate. The Act allows the court to vary the order if it is satisfied that:
- The person whose property or financial affairs are the subject of the guardianship order is still missing;
 - that the absence condition* is met; or
 - the urgency condition* is met (if this applies the court may only make provision in the variation order in respect of property or financial affairs relating to the urgency condition); and,
 - that, in all the circumstances, the proposed variation is in the missing person's best interests.
- 5.109 The variations made will depend on the circumstances of the case, but may include:
- a) appointing a different person to be the guardian;
 - b) adding or removing management of particular property or financial affairs from the order;
 - c) adding, removing or altering conditions or restrictions from the order;

- d) altering the period for which the guardian is appointed;
- e) doing anything else that the court could do on making a guardianship order;
- f) where two or more guardians have been appointed, remove one or more of them without appointing a replacement provided that at least one guardian remains.

5.110 A variation order may be made as a result of an application from the guardian, a third party or by the court in its own right or by the Public Guardian. This may happen following an application for directions* as to how to act by the guardian or an application for a revocation order.

5.111 A copy of the variation order must be sent by the court to the Public Guardian, who is responsible for maintaining the register of guardianship orders.

5.112 A variation of the period for which the guardian is appointed cannot extend beyond a four year period, beginning with the day when the original guardianship order being varied was made.

Tomas was appointed to act as a guardian on 1 August 2019, with the appointment finishing on 31 July 2021 as the missing person's estate was expected to have been exhausted by then. During the period of the guardianship order the missing person inherited significant assets. Tomas applied for an extension of the guardianship. The court considered the evidence and decided to grant a new Order.

Can a guardian resign?

5.113 A guardian may resign but will need to obtain a variation order or a revocation order to do so. This will involve an application to the court.

Can a guardianship order be terminated?

5.114 In some circumstances, the order is automatically revoked (see paragraph 5.120 below). Other circumstances may occur in which it is no longer appropriate for the guardianship to continue: for example, the missing person may return or the guardian may no longer be able to act due to ill health or other commitments. The court is therefore given power to revoke an order if it is satisfied doing so is in the best interests of the missing person or that the missing person is no longer missing. It follows that someone must take responsibility for informing the court of the change in circumstances. The Public Guardian may also apply to the court for revocation of an order in exercising supervisory functions. The OPG will investigate concerns raised or complaints made about a guardian.

Richie, a guardian, has recently been taken into hospital due to a long-term condition. Richie must stay in hospital for the foreseeable future, which means he isn't able to fulfil his guardianship duties. His wife alerts the court to the situation. The court decides that it is inappropriate for Richie to continue being a guardian, so terminates his appointment by making a revocation order in response to Richie's application.

- 5.115 A guardian who has reasonable grounds to believe that the missing person no longer qualifies as missing must apply to the court for the revocation of the order as soon as reasonably practicable. Notice of the application must be sent to the persons specified in the rules of court. The court will send a copy of the order to the Public Guardian.
- 5.116 If a missing person returns and it is established that they lack mental capacity, it would be necessary, independently to seeking the revocation of the guardianship order (which cannot continue), to seek the appointment of a Deputy to manage their affairs under the Mental Capacity Act 2005 (assuming that the person had not created an Enduring or Lasting Power of Attorney before their disappearance). If an enduring or lasting power had been created, the attorney could act for the person lacking capacity.
- 5.117 As with variation orders, a revocation order may be made as a result of an application, or by the court of its own motion in other proceedings. A copy of the order must be sent by the court to the Public Guardian.
- 5.118 On any termination of the appointment, the guardian or the guardian's personal representatives will have to report this to the Public Guardian.

When does a person cease to be a guardian?

- 5.119 The appointment of an individual as a guardian may be ended by a variation order or a revocation order.
- 5.120 In addition, a guardianship order is revoked automatically on the occurrence of the following events:
- (a) on the death of the missing person;
 - (b) on the making of a declaration of presumed death in respect of the missing person under section 2 of the Presumption of Death Act 2013 (the relevant date being the date the court's declaration is made);
 - (c) on the death of the guardian; and
 - (d) on the expiry of the guardian's period of appointment.
- 5.121 It is possible that a guardianship order will have been made after the death of the missing person whilst this fact is still not known. When the death is subsequently discovered, the guardianship order is to be treated as having been immediately revoked on the death or presumed death.

5.122 The date of death may only be known approximately, but where a guardianship order is revoked automatically without the guardian knowing, the guardian does not incur any personal liability in respect of decisions made before the guardian knew of the event triggering the revocation (see paragraph 5.127). The Act also provides protection for people whose transactions depend upon the validity of decisions taken by the guardian.

Can a guardian arrange the funeral of a missing person?

5.123 No, unless they are the executor of their will or separately to guardianship the administrator of their estate. The appointment of the guardian ends with the death (or presumed death) of the missing person. They must cease to act for the missing person at this point. Responsibility for the late missing person's property and financial affairs (which may also include organising a funeral) will pass to the executors or administrators of the estate.

How does the Public Guardian learn of a person ceasing to be a guardian?

- 5.124 The court will send a copy of every revocation order or variation order to the Public Guardian. It will also send the Public Guardian a copy of every declaration of presumed death.
- 5.125 Additionally, where a person becomes aware that a guardianship order appointing the person as guardian has been revoked, for example due to the death or presumed death of the missing person (or the death of the guardian), the person that becomes aware of the event must inform the Public Guardian as soon as reasonably practicable.
- 5.126 Where a guardianship appointment expires by passage of time it will be apparent to the Public Guardian from the register of guardianship orders.

