CHAPTER ~~5~~ 23.

PERSONS PRESUMED DEAD.

Drafting note: Existing Chapter 5 has been relocated to proposed Subtitle V due to its applicability to both probate and nonprobate transfers.

§ ~~64.1-105~~ 64.2-2300. Presumption of death from absence or disappearance; ~~in cause wherein death comes in question~~ when applicable.

A. 1. Any person who ~~has resided in this~~ is a resident of the Commonwealth ~~who (i) leaves,~~ shall be presumed to be dead if such person:

a. Leaves and does not return to the Commonwealth for seven successive years ~~successively~~ and is not heard from; ~~(ii) disappears~~

b. Disappears for seven successive years ~~successively~~ and is not heard from; or ~~(iii) disappears~~

c. Disappears in a foreign country, ~~whose~~ his body has not been found, and ~~who~~ he is not known to be alive, ~~upon issuance of~~ and a report of presumptive death by the Department of State of the United States~~, shall be presumed to be dead~~ has been issued.

2. Any person who is not ~~residing in this~~ a resident of the Commonwealth, but ~~owning~~ who owns real or personal property ~~herein~~ located within the Commonwealth, ~~who~~ shall be presumed to be dead if such person disappears for seven successive years ~~successively~~ from the place of his residence outside of ~~this~~ the Commonwealth and is not heard from~~, shall be presumed to be dead~~.

~~2~~3. The presumption created by this subsection shall ~~arise~~ be applicable in any ~~cause wherein~~ action where the person's death is in question, unless proof is offered that ~~he~~ the person was alive within the time specified or, in the case of a presumed death in a foreign country, at any time following ~~his~~ the person's disappearance, whether before or after the report of presumptive death was issued.

B. The fact that any person was exposed to a specific peril of death may be a sufficient basis for determining at any time after the exposure that the person is presumed to have died less than seven years after the person was last heard from.

C. Any person on board any ship or vessel underway on the high seas who disappears from such ship or vessel, or any person on board an aircraft that disappears at sea, ~~and~~ who is not known to be alive~~,~~ and whose body has not been found or identified prior to a hearing of a board of inquiry as to such disappearance, shall be presumed to be dead upon the findings of a board of inquiry that the person is presumed dead, or six months after the date of such disappearance, whichever ~~shall~~ occurs first ~~occur~~.

D. Before any final order or decree is entered in a cause under subsection A, B or C in favor of the alleged heirs, devisees, next of kin, legatees, beneficiaries, survivors, or other successors in interest of the presumed decedent, or persons claiming by, through, or under them, or any of them, proceedings shall be held in conformity with §§ ~~64.1-107~~ 64.2-2303 through ~~64.1-112~~ 64.2-2306.

E. The ~~person presumed to be dead under subsection A, B, or C his~~ heirs at law, devisees, next of kin, legatees, beneficiaries, survivors, or other successors in interest of the person presumed dead under subsection A, B, or C may be made parties defendant to proceedings in respect to real or personal property in which the ~~person~~ presumed ~~dead~~ decedent may have an undivided interest~~,~~ by order of publication or other process as provided by law. The proceedings~~, whether in the nature of partition, eminent domain or otherwise,~~ shall not be stayed in respect to the division, sale, or other disposition of the entire property. The provisions of subsection D shall be applicable only to the portion of the property set apart or to the share of the proceeds to which such person would be entitled.

Drafting note: Technical changes.

~~§§ 64.1-105.1. , 64.1-105.2.~~

Drafting note: Repealed by Acts 2006, c. 351, effective July 1, 2006.

§ ~~64.1-106~~ 64.2-2301. Distribution of fund when presumption of death not applicable.

~~If in~~ A. In any civil action wherein any estate or fund is to be distributed, if the interest of any person ~~therein~~ to the estate or fund depends upon his having been alive at a particular time and it is not known and cannot be shown by the exercise of reasonable diligence whether such person was alive at that time, and ~~the case is one in which~~ if the legal presumption of death does not apply, the court may~~, if it sees no cause to the contrary,~~ enter ~~its decree~~ an order distributing the estate or fund ~~among~~ to those who would be otherwise entitled thereto if it were shown that such person ~~above referred to were~~ was dead at such particular time. ~~However,~~

B. Before any distribution is made pursuant to subsection A, the court shall require that, until the person is determined to be dead in accordance with § 64.2-2300, the heir at law, devisee, next of kin, legatee, beneficiary, survivor, or other successor in interest shall give a ~~proper~~ refunding bond~~, which shall have~~ with surety ~~thereon~~ in such form as the court directs ~~until such person is determined to be dead in accordance with § 64.1-105, shall be given, with~~ upon condition to account for the estate or fund to any person who may establish title thereto adverse to that of such ~~distributees, or to their successors~~ heir at law, devisee, next of kin, legatee, beneficiary, survivor, or other successor in interest.

