Title Research

Entitlement

Autumn 2019

Exceed your limitations

Plus:

- **Statutory Wills:** A summary of the law and practice by Holly Mieville Hawkins
- How the ever-looming **Brexit** could impact the **estate administration** process
- Finding **missing beneficiaries** to ensure they receive their rightful inheritance

Title Research

Entitlement

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Welcome to Title Research's quarterly news digest – **Entitlement.**

The summer is drawing to a close, the duration of daylight is becoming noticeably shorter and the trees are starting to change colour. That can only mean that autumn is upon us and therefore, the autumn edition of Entitlement has arrived.

In this issue, we welcome an article from Tara McInnes, Senior Associate in Shoosmiths' Disputed Wills and Trusts Team. Tara explores two recent cases where the time limits to bring claims against an estate have been extended.

We are also pleased to feature a discussion about Statutory Wills from Holly Mieville-Hawkins, a Senior Associate Solicitor at Enable Law. Holly uses her background in mental capacity law to provide a summary of the law and practice.

We also share how the ever-looming Brexit could impact the estate administration process. The article explores how the UK's exit from the EU may lead to more complications when dealing with overseas assets, currency rate fluctuations, and travel limitations.

Additionally, we explain how to find missing or unknown beneficiaries to ensure they receive their rightful inheritance.

As always, we continue to support our solicitor clients and travel all across the country to deliver presentations to private client teams. The topics include:

- Mitigating risk in estate administration
- The estate administration timeline
- Intestacy and estate administration

If you'd like to request a presentation at your firm, please **click here and fill in the form.**

Title Research offers fast, fixed fee access to specialist genealogical research and asset repatriation services. The services available to you include dealing with North American and UK shareholdings, locating missing beneficiaries, reconstructing family trees and much more.

Our Client Services Team are the first point of contact to discuss how we can help accelerate the estate administration process. Call +44 (0) 345 87 27 600 or email info@titleresearch.com for more information.

We hope you enjoy this edition of Entitlement!

Anthony Allsopp
Head of Business Development

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Exceed your limitations

By **Tara McInnes**, Senior Associate in Shoosmiths' Disputed Wills and Trusts Team.

Tara McInnes practises exclusively in disputed Wills, Trusts and estates and is listed as a 'Next Generation Lawyer' in the Legal 500 directory.

www.shoosmiths.co.uk

As most legal practitioners specialising within the Private Client field will be aware, there are strict time limits for applicants to bring certain types of claims against an estate. For example, an applicant seeking to make a claim under the Inheritance (Provision for Family and Dependants) Act 1975 ("the Act") for reasonable financial provision from the Deceased's estate has only six months from the date of the Grant of Probate in which to issue proceedings for their claim. However, the court has a discretion to permit an eligible applicant to bring their claim out of time in accordance with section 4 of the Act.

This article considers the two recent cases of Bhusate v. Patel and others [2019] EWHC 470 (Ch) and Cowan v. Foreman and others [2019] EWHC 349 (Fam), in which the High Court has sought to provide (somewhat conflicting) guidance as to when the court might exercise its discretion to extend time in these types of cases. For those practising in this area, Cowan is especially relevant given that the court has advocated the use of its inherent jurisdiction to decide on limitation issues, irrespective of whether the parties have agreed to extend time through a standstill agreement.

Standstill agreements have the effect of suspending or extending a statutory or contractual limitation period. They are common in contractual and commercial litigation, as well as tort, and are often utilised by solicitors to allow the parties more time to resolve matters privately through correspondence or alternative dispute resolution.

Before considering whether to advise clients to enter into standstill agreements and prevent time running for a claim, it is necessary to consider the two cases in detail and the court's conflicting decisions.

Cowan v. Foreman and others

The Claimant was the widow of the Deceased. By the terms of the Deceased's final Will, she was made a principal beneficiary of two Discretionary Trusts, under which she received a regular monthly income of $17,250 as well as a life interest; such provision being expressly designed to meet the Claimant's needs for the remainder of her life. The Claimant sought to bring a claim under the Act on the basis that the Trusts left her financially insecure given that provision was subject to Trustees' discretion.