What happens if the guardian does not know the guardianship order has been revoked?

5.127 Where a guardian acts within the scope of the authority conferred by the guardianship order and the Act at a time when the guardianship order has been revoked by death or presumed death of the missing person, but at the time the guardian does not know that the order has been revoked by that event, the guardian does not incur any personal liability (either to the missing person or any other person) because of the revocation.

Karen has been acting as guardian for the property and financial affairs of her sister, who has been missing for three years. Her sister's body has recently been discovered and it is clear from forensic examination that she died about a year earlier. Karen was unaware of the death and continued to act in her capacity as guardian for her sister, until she learned of the discovery of the body. In this instance, Karen would not be liable for any actions within her authority as guardian taken during this period.

- 5.128 The same principle would apply to revocations caused by the death of the guardian or the expiry of the guardian's period of appointment, but in practice these may not arise because a guardian cannot act after death save in so far as an action takes place after death because of pre-death commitments; and it is hard to conceive of a circumstance in which a guardian will not know or be deemed to know the date when the appointment expires.

What happens if a guardian loses mental capacity?

- 5.129 A guardian who does not have the mental capacity to manage their own property and financial affairs will not have the mental capacity to continue to act as a guardian. A guardian becoming aware of failing mental capacity should consider resigning the appointment. This could be by way of an application for a variation order (which would allow a new guardian to be appointed by a separate order) or by a revocation order.
- 5.130 For a guardian who does not recognise their failing mental capacity or who is struck by a sudden loss of capacity, an application for a revocation order could be made by the Public Guardian or any third party who had grounds to fear a guardian was no longer a suitable person to be acting.
- 5.131 Depending on the length of the term remaining under the guardianship order a decision might be taken to apply for the revocation of the current order and the making of a new order in favour of a new guardian for a new term.

What must a guardian do when the guardianship is terminated?

- 5.132 Termination may occur as a result of the making of a revocation order. The order will specify when termination is to occur and any necessary conditions. Termination may also occur automatically: on the death or the declaration of presumed death of the missing person, on the death of the guardian or the expiry of the term of appointment.
- 5.133 On termination of the appointment a guardian must cease to act for the missing person and must provide the Public Guardian with a final report if required.
- 5.134 If termination is on the death of the missing person, and the guardian only becomes aware of the death later, the guardian must cease to act (once they become aware). The guardian must inform the Public Guardian.

- 5.135 The guardian should ensure that all the records of the guardianship are properly and safely kept so that any papers or information requested by the Public Guardian under his supervisory function or by third parties (perhaps through obtaining a court order) can be supplied without delay or difficulty.

How do I re-apply for Guardianship?

- 5.136 The Act allows a guardian to re-apply to continue in the role after the expiry of the order appointing them, which is for a maximum of four years. The re-application process mirrors the original application process, and all stages must be completed again, including advertising the application.
- 5.137 The guardian will want to think and reflect before renewing their application, and may wish to discuss it with the family and friends of the missing person. A critical factor will be whether it is a move that is in the best interests of the missing person. Each situation will be different, and factors will include the likelihood of the missing person's return, the family's wishes, and the financial and property affairs to be managed. It is good practice for the guardian to inform the organisations (such as banks and utility companies) that they have been dealing with, that the guardianship order has expired.
- 5.138 If an application is made, the court will have to justify the making of another guardianship order, taking account of all factors, and the best interests of the missing person. An order will not be granted unless the court is satisfied.

Where will the Act apply?

- 5.139 The Act applies in England and Wales only. There are no directly equivalent provisions in Scotland and Northern Ireland.

6. Applications to the court

- 6.1 This section of the Code describes the court procedures that will have to be followed in guardianship cases.

Which court do I apply to for a guardianship order?

- 6.2 Applications for guardianship orders and applications to vary or revoke them, and any other applications relating to guardianship orders must be made to the Chancery Division or the Family Division of the High Court. The Chancery Division's web guidance can be found via this link - <https://www.gov.uk/courts-tribunals/chancery-division-of-the-high-court>, and the Family Division's via this one - <https://www.gov.uk/courts-tribunals/family-division-of-the-high-court>.
- 6.3 Applicants for a guardianship order can decide whether to apply to Family or Chancery, but must elect for just one. Relevant considerations include: the extent to which property and trust law questions are likely to predominate the proceedings, in which case, the expertise available in Chancery may well make the case more suitable for Chancery than Family; the likelihood of family disagreements and family related issues arising, in which case Family may be more suitable than Chancery; the court fees to be paid; and, the expectations in each division as to the speed with which the application may be dealt with.

Marcia is unsure which part of the High Court to apply for guardianship to. She is able to get advice from her local Citizen's Advice. As the basis for the application is to resolve the missing person's property and their bills, Marcia is advised to apply to the Chancery Division.

The adviser tells Marcia that if there had been family disagreements or competing demands from family members for benefits, the Family Division would have been a better option.

