

JS R O D E R
B a r r i s t e r

5 March 2007

Ms VA Varga
Treloar & Treloar
Solicitors
22 Grenfell Street
ADELAIDE 5000

Dear Vanessa

re: **Est E Stiliano**

It seems to me that the substantive questions which arise are:

1. were the "gifts" of the Greek land effective so that the titles in question did not form part of the deceased's estate?
2. if the Greek land *is* part of the estate, who is beneficially entitled to it?
3. what is the position with respect to the proceeds of sale of the deceased's interest in the house?
4. from where are the costs of the administration to be paid?

On the materials that have become available it seems to me that the answers to all four questions are now relatively straightforward.

(1) The "gifts"

Where properties were sold during the deceased's lifetime and the proceeds given to the person whose name was written on the title there can be no doubt that an effective gift was made.

Similarly, there can be no doubt that there was no gift of those properties in respect of which there was no writing.

As to the other properties, as a matter of Australian law there was no gift, because everything necessary to complete the gift was not done in the deceased's lifetime. There is one qualification, as a matter of Australian law – where there has been an incomplete gift during the lifetime and the donor names the donee as his or her

HOWARD ZELLING CHAMBERS

PHONE: (08)8211 7677 FAX: (08)8212 9700 E-MAIL: sroder@hzc.com.au
11TH FLOOR, 211 VICTORIA SQUARE, ADELAIDE, SOUTH AUSTRALIA, 5000

executor the gift is perfected upon the donee obtaining a grant of probate. That is the so-called "rule in *Strong v Bird*" – *Benjamin v Leicher* (1998) 45 NSWLR 389; Meagher, Gummow & Lehane's, *Equity: Doctrines and Remedies*, 4th ed, 2002, ch 29.

The position is different when considering gifts of foreign properties. As a matter of Australian law, Australian Courts will apply the law of the jurisdiction in which the property is situated (the "*lex situs*") – Nygh & Davies, *Conflict of Laws in Australia*, 7th ed, 2002, ch32. So, the question is what is the Greek law about gifts of land?

I understand from the letter of Pantazis-Kanellopoulos & Partners dated 20 February 2007 that as a matter of Greek law no effective gift has been made.

(2) Who is beneficially entitled to the Greek land?

There is no doubt that if it has not been effectively gifted during the deceased's lifetime (and I think that that conclusion is almost inevitable) that the land falls into the residuary estate of the deceased. Under the will Mr Philip Stilianos takes the residuary estate.

However, Australian law again is that Australian Courts will apply Greek law relating to succession to land situated in Greece – Nygh & Davies, p680.

I understand from the email of Pantazis-Kanellopoulos & Partners dated 24 February 2007 (which is consistent with advice about Greek law that I have received in other matters) that the effect of Greek law in the circumstances is that one half of the interest in the land passes pursuant to the will and that the other passes to the deceased's children (and George's "share" to his children). The effect is that Mr Philip Stilianos is entitled to 60% of the properties and that his siblings are entitled to the balance.

(3) Proceeds of sale of the interest in the house

The sale occurred while the deceased was alive. The consequence is that when she died she did not own any interest in 31 Halifax Avenue and the gift to Sara and Shamona in clause 3(b) of the will fails.

Because the sale was effected by Public Trustee as administrator pursuant to an order of the Guardianship Board Sara and Shamona are entitled to seek an order

under sec 43(1) of the *Guardianship and Administration Act, 1993*, which provides:

“Where at the death of a protected person or former protected person who died leaving a will it appears that, in consequence of any dealing with the estate by an administrator, the share of any beneficiary in that estate under the will has been affected, the Supreme Court may, on application by an interested person, make such orders as it thinks just to ensure that no beneficiary gains a disproportionate advantage, or suffers a disproportionate disadvantage, of a kind not contemplated by the will, in consequence of the estate having been subject to administration under this Division.”

In the present case the proceeds of sale have been held by Public Trustee in a separate account and are clearly identifiable as representing the deceased's interest in the property.

If Mr Philip Stilianos (the sole residuary beneficiary) consents, the proceeds can be applied for the benefit of Sara and Shamona.

In the absence of consent, an application will have to be made on behalf of Sara and Shamona. In the circumstances I think that there is no doubt that the order would be made and it would seem to be an undesirable waste of money on costs to require the application to be made. That, however, is a matter for Mr Philip Stilianos.

(4) Costs of administration

The costs of administration of the estate are payable out of the residuary estate. It is highly unlikely that the Court would order that any of those costs be borne by the proceeds of sale of the interest in the house, because to do so would be to impose a

“disproportionate disadvantage, of a kind not contemplated by the will”

on Sara and Shamona.

That being the case, the costs will be borne by the Greek properties. Pantazis-Kanellopoulos & Partners confirm (email 24 January 2007) that that is consistent with Greek law. They further say that if the beneficiaries will not cooperate the executor may apply to the Greek Court for an order for sale for the purpose of paying administration expenses (letter 20 February 2007).

Again, it would seem to be in the interests of all beneficiaries to co-operate in agreeing that the costs be borne by the Greek properties - but that is a matter for them. If they do not agree, the executor will have to take out the necessary application in the Greek Courts.

Ongoing administration of estate

While this not one of the questions that arises on the papers, it is apparent that there is some dissatisfaction with Mrs Itsines continuing as executor. Having taken out probate, she cannot retire as executor. She could, however, apply for an order approving the appointment of Public Trustee in her place (*Public Trustee Act, 1995*, sec 15). It might be worth canvassing the views of the family on such an appointment.

Summary

In my opinion the answers to the questions in issue are now clear. I suggest that you circulate this advice to all of the members of the family, asking for agreement on the way that the matter proceed from here, with a view to avoiding further substantial costs in obtaining the orders that would otherwise have to be sought.

Regards,

A handwritten signature in cursive script, appearing to read "Alve Roder". The signature is written in dark ink and is positioned to the right of the word "Regards,".