C. No motion shall be made hereunder except after reasonable notice to all parties upon whom service may be had. Nothing in this section shall be construed to affect in any way any requirement of law as to service ~~or publication~~ of process.

Drafting note: Technical changes.

§ ~~64.1-106.1~~ 64.2-2302. Appointment of curator when presumption of death not applicable.

~~After~~ A circuit court, upon good cause shown, may appoint in accordance with the provisions of § 64.2-451 a curator for the estate of a resident of the Commonwealth in a case where the legal presumption of death is not applicable if (i) at least one year has expired since the date that ~~a~~ the resident ~~of the Commonwealth~~ was last ~~seen or~~ heard from~~,~~ and (ii) it is not

known and cannot ~~be shown by the exercise of~~ with reasonable diligence be shown whether such person is alive~~, and the case is one in which the legal presumption of death does not apply, the court may, upon good cause shown, enter its decree appointing a curator for the estate of such resident as if he were dead, pursuant to § 64.1-93~~. In determining whether good cause ~~hereunder~~ exists, the court shall ~~take into account~~ consider the existence and efficacy of any durable power of attorney.

Drafting note: Technical changes.

§ ~~64.1-107~~ 64.2-2303. ~~Probate or administration not to be granted by a~~ Persons presumed dead; authority of clerk.

~~Neither (i)~~ A clerk of the circuit court has no authority to (i) admit to probate ~~of~~ a will of a person presumed to be dead, ~~nor~~ (ii) grant administration upon the estate of ~~such~~ a person presumed to be dead, ~~nor~~ or (iii) ~~appointment of~~ appoint a curator pursuant to § ~~64.1-106.1 shall in any case be granted by a clerk~~ 64.2-2302.

Drafting note: Technical changes.

§ ~~64.1-108~~ 64.2-2304. Petition seeking determination of death; hearing; evidence; notice.

A. Whenever a petition is filed seeking a judicial determination that a person is dead, the court ~~having~~ that would have jurisdiction over the person's probate estate if such person were dead shall ~~cause to~~ hear evidence concerning the alleged absence of the presumed decedent and the circumstances and duration of such absence. The court shall require that notice of the filing of the petition be ~~advertised~~ published once a week for four successive weeks in a newspaper published in the county or city ~~once a week for four successive weeks the fact of the petition~~ where the petition is filed, ~~together with~~ and the notice ~~that on a certain day~~ shall include the date of the hearing, which shall be at least two weeks after the ~~advertisement, the court will hear evidence concerning the alleged absence of the presumed decedent and the circumstances and duration thereof~~ last publication. ~~The cost of such publication shall be paid by the petitioner.~~

B. At the hearing, the court shall hear all admissible evidence offered for the purpose of determining whether or not the presumption of death is applicable. If the court determines that the legal presumption of death is applicable, the court shall enter an order in accordance with § 64.2-2305, provided, however, that if the evidence shows that the length of a presumed decedent's absence is less than 10 years, the court shall immediately require notice of the order to be published once a week for two successive weeks in a newspaper published in the county or city where the petition is filed and, when practicable, in a newspaper published at or near the place where the presumed decedent had his residence when last heard from. The notice shall require the presumed decedent, if alive, or any person for him, produce to the court satisfactory evidence that the presumed decedent is alive within two weeks from the date of the last publication. If no satisfactory evidence is produced within this period, the court shall enter an order in accordance with § 64.2-2305.

C. For the purposes of subsections A and B, if there is no newspaper published in the county or city in which the publication required may be had, then the court shall order that the required notice be published in a newspaper having general circulation in such county or city. The cost of the publication pursuant to this section shall be paid by the petitioner.

Drafting note: Existing § 64.1-110 has been relocated to proposed subsections B and C. There are also technical changes.