Probate of the Deceased's Will was granted in December 2016. However, the Claimant made no attempts to progress her claim until January 2018, at which time she secured standstill agreement with the proposed defendants in order to stop time from running.

In November 2018, court proceedings were issued under s4 of the Act despite the fact that, even with the benefit of the standstill agreement, the Claimant was still 17 months out of time.

The case proceeded to the High Court to consider the issue of whether the Claimant should be allowed to proceed out of time. After reviewing the authorities, the presiding judge, Mostyn J, identified two fundamental issues for the court to consider when deciding whether to permit an applicant to issue a claim out of time under the Act:

1. Whether there are good reasons for the delay; and

2. Whether the claim has sufficient merit to proceed to trial.

He categorised this exercise as the making of a qualitative decision or value judgement, rather than the exercise of an unfettered discretion.

Regarding the first issue, Mostyn J concluded that the Claimant had failed to adduce cogent reasons for the delay, adding that excusable delay should be limited to weeks or a few months at most, absent exceptional circumstances.

As to whether the claim had merit, he determined that the Claimant also had no real prospect of success given that there was no evidence to suggest the Trustees would defy the Deceased's wishes and, what's more, any attempt to do so would likely be actionable as a breach of trust.

As such, Mostyn J refused to extend the six month period and the claim was not permitted to proceed out of time.

Notably, in the course of his judgment Mostyn J disparaged the use of standstill agreements in these cases, commenting: "I was told that to agree a standstill of this nature is "common practice". If it is indeed common practice, then I suggest that it is a practice that should come to an immediate end. It is not for the parties to give away time that belongs to the court."

Bhusate v Patel and others

Following the case of Cowan came the Bhusate claim. This matter was also brought by the widow of the Deceased on the grounds that his estate failed to make reasonable financial provision for her.

Following the Deceased's death in 1990, his widow became entitled to a statutory legacy and a half share of the residuary estate in accordance with the intestacy rules. Given that the Deceased's estate consisted, for the most part, of one property, the Claimant's legacy was contingent on the property being sold.

In 1991, the Claimant and the First Defendant (one of the Deceased's children from a previous marriage) applied jointly for a Grant of Letters of Administration. However, the Deceased's other children frustrated attempts to sell the Deceased's property by refusing to agree to the sale price, and subsequently no further steps were taken to administer the estate by either the Claimant or First Defendant for 23 years.

In November 2017, the Claimant issued a variety of claims in relation to the Deceased's property, as well as a claim for payment of her statutory legacy and capitalised life interest (plus statutory interest), all of which failed.

The Claimant subsequently sought to rely upon a spousal

claim under the Act, but 25 years had passed since the Grant was issued. In view of the time which had passed and in light of the decision in Cowan, which had come out only weeks earlier, one might have thought the application to proceed out of time would have failed. Instead, the court found that:

1. The delay in bringing the claim was explicable on the basis that the First Defendant and the Claimant's other stepchildren, beneficiaries of the Deceased's estate, had failed to engage with the Claimant's initial steps to administer the estate. The Claimant's own culpability was negligible.

2. The merits of the claim under the Act were very strong.

Additionally, Chief Master Marsh noted that, if the application under section 4 was not granted, the Claimant would receive no benefit from her husband's estate as she had no other remedy available to her. As such, permission to bring the claim was granted.

It is the author's view that the facts of Bhusate do not (in reality) seem exceptional enough to warrant the 25 year delay, especially when one considers that the Claimant's financial needs had only arisen because of her failure to administer the estate.