- 6.4 Details of the fees that apply in the Chancery and Family Divisions of the High Court can be found via this link - <https://www.gov.uk/court-fees-what-they-are>. Details on fee exemptions and remissions are also available on the gov.uk website - <https://www.gov.uk/get-help-with-court-fees>. It is the guardian's means that are assessed in relation to granting remissions or exemptions. The court fee may, however, only be part of the expense of bringing an application, particularly if the applicant is legally represented. The difference in court fees should be set in the context of the overall expected cost of the appointment process. See also section 8 of this Code on fees.
- 6.5 Applications can be transferred by the court between divisions, so an application that is started in Family may be dealt with in Chancery and vice versa. Transfers will only

be made by the court for the better disposal of the case. They do not affect the fee payable.

Which court do I make a subsequent application to relating to a guardianship order?

- 6.6 Applications related to a guardianship order must generally be made to the same court where the claim for the guardianship order was started, unless the claim has been transferred to another court, in which case the application must be made to that court, unless there is good reason for another court to be chosen. This is because once a guardianship order has been made, all subsequent guardianship related applications about the missing person in question are linked to the first order.

What rules of court will apply to applications for a guardianship order and applications related to a guardianship order?

- 6.7 The Civil Procedure Rules will apply to all applications for guardianship orders and all applications related to guardianship orders whether made in the Chancery Division or the Family Division for guardianship cases.
- 6.8 The principal rules relating to guardianship cases are set out in Part 57 of the Civil Procedure Rules and Practice Direction 57C. The rules in Part 57 modify rules in other Parts of the Civil Procedure Rules so that they can be applied in guardianship cases.
- 6.9 The Civil Procedure Rules are available at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/>. Part 8 of the Civil Procedure Rules can be accessed at <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part08>. A link to Part 57 and Practice Direction 57C can be accessed at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-57c-proceedings-under-the-guardianship-missing-persons-act-2017>.
- 6.10 The rules say that the court will fix a date for the first hearing of the claim, normally no less than 56 days from the date of the issue of the claim. In some cases, the court may order that a hearing is not required.

What form should I use to make an application for a guardianship order?

- 6.11 An application for a guardianship order is classified as a “claim”. Claims for a guardianship order must be made by issuing a claim form in accordance with Part 8 of the Civil Procedure Rules. The claim must be made on a ‘Part 8’ claim form – and the link to the form and guidance on completing it is here - <https://www.gov.uk/government/publications/form-n208-claim-form-cpr-part-8>.

What do I have to include in the claim form?

6.12 The claim form must contain the information required by Rule 57.27 and paragraph 1.1 of Practice Direction 57C and must be accompanied by a witness statement containing the information required by paragraph 1.2 of that Practice Direction. These paragraphs specify the following information:

- On the claim form,
 - the claimant (applicant)’s name and address,
 - their relationship to the missing person,
 - the missing person should be named as the defendant on the form⁶
 - if they are not the missing person’s spouse, civil partner, parent, child or sibling, details of their interest in relation to the missing person’s property or financial affairs;
 - name and last known address of the missing person, and when and for how long they have been missing;
 - details of the terms of the order sought, including the name of the guardian; and,
 - whether the applicant is seeking an order even though the 90-day requirement for the period of “missing” has not been satisfied. This is the ‘urgency condition’ provided for in the Act where the circumstances necessitate the appointment of a guardian as soon as possible (see paragraph 5.7);
- In the witness statement,
 - reasons why the applicant considers the court has jurisdiction to hear the claim under the Act (this relates to where the missing person, or, if relevant, their spouse or civil partner, has been domiciled or habitually resident), and any evidence for this;
 - personal details of the missing person (for example, age, sex, changes of name, alternative names, date of birth, occupation, usual address, National Insurance number etc);
 - the missing person’s usual day-to-day activities and when they became absent from them;
 - The missing person’s usual place of residence and when they became absent from it;
 - (in relevant cases) whether the missing person is detained

⁶ Only in highly exceptional situations would the court order an applicant to serve the claim on the missing person.

- evidence that the missing person was missing throughout the period of 90 days ending with the date of the application; or evidence that the court may make an order without that requirement being met (this evidence may include the date and circumstances of their disappearance and any indications of their whereabouts);
- details of the property and financial affairs of the missing person relevant to the application with any evidence;
- details of why a guardian is needed in the best interests of the missing person;
- reasons for the belief the missing person is alive;
- any details on the date and circumstances of their disappearance and of any police investigation or report;
- where applicable, the names and current residential, electronic addresses (or nominated address for service) of the missing person's spouse or civil partner, parents, siblings and children;
- details of the persons who will be given notice of the application⁷ (it may be helpful to include a note of their relationship to the missing person);
- details of any persons to whom the claimant should but cannot give notice of the application and the reasons for this
- Details of the proposed news media advertisement;
- The name and address of the proposed guardian and evidence of their consent to acting (if not the applicant)
- Evidence of the suitability of the proposed guardian; and
- Details of any Enduring or Lasting Powers of Attorney made by the missing person, and of a Deputy appointed in respect of the missing person under the Mental Capacity Act 2005.
- Applicants should follow the requirements of the Practice Direction for guardianship applications (<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-57c-proceedings-under-the-guardianship-missing-persons-act-2017>). The Practice Direction sets out a full list of matters that guardians should include in their witness statement accompanying their application. Applicants should include declarations which will assist the court in determining their suitability to act as a guardian – for example, details of any criminal convictions, bankruptcy proceedings etc.