~~§ 64.1-109.~~

Drafting note: Repealed by Acts 2006, c. 351.

~~§ 64.1-110. Hearing application; evidence receivable; further publication.~~

~~At the hearing, the court shall hear such legal evidence as may then be offered for the purpose of ascertaining whether or not the presumption of death is made out. If satisfied that the legal presumption of death is made out, the court shall so order. If the evidence shows the length of absence of a presumed decedent to be less than 10 years, the court shall forthwith cause notice of the order to be inserted once a week for two successive weeks in a newspaper published in the county or city and also, when practicable, in a newspaper published at or near the place where the presumed decedent had his residence when last heard from. The notice shall require the presumed decedent, if alive, or any person for him, to produce to the court within two weeks from the date of its last insertion, satisfactory evidence of his continuance in life. If there is not a newspaper in the county or city in which the publication required by this section and § 64.1-108 may be had, the same may be published in such newspaper having general circulation therein as the court shall order. The cost of such publication shall be paid by the petitioner or applicant.~~

Drafting note: The provisions of existing § 64.1-110 have been relocated to subsection B of proposed § 64.2-2304.

§ ~~64.1-111~~ 64.2-2305. ~~Grant~~ Entry of order that presumption of death is applicable; effect.

A. If ~~the evidence at~~, after the hearing ~~required by § 64.1-110 shows the length of absence to be 10 years or more or if within the period of two weeks after publication of the order on the hearing aforesaid evidence satisfactory to the court of the continuance in life of the supposed decedent shall not be forthcoming,~~ conducted pursuant to § 64.2-2304 and any subsequent publication required pursuant to that section, the court determines that the presumption of death is applicable, the court shall enter ~~its~~ an order determining that the ~~supposed~~ presumed decedent is in fact dead ~~and~~. Upon entry of such order, the court shall proceed to admit any will to probate ~~or~~, issue letters of administration to the party entitled thereto, or order that the claim of the heirs at law, devisees, next of kin, legatees, beneficiaries, survivors, or other successors in interest of the ~~person~~ presumed ~~dead~~ decedent be established~~, as the case may be, and until~~. If the order is subsequently revoked pursuant to § 64.2-2307, all acts done in pursuance ~~thereof and~~ of or in reliance ~~thereon,~~ on the order shall be as valid as if the ~~supposed~~ presumed decedent were ~~really~~ actually dead.

B. The court's order determining a person to be dead shall state the person's date of death to be:

1. The date of the expiration of the seven-year period in a proceeding governed by subsection A of § ~~64.1-105~~ 64.2-2300, except that in a proceeding governed by ~~clause (iii) of subsection~~ subdivision A 1 c of § ~~64.1-105~~ 64.2-2300 it shall be the date of the Department of State's issuance of a report of presumptive death unless the evidence shows the likelihood of death at an earlier date;

2. The date of the person's exposure to the specific peril of death in a proceeding governed by subsection B of § ~~64.1-105~~ 64.2-2300; or

3. The date of the person's disappearance in a proceeding governed by subsection C of § ~~64.1-105~~ 64.2-2300.

C. A certified copy of the court's order determining that the ~~supposed~~ presumed decedent is in fact dead shall be accepted as proof of death in all situations in which a certificate of death issued by the State Registrar of Vital Records of the Virginia Department of Health would have been accepted as such proof.

Drafting note: Technical changes.

§ ~~64.1-112~~ 64.2-2306. Distribution of property; refunding bond.

Before any distribution of the proceeds of the estate of a person determined to be dead~~,~~ pursuant to this chapter or the payment or transfer of any of his other property~~,~~ is made, and before the sale of any real or personal property passing in kind by persons claiming ~~the same~~ such property as heirs at law ~~or~~, devisees, next of kin, ~~distributees~~ legatees, beneficiaries, survivors, or other successors in interest, the persons entitled to receive such proceeds or ~~such~~ property in kind shall give a refunding bond without surety upon condition that if the person determined to be dead is in fact alive at that time, they will respectively refund to such person the proceeds or property, or proceeds of such property, received by each on demand, without interest thereon.

Drafting note: Legatee is used in place of distributee in order to be consistent with other provisions of this chapter. See, e.g., existing § 64.1-111. There are also technical changes.