Comment

Bhusate and Cowan do little to help clarify the uncertainty in this area of law or assist practitioners in advising clients on their prospects of success in bringing a claim under the Act out of time. It is notable that Bhusate expressly disapproved of Mostyn J's reasoning in Cowan as to why the court's power to permit claims out of time should be applied robustly, namely that this would accord with the overriding objective in Rule 1.1 of the Civil Procedure Rules (i.e. to enable the court to deal with cases justly and at a proportionate cost) as well as the approach to relief against sanctions. This may go some way in reconciling the two cases.

Evidently, what can be taken from these cases is confirmation that each claim is considered on its merits, which is not overly helpful when advising clients. A more definitive conclusion is that substantial delay alone is not enough to defeat an application to apply out of time where a Claimant has a strong case and a reasonable excuse for delay (even if the delay is grossly disproportionate to the standard six month period that Parliament had intended).

Of real practical concern are Mostyn J's comments in Cowan, pronouncing against the use of standstill agreements.

Many practitioners rely on standstill agreements, which enable parties to properly engage with Pre-Action Protocols and the ACTAPS Code, and resolve claims sooner rather than later at minimum cost. Mostyn J's comments therefore appear to fly in the face of the overriding objective and a party's ability to resolve claims easily and quickly with minimal costs.

The Bhusate claim provides a slither of hope that in cases where there are good prospects of success, coupled with a sound reason for missing the six month deadline, the court will be sympathetic. These circumstances are quite unusual though and therefore in the vast majority of claims where solicitors have received instructions prior to the expiration of the six month period, the court's current view is that proceedings will need to be issued to avoid falling foul of the tight deadline and possibly opening the solicitor up to a negligence claim.

Cowan was subsequently appealed. The Court of Appeal handed down its judgment in July 2019 and held that the Claimant was able to bring a claim on the basis that reasonable financial provision had not been made for her, as she did not have a direct interest in her husband's estate.

The court also held that the Claimant was able to bring her claim out of time, and further that standstill agreements can still be used in Inheritance Act claims, provided that the terms are clearly recorded in writing and the parties have been advised of their effect.

This is good news for parties to this type of dispute, as the six month time limit to bring a claim can cause Claimants to incur unnecessary costs issuing proceedings in order to avoid falling foul of the limitation period.

Statutory Wills: A summary of the law and practice

By **Holly Mieville-Hawkins**, Senior Associate at Enable Law

Holly is a Senior Associate Solicitor at Enable Law, specialising in mental capacity law. She has extensive experience making and defending applications in the Court of Protection, and regularly acts where there are concerns of physical or financial abuse. She is a member of the Law Society Wills and Equity Committee, and works closely with the Office of the Public Guardian (OPG).

What is a Statutory Will?

A Statutory Will is a Will for a person that lacks mental capacity otherwise to make one for themselves. It has been possible for a Statutory Will to be made for a person since 1970 (s.103(1)(dd) Mental Health Act 1959).

However, the statutory power to do so now lies within the Mental Capacity Act 2005 (MCA 2005). It states that the Court of Protection has authority to make decisions for an individual (known as P) who lacks capacity to make those decisions for himself (s.16 (1) and (2) MCA 2005), and that this decision making power extends to 'the execution for P of a Will' (s.18(1)(i) MCA 2005). The power to order the execution of a Statutory Will lies only with the court. No deputy or attorney can authorise this, and so if a person lacks mental capacity to make a Will (s.2(3)(b) MCA 2005), an application to the Court of Protection for the execution of a Statutory Will simply cannot be avoided.

A Statutory Will in the main looks and acts like a normal Will, but there are specific clauses, including a special execution clause that must be used, as it has to be executed in a particular way. See later on practice and procedure for detail of this.

What is the test for capacity to make a Statutory Will?

The general test for mental capacity is established by s.2 MCA 2005, that a person's mental capacity to make decisions should be assessed on an issue by issue basis, and can fluctuate according to the time and conditions in which a person is assessed.

The general test for capacity under the Mental Capacity Act 2005 is a two stage test:

1. Is there an impairment of, or disturbance in the functioning of, the person's mind or brain?

2. If so, is the impairment or disturbance sufficient that the person lacks capacity to make a decision in relation to the matter in question?