⁷ The rules (57.29) set out a list of people who should be served, including the missing person's spouse/civil partner, parents, children, siblings or if no such persons their nearest relative.

Why is the missing person named as a defendant on the claim form?

- 6.13 The claim form should name the missing person as a party to the application since it concerns their property and financial affairs in which they clearly have an interest. When considering the application for a guardianship order the court needs first to be satisfied that there is a “missing person” as defined by the Act. Where there are questions as to whether a person is a “missing person”, e.g. questions about the location or the inability of that person to make decisions relating to their property, the court may decide that further efforts be made to better establish the facts. This may include attempting to serve the defendant with the court papers to see if they respond. Such matters would be considered by the court when it considers the case at the first hearing. Up until that point, the claimant does not have to take any steps to serve the defendant missing person. In many cases, the court will conclude that evidence shows clearly that there is a “missing person” and, accordingly that there is no question of being able to serve notice on such person.

How much evidence should be provided with the claim form?

- 6.14 The amount of evidence and the matters on which it must be provided will vary from case to case. The court needs to know the relevant facts on which to base its decision, and if only a limited amount of evidence is supplied it may lead to delays as the court asks for further information.
- 6.15 Information can only be provided if it is known. A prospective claimant must consider if there are enquiries that could be made to establish relevant facts that are not known to them, and should make relevant enquiries where it is reasonable to do so. In some cases, persons left behind could have access to bank account records, to email accounts and to telephones. The absence of activity could be indicative of a person being missing. Records of enquiries of friends and family are also likely to be pertinent. Some organisations (such as banks) may not be able to offer account and financial information necessary for the court application. If the existence of an account is known, then it should be included in the claim. In some instances, accounts and assets may be discovered once an applicant becomes a guardian. It may be appropriate to seek a variation order to suitably manage this account.
- 6.16 The court will want to be clearly satisfied of the identity of the missing person. This may be relatively straightforward and details of age, sex and last address may be sufficient, but they could be supported by official identity indicators (such as NHS, NI or passport numbers) as well as email addresses and telephone numbers. The last address may only have been a recent move. Previous addresses could usefully add to the identification of the missing person. Similarly, when people have been known by different names in different places or times, the history of names will help build up the identity of the missing person.
- 6.17 Applicants should also investigate whether the missing person is subject to any insolvency action e.g. director disqualification, and whether they act as a trustee.

Applicants should include declarations which will assist the court in determining a person's suitability to act as a guardian – for example, details of any criminal convictions, bankruptcy proceedings etc.

- 6.18 The evidence of being “missing” will depend on the circumstances of the case, but a written statement from the police confirming that the missing person has been reported as missing and that after investigation cannot be found would clearly be very helpful and may be expected by the court. Other evidence may take the form of reports of previous activities, whether family, work or social, that have been missed.
- 6.19 The identity of the proposed guardian will have to be established and confirmation provided that they consent to act. This should be relatively straightforward. Establishing their suitability may be more difficult as the suitability depends on a wide range of factors. In a non-professional guardian, evidence of the relationship with the missing person is likely to be important and presenting the evidence of it will be a very personal issue. If there is written evidence of the views of the missing person on the proposed guardian it should be provided.
- 6.20 In nearly all cases, however, it will be helpful for the court to have basic indications of the financial integrity and ability of the proposed guardian. The degree of ability required will vary with the complexity of the estate.
- 6.21 In general, as regards financial experience and integrity, the witness statement could usefully confirm:
- Whether the proposed guardian has a bank account;
 - Whether the proposed guardian has ever been refused credit;
 - Whether the proposed guardian has been convicted of a criminal offence;
 - Whether the proposed guardian has any outstanding judgments debts;
 - Whether the proposed guardian has ever been declared bankrupt or been a debtor under an Involuntary Arrangement under Part VIII of the Insolvency Act 1986, or subject to a debt relief order;
 - Whether any business the proposed guardian has been involved with has been subject to a recognised insolvency regime (e.g. winding-up or administration);
 - Whether the proposed guardian has been the subject of a declaration under section 213 or 214 of the Insolvency Act 1986, in relation to fraudulent or wrongful trading; and
 - Whether the proposed guardian has been the subject of a bankruptcy restrictions order or a disqualification order as a company director.
- 6.22 The witness statement could also provide details of any relevant experience of the proposed guardian, for example having previously acted as a guardian, or a deputy

or attorney under a lasting or enduring power. Such experience is helpful but not necessary in order to be appointed as a guardian.

- 6.23 The witness statement should identify any conflicts that might exist between the interests of the missing person and the interests of the guardian (or how they are aligned). A business partner might have more to disclose here than a friend.
- 6.24 The witness statement could also provide a statement of the assurances from the proposed guardian that they will comply with the terms of the appointment, to keep the property of the missing person separate from their own, to keep accounts, to make reports, and to obtain security).
- 6.25 As regards the people to be sent the claim (i.e. the missing person's spouse, civil partner, parent, child, sibling etc), if the existence of such people or their full names and addresses are not known to the claimant, with sufficient detail to send them the claim form, this should be explained in the witness statement.

What should the claimant do with the completed claim form and witness statement?

- 6.26 The claim form and witness statement must be sent or given to the court together with the court fee, so that the claim form can be issued. The court issues the claim form by sealing (stamping) the document and assigning it a court case number, by which it will be recorded on court files. The issued claim form will then be sent back to the claimant. The court will also list a first hearing for the claim which will be no later than 56 days after the date it was issued. The court will notify the claimant of the hearing date.