§ ~~64.1-113~~ 64.2-2307. Revocation of determination of death~~, etc.~~; effect on previous acts; title of purchasers~~, etc~~.

The court, after reasonable notice to the parties interested, may revoke ~~such~~ a determination of death at any time based on ~~due and~~ satisfactory evidence that the ~~supposed~~ presumed decedent is in fact alive. ~~After such revocation~~ If a determination of death is revoked, all powers of any personal representative shall ~~cease~~ terminate, ~~but~~ however, if the personal representative has complied with the provisions of § 64.2-2306, all receipts and disbursements of assets and other acts previously done by ~~him~~ the personal representative and the title of bona fide purchasers ~~to~~ of property under sales made by ~~him~~ the personal representative or by ~~the~~ any heir at law, devisee, next of kin, legatee, survivor, beneficiary, or other successor in interest ~~if such~~

~~person shall have complied with § 64.1-112,~~ shall remain as valid as if no revocation had been made. Any personal representative shall settle his account and all assets remaining in his ~~hands~~ possession or in the ~~hands~~ possession of such heir at law, devisee, next of kin, legatee, survivor, beneficiary, or other successor in interest, and the proceeds ~~thereof~~ of such assets, shall be transferred to the ~~owner thereof~~ person who had been determined to be dead or to his duly authorized agent or attorney. Nothing in this section shall validate the title of any person to any money or property received as an heir at law, devisee, next of kin, legatee, survivor, beneficiary, or other successor in interest of such ~~supposed~~ presumed decedent, ~~but the same~~ and such money or property may be recovered from them ~~in like manner~~ as if ~~such~~ the order determining death had not been granted.

Drafting note: Technical changes.

§ ~~64.1-114~~ 64.2-2308. Substitution of ~~supposed~~ presumed decedent in pending actions; reopening of judgments; effect of judgments.

A. After revocation of the order determining death, the person ~~erroneously supposed~~ who had been determined to be dead may~~, on suggestion filed of record of the proper fact, be substituted as plaintiff in~~:

1. Be substituted as plaintiff in all actions previously brought by his personal representative, whether prosecuted to judgment or otherwise~~. He may, in~~, on suggestion filed by such person; and

2. Be substituted as defendant in all actions previously brought against his personal representative, ~~be substituted as defendant,~~ on ~~proper~~ suggestion filed by ~~himself,~~ such person or ~~of~~ the plaintiff ~~therein, but~~ to the action. If such person is substituted as defendant, he shall not be compelled to go to trial in less than three months from the time ~~of~~ that such suggestion is filed.

~~Judgments~~B. Upon application by the presumed decedent, judgments recovered against the personal representative before revocation ~~as aforesaid~~ of the ~~letters~~ order determining death may be opened~~, on~~. Such application by the ~~supposed~~ presumed decedent shall be made within three months from the date of the revocation and shall be supported by an affidavit~~, denying~~ that specifically~~, on the knowledge of the affiant,~~ denies the cause of the action, in whole or in part, or specifically ~~alleging~~ alleges the existence of facts ~~which~~ that would ~~be~~ constitute a valid defense~~; but, if within such~~. However, if no application is made during the three-month period ~~of three months~~, ~~such application shall not be made~~ or, ~~being made,~~ if an application is made but the facts exhibited ~~shall be~~ are adjudged ~~an~~ to be insufficient to constitute a defense, the judgment shall be conclusive ~~to~~ for all intents~~, saving the defendant's right to have it reviewed, as in other cases, by certiorari, appeal or writ of error~~. After the substitution of the ~~supposed~~ presumed decedent as defendant ~~in~~ to any judgment~~, as aforesaid~~ pursuant to subdivision A 2, ~~it~~ the judgment shall become a lien upon his real estate ~~in the county or city~~ and shall so continue

as other judgments~~, unless and until it shall be set aside by the court below or reversed in the Supreme Court~~.

Drafting note: Technical changes.

§ ~~64.1-115~~ 64.2-2309. Costs~~, by whom payable~~.

The costs~~ attending the issue of such orders~~ attendant to the issuing of an order determining death or~~ their~~ the revocation of such order shall be paid out of the estate of the ~~supposed~~ presumed decedent~~; and~~. If the petition for the issuance or revocation of an order determining death is not granted, the costs~~ arising upon a petition which shall not be granted~~ shall be paid by the petitioner.

Drafting note: Technical changes.