

Article Information

Authors: Donna Benge, Rod Jones

Service: Estate & Succession Planning

Sector: Private Clients

No postcard from the Philippines

Alma Warriner died a widow survived by her son George aged 68 years and her daughter Jean aged 65 years. Donna Benge and Rod Jones explore the implications of her subsequent estate division.

*Alma Warriner died a widow survived by her son George aged 68 years and her daughter Jean aged 65 years. **Donna Benge and Rod Jones** explore the implications of her subsequent estate division.*

Mrs Warriner's main asset was her home situated at Maribyrnong valued at approximately \$680,000 to \$740,000. She bequeathed this property to her daughter Jean with the balance of her estate to be divided equally between George and Jean, which after payment of expenses was effectively zero.

George did not have a close relationship with Mrs Warriner. George's evidence was that from 1973 until 1990 he lived close to his parents and visited his parents and Jean at the Maribyrnong home. Jean had lived her entire life in that home including up to the date of the hearing. George also gave evidence that he contributed to that home by constructing a large garage and making other minor improvements to the property. In 1990 he married his second wife and had a child with her. In 1992 he moved with them to live in the Philippines. He learnt of his father's death in 1994 six weeks after his funeral after receiving a letter from Jean. Prior to that it seems that the contact between George and his mother was limited to mail while his father was alive, which was limited. Between 1993 and 1995 George received \$200 per month from his mother for everyday living expenses while living in the Philippines.

George's evidence was that he did not provide or offer any assistance to Mrs Warriner after his father died because Jean was living in the home. He didn't offer to return to Australia to help Mrs Warriner before her leg was amputated because he relied on Jean to deal with and look after her.

George separated from his second wife in 2012 and at the date of the hearing was in receipt of the aged pension, was residing with his de facto partner and had total assets of \$18,500.

On the other hand, Jean had lived in the property since birth and had lived there on her own since 1999 when Mrs Warriner went to live in an aged care facility. Medical evidence was also lead by Jean that given her mental health issues, if she were to lose the Maribyrnong home it would be traumatic and she would find the transition to a new home extremely difficult. Justice Zammit noted that the discretionary power under Section 96 of the *Administration of Probate Act 1958* (Vic) (Act) was very broad and it was important to remember that the courts do not intervene just because it would have been "nice or good" of a Willmaker to give a benefit. It is important to remember that the test for the court is "whether and if so what provision a wise and just testator would have thought it his moral duty to make in the interests of the claimant, having regard to community standards".

Justice Zammit determined that at the threshold stage, George did have a case under section 91(1) of the Act and that Mrs Warriner had a responsibility to make provision for his maintenance and support. He did however note that the relationship between parent and child changes when the child leaves home and that a child does not cease to be a natural recipient of parental ties, affection or support as the bonds of childhood are relaxed.

If an adult child remains a dependent of the parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death but where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect a parent to provide a buffer against contingencies or where a child has been unable to accumulate superannuation or to make other provision for his or her retirement, then something to assist in

retirement where otherwise he or she, would be left destitute. That said, there was no obligation upon Mrs Warriner to have treated both children equally. It was George's obligation to show that Mrs Warriner failed by her Will to make adequate provision for his maintenance and support.

After finding that there was no evidence of estrangement between George and Mrs Warriner and that there was no evidence that George had abandoned Mrs Warriner because of indifference or some deliberate, dilatory conduct, it was a relationship in which there was a weakening of the parent/child bond. Circumstances kept George and Mrs Warriner apart. Nor was it a case where George callously withheld his love and support from Mrs Warriner in her declining years. There was no hostility. The lack of contact was in part explicable by the actual geographical distance between George and his mother. However the evidence was that only minimum efforts were made by George to keep in contact with her, even at times in her life when she was placed in care after her leg had been amputated. George's failure to keep up regular contact did not demonstrate that there was an estrangement or hostility between George and Mrs Warriner. Rather it was a relationship which given George's commitment and obligations to his family in the Philippines, suffered from the strains of distance.

Jean was psychologically dependent and on the aged pension. It was accepted that Jean contributed to her mother's welfare after she moved into a nursing home in 1999 and assisted her with other financial and non-financial matters. The court accepted that Mrs Warriner was aware that Jean would consider suicide if she did not remain in the property. The only evidence before the court in relation to her reasons for effectively omitting George from the Will was that she was concerned about Jean's mental health and the possibility she would harm herself if the house was not left to her. George had a normal mother and son relationship with Mrs Warriner, was not dependent on her and nor did he receive any financial support from his mother at the date of her death. His relationship with Mrs Warriner after he left Australia in 1993 until her death in August 2012 was not close and for many years his involvement in her life was virtually non-existent.

In this case, even on George's evidence, Mrs Warriner understood and considered Jean's mental health issues and the need to ensure that she was able to continue to live in the property. Jean remained dependent on her mother to provide a home for her and even though the court accepted George had fallen on hard times and that he had some financial need there was no obligation upon Mrs Warriner to treat all of her children equally. It was not contested that the Australian pension George received would go further in the Philippines than in Australia.

Despite this George's application was dismissed.