What should claimants do when the issued claim form and the first hearing date is received by them from the court?

- 6.27 The claimant must, within 14 days of issue of being notified of the hearing date, send a copy of the claim form and the evidence in support (which will at least be the witness statement) on the spouse or civil partner of the missing person, their children and siblings (and if there are no such, the nearest relative of the missing person known to the applicant); and any other persons considered by the claimant to have an interest in the claim (a co-habitant or close friend, for example). In practice this will mean sending them a letter/e-mail containing the claim form and evidence supporting it.
- 6.28 The claimant must, at least 14 days of being notified of the first hearing date, advertise the claim in at least one news media circulating in the vicinity of the missing person's last known usual address. The news media may be a print or online newspaper and must relate in some way to the area the missing person last lived. The advertisement may be placed more widely if the claimant wishes. A form of advertisement is provided in Practice Direction 57C, but so long as the advertisement contains all of the equivalent information it is not mandatory to use this form.

6.29 The claimant must, within at least 7 days before the first court hearing, file with the court evidence that the claim was advertised, which means providing details of how, where and when it was published (for example, by supplying the court with a copy of the printed page on which the advertisement appeared, an active web link, or, confirmation from the news organisation or screenshot of the advert).

Can I obtain permission not to advertise the claim?

6.30 Not in normal circumstances, but an application may be made to the court – for example in the case of an urgent application or in cases of a highly sensitive nature.

What must a person do if they receive the claim form served from the claimant?

6.31 The missing person's spouse, civil partner, parent, child or sibling are entitled to give notice to intervene in the application for guardianship order. Intervening in an application means becoming a party to the claim in order to take part in it. People would take this step where they disagree with the application which is being made and would like to ask the court to make a different order to the one which is being requested. For example, a person may intervene in an application where they think the proposed guardian is unsuitable for some reason, or if they have information about the missing person's whereabouts.

6.32 Anyone entitled and wishing to intervene should, as early as possible and not later than 14 days before the date of the first hearing give notice to the court and the claimant, specifying—

- the intervener's name and address;
- the intervener's relationship to the missing person;
- the reasons for intervening; and
- details of any determination, order or directions sought.

6.33 Anyone who has received the issued claim form from the claimant who is not within the class of persons entitled to may make an application to the court for permission to intervene. The court may refuse the application if it is not satisfied that the applicant has a sufficient interest in the property and financial affairs of the missing person. The application must be filed with the court and served on the claimant as soon as possible and in any event no later than 14 days before the first hearing. The application must be made in accordance with Parts 23 and 57 of the Civil Procedure Rules and the requirements of Practice Direction 57C. The application must specify—

- the intervener's name and address;
- details of the intervener's interest in the determination of the claim or application;
- the intervener's relationship to the missing person or other interest in the proceedings;

- the reasons for applying for permission to intervene; and
- particulars of any determination, order or directions sought.

What can a person do who only learns of the claim from the advertisement?

6.34 A person who only learns of the claim from an advertisement may be entitled to intervene or may need to seek permission to intervene in the same way as in paragraphs 6.32-6.33. The application must be made in accordance with Part 23 of the Civil Procedure Rules and the requirements of Practice Direction 57C. The application must be filed with the court and served on the claimant as soon as possible and no later than 14 days before the first hearing date of the claim. The application must specify—

- the intervener's name and address;
- details of the intervener's interest in the determination of the claim or application (it will need to qualify the sufficient interest test in Sections 19 and 21(3) of the Act);
- the intervener's relationship to the missing person or other interest in the proceedings;
- the reasons for applying for permission to intervene; and
- particulars of any determination, order or directions sought.

What must the claimant do on receiving notice of an intention to apply for permission to intervene?

6.35 Within 7 days of receiving an application for permission to intervene from a person who has not been sent the claim form, the applicant must serve the claim form and supporting evidence upon the person seeking permission to intervene, and notice of any hearing date.

6.36 If the applicant for guardianship objects to the person seeking permission to intervene they must file with the court and serve on the person seeking to intervene a statement giving reasons for the objection and any evidence in support.

Applications to the court after the Guardianship Order has been made

6.37 The other circumstances in which a guardian or others can apply to the court would be for a variation to the order (see sections 5.108-5.112 of this Code) or revocation of the order (see sections 5.127-5.128 of this Code) of a guardianship order. These applications are made under Civil Procedure Rules Part 23 – the link for which is here - <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part23> - as well as Part 57 and Practice Direction 57C.

6.38 The process to be followed is very similar to the one for making the original application, including the requirements to send notice to interested parties (including current or former guardians in this context) and advertising the application.

6.39 More information on the format of a court order for guardianship will be provided on gov.uk.

7. Registration and supervision of guardians

7.1 The registration of guardianship orders and supervision of guardians of missing people's property and financial affairs is undertaken by the OPG), an executive agency sponsored by the Ministry of Justice. The role and functions of the OPG in relation to guardianship is set out in the Act and the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 ("the LPA Regulations") which have been amended to implement the Act. The LPA Regulations can be accessed here: <http://www.legislation.gov.uk/uksi/2019/1030/contents/made>.