The Mental Capacity Act 2005 goes on to confirm at s.3 that a person is regarded as being unable to make a decision if they cannot:

- Understand information about the decision to be made;
- Retain that information;
- Use or weigh the information as part of the decision-making process; or
- Communicate the decision (by any means).

As a result of this, a person can have capacity to manage day to day funds, or make decisions about small gifts, but lack capacity to make decisions about the management of their wider estate, or about whether to make a Will. There is a presumption in favour of a person having mental capacity to make a particular decision.

In respect of a person's ability to make a Will, there is a lack of clarity about whether the above MCA 2005 test is the applicable test, or whether the true test is set out in the old case of Banks v Goodfellow (1870) LR 5 QB 549. This test states that in order to have sufficient mental capacity to make a Will, a person must be able to understand, retain information about and consider the following, in order to be able to make a decision about the contents of their Will:

i) The nature and effect of making a Will

ii) The extent of their assets

iii) Who their beneficiaries are, and what obligations they have towards those beneficiaries

They must also not be suffering from delusions that affect their views to consider their obligations under 'iii' above.

The current view is that the correct test is the one set out in Banks v Goodfellow, as confirmed by the recent High Court case of James v James and others [2018] EWHC 43 (Ch), however, there are some differing academic views on this issue. A full discussion of this can be found in Chapter 2 of the Law Commission's Consultation on Wills reform. It is likely that the Law Commission will recommend that the Mental Capacity Act 2005 as the correct test going forwards for assessing mental capacity in the future.

Notwithstanding this, in the event that it is established that a person lacks capacity to make a Will for themselves, an application for a Statutory Will becomes necessary. The class of people that can make the application is very wide, and essentially includes anyone that is or may potentially be a beneficiary under P's estate. Permission is not required for the making of such an application (Rule 8.2(b)(i) Court of Protection Rules 2017).

How do you make an application for a Statutory Will?

The Court of Protection have issued a really useful Practice Direction in respect of making an application for a Statutory Will, in the form of Practice Direction 9E. It sets out in great detail who must be named as respondents and notified persons, the information that is needed as part of that application, and how the Will is executed. Rather than setting this detail out in this article, readers are encouraged to read the short practice direction for themselves using the above link, as it is very user friendly and clear. However, it should be noted that applicants are required to submit a draft of the proposed Statutory Will, and also provide significant accompanying information, including detail about life expectancy of P, otherwise the application will be significantly delayed.

The forms that are needed are COP1, COP1C, COP3 and COP24, and the standard issue fee of £365 applies, plus a further £485 if there is a hearing. Additionally, the Official Solicitor is nearly always appointed by the Court to act for P, and therefore their costs will need to be met. The usual rule is that the costs of other parties are also covered by P, but this can be deviated from by the Courts, so parties must be alive to this. The whole process can easily take six months to a year. If there is a need for greater urgency than this, then the application should be accompanied by a COP9.

Case study: Research for a Statuory Will

Title Research was recently approached to help a Deputy who was handling the affairs of an elderly gentleman. The Deputy planned to write a Statutory Will for the person to avoid an intestacy situation, and to remember a selection of charities that they could see he had regularly supported through his lifetime.

