

Dissecting Decisions

WILLS & ESTATES



In the Estate of Linda Vera Frencken (Deceased) [2017] SASC 160

By Sarah Annicchiarico & Marianna Danby

In a nutshell: defamatory words in a Will may not be struck out if they serve another purpose.

A grandmother's Will included a statement which read:

"I declare that I have made no provision for my grandson [A.B.V.Z.] as he stole a number of valuable items including jewellery from me and I have not spoken to him since that date and we no longer have a meaningful relationship."

The name here has been abbreviated to the initials to avoid further embarrassment to the man in this instance.

Upon the grandmother's death, an application was made by the executor to the Court to have this statement struck from the Will, which was to be admitted

to Probate. The Will was not rectified to omit the "offensive or libellous nature" of the sentence because, as quite simply stated by his Honour Stanley J:

"the words do not represent an attempt by the deceased to use her Will as a vehicle for libel, but rather are used to explain the terms of her Will".

The neat difference is that even where the criteria allowed the Courts to use their discretion to omit the words, there are further considerations that will weigh in differently with each case. Interference with a testator's testamentary affairs, for example, is to be kept to a minimum and therefore because those blasphemous words provided and supported a cause or reason in the testamentary wishes, they were there to stay.

A beautiful juxtaposition played out in this case whereby his Honour Stanley J observed that where there is a more serious accusation (for instance an alleged criminal offence), the more weight was to be given to the testator's wishes. It was the deceased's intention to omit the man from her Will and to have her bounty aptly divided. To omit the words instructing this instead would give the effect of allowing the man to claim further provision out of her estate. This would be seen as a grand disregard to her testamentary wishes.

The party line we are left with to reflect upon is that:

"The omission of the words would conceal rather than reveal the deceased's testamentary purpose."

continued overleaf...

Take Away Message: originally an application was made to the Supreme Court to have the Will rectified so that this sentence was omitted to save the grandson embarrassment. It seems however, that by highlighting the very words causing havoc, it has allowed the expressive sentence to be realised and recognised by reverberation through the larger community.

This is a timely moment to stop and reflect on the real consequences of legal actions. If you are confronted with a similar situation in a Will, we advise that you or the executor seek legal advice before you propose to use a public platform to rectify a private matter.



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