Registration of guardianship orders

7.2 The OPG is sent a copy of all guardianship orders made by the court, and this forms the basis for entering guardianship orders on a register. The register is not a public document, although requests may be made to the OPG for verification of a guardian's appointment. Guardians should notify the OPG to update them of any changes to their address or contact details that would necessitate amending the register.

Discharge of a guardian's security

7.3 The Act empowers the Public Guardian to receive security when the court requires a guardian to provide it for the exercise of their functions. Security is a form of insurance, such as a guarantee bond, to cover any loss as a result of the guardian's behaviour in carrying out their role.

7.4 The court is able to order the discharge of security. In any other case the regulations set out the circumstances in which they may not be discharged. The regulations state that the security may not be discharged until the end of the period of **2 years** where:

- If the missing person dies, from the date of their death; or
- If a declaration of presumed death is made in relation to the missing person, from the date a court makes the declaration.

7.5 For the following alternative circumstances, the regulations state that the security may not be discharged until the end of the period of **7 years**, commencing with whichever of the following dates first occur:

- if the guardian dies, the date of his/her death;
- if the court makes an order which discharges the guardian but which does not also discharge the security, the date of the order; or

- the date when the guardian otherwise ceases to be under a duty to discharge the functions in respect of which he was ordered to give security.

7.6 In any of these five circumstances, if a person takes any step with a view to discharging the security before the end of either the 2 or 7 year period (as outlined above), the security is to be treated for all purposes as if it were still in place.

Guardians producing reports and financial returns

7.7 The Act provides that the court order appointing a guardian may require the guardian to prepare and submit to the OPG at specified intervals a report on the exercise of their functions. The LPA Regulations further provide for the Public Guardian to direct the information the guardian must submit to them in their report. The OPG will issue further guidance on this, but the regulations state that it will cover documents and information the OPG specifies, which will be needed to enable it to supervise a guardian's management of the missing person's property and financial affairs may include the need for documents to be verified.

7.8 Guardians may ask for more time to produce reports, but they must apply to the OPG for permission for a time extension and set out their reasons for needing more time as well as providing information supporting the request.

7.9 The LPA Regulations also set out the Public Guardian's power to require guardians to prepare a final report at the end of their appointment, and to set a reasonable timeframe for its completion. If the OPG is dissatisfied with an aspect of the final report, the LPA Regulations enable it to apply to the court for a remedy, such as enforcing the security given by the guardian at the start of their appointment.

7.10 The LPA Regulations allow the Public Guardian to seek information from guardians in their supervisory capacity to enable it to investigate representations (including complaints) on the guardian's management of the missing person's property and financial affairs.

Glyn is the guardian for his missing sister Myfanwy's assets. Myfanwy's daughter, Angharad, wrote to the OPG to say that she was concerned that Glyn had neglected to pay for the upkeep of her mother's property.

The OPG contacted Glyn and asked him to set out his views and provide copies of any bills/invoices relating to the maintenance of the property. The OPG then assessed the claims against the evidence supplied by Glyn.

7.11 The LPA Regulations enable guardians to require the Public Guardian to reconsider a decision he has made in relation to that guardian. This is exercisable by following a particular process – notice must be given before the end of 14 days, starting on the date on which the OPG gave the relevant decision to the guardian. The notice of exercising this right must:

- state the grounds on which reconsideration is required; and
- contain or be accompanied by any relevant information or documents.

7.12 At any time after receiving the notice and before reconsidering the decision to which it relates, the OPG may require the guardian to provide it with such further information, or to produce such documents, as it reasonably considers necessary to enable it to reconsider the matter.

7.13 After reconsidering the decision to which it relates, the OPG will give the guardian a written notice of its decision on reconsideration. If the original decision is upheld, the OPG needs to provide a statement of the reason(s) for this.

OPG making applications to the court

7.14 The LPA Regulations formally empower the OPG to make applications to the court in connection with its functions under the Act in such circumstances as it considers it necessary or appropriate to do so.

8. Fees

Court fees

- 8.1 Separate court fees apply for the Chancery and Family Divisions of the High Court. Details of court fees can be found via this link - <https://www.gov.uk/court-fees-what-they-are>. We have not included current fee amounts in this Code as they may change over time.
- 8.2 Different levels of fee will be charged for the original guardianship application ('claim fee' in court terminology), and the fee for subsequent applications – such as for variation or revocation of the guardianship order, which will be lower. Re-applications to renew guardianship would be at the higher fee (claim form) rate.
- 8.3 Details on the fee remission scheme (for full or partial fee reductions) are also available on the gov.uk website via this link - <https://www.gov.uk/get-help-with-court-fees>. It is the applicant's means that are assessed for eligibility for court fees. To qualify for fee remissions, the applicant must meet the savings test and either be in receipt of certain qualifying benefits or have low income.
- Savings - the applicant (and applicant's partner, if applicable) must not have savings above a certain level; and either
 - Benefits - the applicant must be in receipt of qualifying benefits; or
 - Income - if the applicant is not on qualifying benefits but has a low income they may still qualify for Help with Fees. The income thresholds are different for those who have partners and/or children.
- 8.4 When the court makes a guardianship order, it may include provision for the applicant to be reimbursed the costs of making the application from the missing person's estate.
- 8.5 If the applicant does not qualify for the remission scheme, he or she may still apply to the court to waive the fee if, due to the exceptional circumstances of a particular case, there are reasons for doing so. They will need to contact the court, sending supporting statements and documents to support their request. Each application will be decided on a case-by-case basis and these decisions are final.