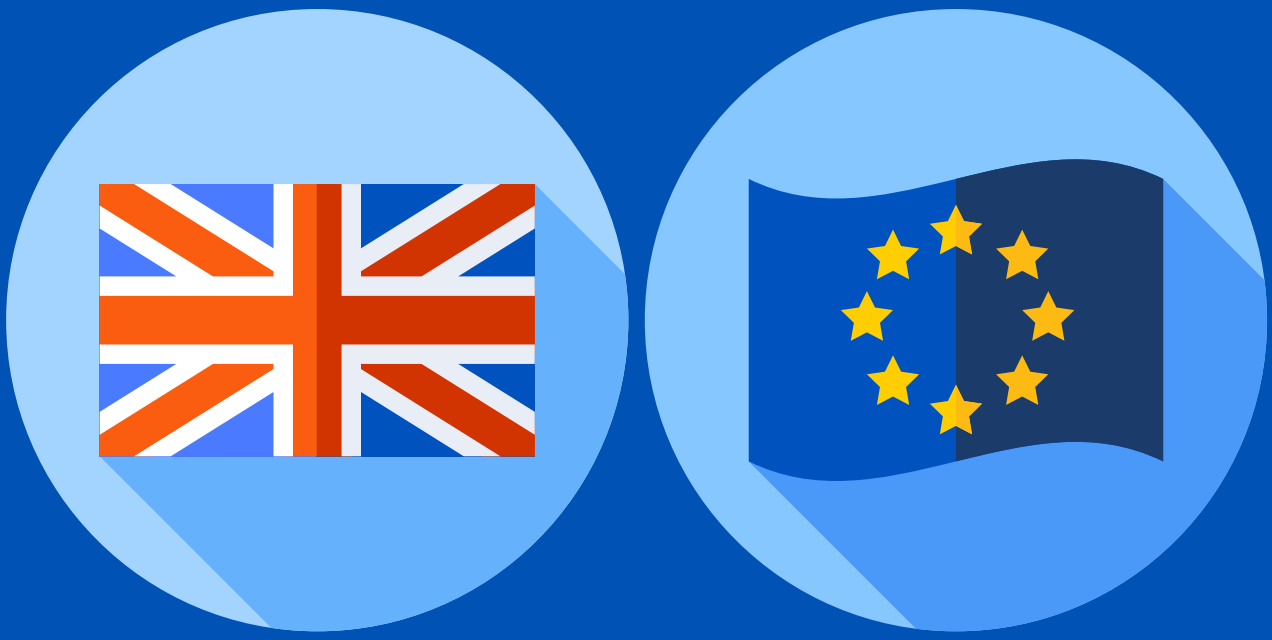
To do so, the Deputy needed to serve notice on the Person's next of kin to inform them of their intentions and as they had no contact details for his family, we were asked to help. We reconstructed his family tree and located his seven nieces and nephews – the closest kin to him.

Our report was submitted as part of the court application and the next of kin notified. The Statutory Will was approved and now our client will be able to administer the estate efficiently when the time comes, and distribute funds to those charities the person had connections to during his lifetime.

If you need to help with Statutory Will matters, call Title Research's Client Services Team on 0345 87 27 600.

How the ever-looming Brexit could impact the estate administration process

By Title Research



Boris Johnson has entered his new reign as the UK's Prime Minister and is now responsible for leading the country out of the EU on the 31st of October 2019. There is currently a lot of uncertainty surrounding what will happen as a result of Brexit, and whether we'll be leaving with or without a deal. With all this ambiguity about the inevitable Brexit, it has us questioning how it will impact the legal sector and more specifically, the estate administration process. Read on to find out how the UK's exit from the EU could affect our industry.

More complications when dealing with overseas assets

Administering overseas assets is such a big part of what we do at Title Research and we are very aware that the number of estates with overseas assets is continually rising. In today's society, more people emigrate, buy holiday homes abroad, and own shares in foreign companies.

With the increased number of multinational estates, it has got us wondering whether Brexit will impact how assets held in the EU are dealt with. It is currently unclear as to what will happen but there are concerns surrounding which jurisdictions taxes will apply, who would inherit on intestacy and how assets can be protected from unnecessary tax. Owners of EU assets should stay alert to developments in this area and be ready to update their Will accordingly.