Public Guardian fees

- 8.6 Once the Court has made an order appointing a guardian, the Public Guardian will charge a set-up fee as required by the Public Guardian (Fees etc) Regulations 2007. Details of the fee can be found here: <https://www.gov.uk/manage-missing-persons-finances/how-much>. The fee is payable within 30 days of the date of the invoice which the Public Guardian will send to the guardian.

- 8.7 In addition to the set-up fee, an annual supervision fee is payable to the Public Guardian for the costs of providing supervision and oversight of guardians. This fee is payable in arrears every 12 months, starting from the date of the Guardianship order coming into force, and within 30 days of the date of the invoice which the Public Guardian will send to the guardian. The set up fee and annual supervision fees can be reclaimed as an expense from the missing person's estate.
- 8.8 A system of fee exemptions and remissions is also available for those paying fees to the Public Guardian, and based on the means of the missing person. Further details can be found on the Public Guardian's website. To qualify for an exemption or remission under this scheme, the missing person must either be in receipt of a qualifying benefit or otherwise have low income.
- 8.9 If a missing person does not qualify for the remission scheme, the guardian may still apply to the Public Guardian for a remission if paying the fee would, in the exceptional circumstances of a particular case, involve undue hardship. They will need to write to the OPG to ask for their guardianship fees to be reduced, sending supporting statements and documents showing savings, income and outgoings. Each application will be decided on a case-by-case basis and these decisions are final.

9. Resolving disputes

- 9.1 Sometimes a dispute will arise during a guardian's appointment.
- 9.2 This could be regarding the way a guardian has acted or a decision they have taken. This might, for example, be between the guardian and (other) members of the missing person's family on the use of the missing person's finances, or the handling of debt.
- 9.3 Disputes may also arise with organisations such as those within the financial or legal industry, for example regarding delay caused by an institution either not recognising or misinterpreting a guardianship order.
- 9.4 It is in everybody's interests to settle disagreements and disputes quickly and effectively, with minimal stress and cost. This section sets out different options available for settling disagreements. It also suggests ways to avoid letting a disagreement become a serious dispute. Finally, it sets out when it might be necessary to apply to a regulatory body or the High Court.

Options for resolving disputes

- 9.5 It is usually best to try and settle disagreements before they become serious disputes. Many people settle them by communicating effectively and taking the time to listen and to address worries.
- 9.6 Disagreements between family members are often best settled informally, or sometimes through mediation. When professionals are in disagreement with a person's family, it is a good idea to start by:
- setting out the different options in a way that is easy to understand;
 - inviting an independent party to talk to the family and offer a second opinion;
 - offering to get independent expert advice;
 - arranging a meeting to discuss matters in detail;
 - listening to, acknowledging and addressing worries; and
 - where the situation is not urgent, allowing people time to pause and think it over before having a meeting or making a decision.

When is mediation useful?

- 9.7 A mediator helps people to come to an agreement that is acceptable to all parties. Mediation can help solve a problem at an early stage. It is a far less formal procedure than a court and offers a wider range of solutions. It may be less stressful for all parties, more cost-effective and quicker. People who come to an agreement through mediation are more likely to keep to it, because they have taken part in the decision-making.

- 9.8 Mediators are independent. They have no personal interest in the outcome of a case. They do not make decisions or impose solutions. The mediator will decide whether the case is suitable for mediation. They will consider the likely chances of success and the need to protect the interests of the missing person.
- 9.9 Any case that can be settled through negotiation is likely to benefit from mediation. It is most suitable when people are not communicating well or not understanding each other's point of view. It can improve relationships and stop future disputes, so it is a good option when it is in a person's interests for people to have a good relationship in the future.

Astha went missing 3 years ago. Her father Ishan is guardian of her financial affairs. Ishan recently decided to put her house up for sale. But Bhav, Astha's brother, is upset about this decision. Ishan and Bhav initially try to resolve their disagreement through informal conversations. When this didn't work they agreed to try mediation as a form of dispute resolution.

During the mediation sessions the mediator helps Ishan and Bhav focus on Astha's best interests, rather than their own views. In the end the pair decide it is in Astha's best interest to sell the house, as she has large debts to pay off. By understanding each other's perspectives and reaching a decision together, the mediator has helped family members reach an amicable agreement.

- 9.10 In mediation, everybody needs to take part as equally as possible so that a mediator can help everyone involved to focus on the missing person's best interests.
- 9.11 The National Mediation Helpline⁸ helps callers to identify an effective means of resolving their difficulty without going to court. It will arrange an appointment with a trained and accredited mediator.

If disputes cannot be resolved by parties themselves or mediation

- 9.12 Guardians or those wishing to complain about them will have different options in taking further action, depending on the circumstances of the issue. For example, the concern may be with a financial or legal services provider - further details of the Financial and Legal Services Ombudsmen appear below. For some issues, guardians or others will be able to consult the OPG, acting in its supervisory capacity in relation to the guardian's specific responsibility for property and financial affairs. There may be other regulatory bodies involved, depending on the nature of the dispute – for example there are Ombudsmen for both the Energy and Communications industries. Ombudsmen and regulatory bodies often have guidance and factsheets on their websites to assist people in deciding whether they should make a complaint and how to go about it.