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Currency exchange rate fluctuations

Over the last few years, we have seen frequent fluctuations to exchange rates due to economic and political changes. With a new Prime Minister and Brexit imminent, we predict that exchange rates will continue to fluctuate for the foreseeable future. Therefore, the unpredictable nature of the currency market could impact the estate administration process. You could be affected if you need to transfer an inheritance to overseas beneficiaries, repatriate an inheritance from abroad, transfer funds for foreign investments, repatriate proceeds from selling overseas assets, or transfer funds to/from an overseas solicitors' firm.

Staying up-to-date with exchange rate developments can help you to get the best return when the proceeds from a legal claim are repatriated, and in return could maximise the value of the estate. Title Research has teamed up with TorFX to offer a solution that will ensure you get the best exchange rate possible. If you'd like to find out more about our currency transfer service, powered by TorFX, call our Client Services Team on 0345 87 27 600.

DIY estate administration could be impacted by travel limitations

If the UK is to leave the EU without a deal, then travel to EU countries could be affected. This could have an impact on Personal Representatives adopting the do-it-yourself (DIY) approach when the estate administration process involves overseas work.

According to gov.uk: "There would be changes if you visit the EU, Iceland, Liechtenstein, Norway or Switzerland and the UK leaves the EU without a deal. ... There would be no immediate changes to travel if the UK agrees a deal to leave the EU. The rules would be the same until at least 2020." The government's guidance suggests that a UK citizen acting as Personal Representative would be entitled to travel to an EU country for up to 90 days. However, if they needed an extended period, UK residents will likely need to apply for a visa.

The impact on your practice

Businesses are expected to be hit the hardest by the repercussions of Brexit, forcing companies to adapt in a variety of different ways. It looks like the free movement of employees and free trade for goods and services will change.

We advise business owners to keep an eye on the government's recommendations as to how you can prepare for Brexit before the 31st of October 2019.

Click here to find out what guidance is currently available for your company.

Finding missing beneficiaries to ensure they receive their rightful inheritance

By Title Research

In estate administration, there are a number of different scenarios where you may need to search for missing or unknown beneficiaries:

- You may be presented with a Will where the testator has named a beneficiary that is unknown to the family.
- You could need to find someone that relatives and friends have lost touch with.
- You might be dealing with an intestate estate and whilst family tree research is conducted, you could discover an entitled heir whose whereabouts is unknown.
- You could be administering an estate where there is no Will and no known next of kin.

In all these scenarios, you'll need to trace the missing or unknown people. This can slow down the administration of an estate as it's likely to take a substantial amount of time and effort. It can be difficult to work out where to look and focus your efforts. That's why this blog post explores how to overcome the challenge of locating missing or unknown heirs.

Tracing missing or unknown beneficiaries

The nature of family relationships is often complex as people lose touch and divisions occur. Today, family dynamics are more complex than ever before due to rises in blended families, multiple marriages, adoption both in and out of families, and cohabiting couples. All these factors contribute to making the search for missing or unknown beneficiaries more complicated, so where do you start?

Firstly, you should take practical steps to see if the beneficiary can be located through easy and traditional methods. You should speak to family and friends to see if they can provide you with any useful information. Additionally, you should follow any leads you may have, such as previous addresses. It's important to remember that if you find someone at this stage, you should verify that they are the correct person.

If these steps fail, then we advise seeking professional help. A specialist who has experience in searching for missing people is likely to locate the individual much quicker than you could yourself.

By passing the search over to a professional at this early stage, you can save a significant amount of your valuable time. So how does a professional genealogist conduct their research into missing beneficiaries?

Genealogical researchers will use multiple approaches to locate a missing beneficiary, including searching:

- Electoral roll data – both current and historic
- Consumer databases
- Credit reference databases
- Birth, marriage and death records
- Other genealogical datasets

An experienced and well-resourced genealogy firm, like Title Research, will have access to various records, as well as experienced and competent staff who know where to look to resolve even the most challenging cases.

Case study: The man in a cave

A solicitor client had asked Title Research to locate a legatee who had lost contact with the family. The family thought that he may have moved to a village in Spain, so our local researcher visited the village only to discover that he was living in a cave in the mountains. Fortunately, he regularly collected post from the local Post Office when buying other provisions.

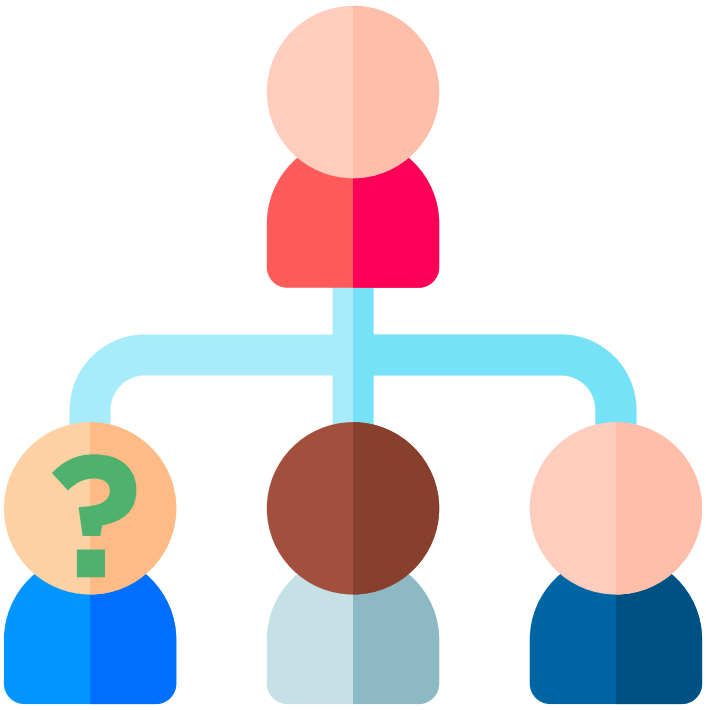
What to do if a missing beneficiary can't be located

In some rare cases, a missing beneficiary may not be found even with the help of a professional researcher. If this challenge occurs, it's important to protect the estate from future risk as they could reappear with a claim for their rightful inheritance after the date of distribution. Missing Beneficiary Indemnity Insurance can offer a resolution in these cases and protect the estate from future risk.

Before a policy can be underwritten, insurers will require a genealogy report that shows that sufficient attempts have been made to locate the missing or unknown heir. At Title Research, we conduct our research with insurance in mind, so our methodologies are accepted by specialist insurers.

Title Research has more than 50 years of experience tracing missing beneficiaries. We will only charge on a time and expense or fixed fee basis as we believe that the research requirements remain the same regardless of the sum at stake. It costs the same to locate a missing person due to receive £5,000 as it does one due £50,000.

If you'd like to find out more about how we can trace missing or unknown people, call our Client Services Team on 0345 87 27 600.



Specialist support for estate administration

At Title Research, we provide trusted genealogical research and asset repatriation services to legal professionals.

The experience we've gained over five decades means that we know where to find the people you need to trace and how to navigate even the most complex international processes. We believe it's our task to remove uncertainty so that you can complete your job with confidence.

A commitment to clarity runs through everything we do at Title Research and helps us provide legal professionals with the best possible service. Our fees are transparent, our processes straightforward and our reporting unambiguous.

Everything we do is designed to streamline estate administration, to take the effort out of locating the correct people or assets, and to mitigate against the risk of future dispute or complications.

- Locating missing beneficiaries
- Reconstructing family trees
- FamilyChecker™
- Probate valuation and verification
- Missing beneficiary insurance
- Worldwide bankruptcy searches
- Locating Wills, adresses and missing documents
- UK share sales with a nine-day turnaround
- Obtaining overseas Grants and resealing UK Grants overseas
- Dealing with North American assets
- Administering foreign shares and funds
- Research for a Statutory Will

Our proven expertise can help you with any estate administration challenge – at home or overseas. Call one of our team today on **+44 (0) 345 87 27 600** to find out more.

Ensuring accuracy, eliminating risk

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