⁸ <http://civilmediation.justice.gov.uk/>

9.13 Ultimately, disputes can form the basis for an application to the High Court – either seeking a ruling on a matter under dispute, or potentially seeking a variation or a revocation of the guardianship order.

Regulatory bodies

9.14 A number of regulators are able to investigate complaints about a particular profession or industry, with examples being the Financial Conduct Authority and the Solicitor’s Regulatory Authority. We have not attempted to provide a general listing as the range of professions/trade sectors a guardian may come into dispute with is so extensive. The general rule of thumb is that complaints should first be taken up with the organisation/individual, and if not resolved their regulatory body. If they are also unable to resolve the issue, it may be possible to go to an Ombudsman. Further details on the two most likely to receive guardianship disputes are given below.

The Financial Ombudsman

9.15 The Financial Ombudsman is a free service which helps settle disputes between customers and banks, building societies and other financial companies without having to go to court. If you wish to contact them you must have been through the internal complaint procedure of the organisation you are complaining about and then to their regulatory body if not resolved. If the regulator is also unable to resolve matters then the issues the ombudsman can investigate include:

- Organisations continued use of a guardianship order after they have been notified that it no longer has legal effect
- Organisations refusing to comply with the guardianship order
- Organisations causing guardians unnecessary delays, inconvenience or costs due to error or misunderstanding.

The Legal Ombudsman

9.16 The Legal Ombudsman deals with complaints across the entire legal sector including solicitors, notaries and barristers among others. Individuals must try and seek resolution through internal complaint procedures first. Issues you can be brought to the ombudsman include:

- Poor service of a professional when carrying out a service in relation to guardianship; and
- Professionals causing undue delays, costs and inconvenience due to errors.

The Office of the Public Guardian (OPG)

9.17 The OPG is an executive agency, sponsored by the Ministry of Justice. It has statutory responsibility for the registration and supervision of guardians appointed by the court to manage the property and financial affairs of missing people. You can contact the OPG if you have concerns about a guardian’s management of the

missing person's property and financial affairs, and feel they have acted in a way that is not in the best interests of the missing person.

The High Court

9.18 For issues where no resolution of a dispute has been achieved, there is an option of applying to the court to make a ruling. This might take the form of an application on a specific matter – for example the sale of a property - but it may be in the form of an application for a variation order (amending the terms of the original court order of guardianship) or – ultimately – seeking its revocation. See section 6.2-6.5 on making applications to the court. Court fees will be payable for each application made. The court will only hear applications from people who have sufficient interest in the property and financial affairs of the missing person. Certain people are deemed to have such an interest, which include the spouse, civil partner, sibling, parent and child of the missing person, the guardian themselves and the Public Guardian. If agreement is reached prior to a court hearing, the court should be notified immediately.

Seeking advice in relation to disputes

- 9.19 In general, advice on guardianship matters will not qualify for legal aid funding.
- 9.20 Seeking legal advice from a solicitor is always an option when resolving disputes, but guardians and others will need to bear in mind the professional fees involved. The Law Society has a 'find a solicitor' service - <http://solicitors.lawsociety.org.uk/> - to assist in finding someone with the specialist skills required by location. A guardian who seeks professional advice will probably be able to claim the cost from the missing person's estate.
- 9.21 You may be able to seek free advice from Citizen's Advice, the Money Advice Service or another voluntary body offering legal advice and support. Contact details for these appear in the annex to the Code.

Annex – useful documents and sources of advice

Useful documents/references

- Text for the Guardianship (Missing Persons) Act 2017 - <http://www.legislation.gov.uk/ukpga/2017/27/contents>
- Regulations for guardians for missing persons - <http://www.legislation.gov.uk/uksi/2019/1030/contents/made>
- Practice Direction 57c (court rules for the appointment of guardians) - <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-57c-proceedings-under-the-guardianship-missing-persons-act-2017>
- Office of the Public Guardian – advice for guardians - <https://www.gov.uk/manage-missing-persons-finances/make-decisions>
- Office of the Public Guardian – guidance on gifts (in relation to the Mental Capacity Act, but the same principles will apply to guardians) - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/681929/Giving-gifts-practice-note-PN7.pdf
- Mental Capacity Act 2005 Code of Practice - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/497253/Mental-capacity-act-code-of-practice.pdf
- HM Land Registry’s Practice Guides - <https://www.gov.uk/topic/land-registration/practice-guides>

Useful sources of advice

Missing People - <https://www.missingpeople.org.uk/>

UK Missing People’s Unit - <https://www.missingpersons.police.uk/en-gb/home>

Prisoners Abroad - <https://www.prisonersabroad.org.uk/>

Lucie Blackman Trust - <https://www.lbtrust.org/>

Hostages International - <https://hostageuk.org/>

British Red Cross - <https://www.redcross.org.uk/get-help>

Citizen’s Advice - <https://www.citizensadvice.org.uk/>

Advice UK - <https://www.adviceuk.org.uk/>

LawWorks – <https://www.lawworks.org.uk/>

Money Advice Service - <https://www.moneyadviceservice.org.uk/en>

Step Change (debt charity) - <https://www.stepchange.org/>

AgeUK - <https://www.ageuk.org.uk/>

UK benefits advice - <https://www.gov.uk/benefits-calculators>

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