

CIVIL JURISDICTION

BEFORE MR JUSTICE MACKENZIE

BRISBANE, 27 APRIL 1990

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IN THE MATTER of "The Succession Act 1981-1987"

- and -

IN THE MATTER of the Rules of the Supreme Court

- and -

IN THE MATTER of the Will of DOREEN BYRNES formerly of 262 Rainbow Street, Sandgate, Brisbane in the State of Queensland, Widow deceased.

JUDGMENT

HIS HONOUR: In this matter I order that the words "I give devise and bequeath the whole of my estate both real and personal of whatsoever nature and wheresoever situate or over which I may have any power of appointment this position or control unto and to the said Beryl Duffy absolutely" be omitted from the probate copy of the will.

I further order that the order of the Deputy Registrar dated 22 September 1989 be varied so that the Grant of Probate of the will, subject to the formal requirements of the registrar, issues in accordance with these orders.

I publish my reasons.

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IN THE SUPREME COURT OF QUEENSLAND

No. E1392 of 1989

Before Mr. Justice Mackenzie

IN THE MATTER of "The Succession Act of 1981 to 1987

- and -

IN THE MATTER of the Rules of the Supreme Court

- and -

IN THE MATTER of the Will of DOREEN BYRNES formerly of 262  
Rainbow Street, Sandgate, Brisbane in the State of  
Queensland, Widow deceased

JUDGMENT - MACKENZIE J.

Delivered the 27th day of April, 1990.

CATCHWORDS:

Solicitor: S.D.M. Shepherd (Solicitor) of Young Shepherd  
& Associates for applicant

Hearing date: 10th April, 1990.

IN THE SUPREME COURT OF QUEENSLAND

No. E1392 of 1989

IN THE MATTER of "The Succession Act of 1981 to 1987

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Rainbow Street, Sandgate, Brisbane in the State of  
Queensland, Widow deceased

JUDGMENT - MACKENZIE J.

Delivered the 27th day of April, 1990.

The substantial question in this application is whether a paragraph in the deceased's will should be omitted on the basis that it was accidentally or inadvertently inserted when the will was made. The application is not opposed and if granted will work against the applicant executrix's interests and in favour of the other beneficiaries under the will.

The will appointed Beryl Duffy, a daughter of the deceased, "to be sole executrix and trustee of the will". Then the following provisions appear, the former being that whose omission is sought.

"I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate or over which I may have any power of appointment disposition or control unto and to the said BERYL DUFFY absolutely.

I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate or over which I may have any power of appointment disposition or control unto and to the use of my trustee upon the following trusts:- ..."

The latter provision is inconsistent with a disposition to Beryl Duffy absolutely.

Evidence was placed before me to establish that the provision in question was inserted by accident or inadvertence. It consisted of an affidavit of the solicitor who prepared the will, Peter Harley Young, deposing to the instructions of the deceased. The handwritten notes of the instructions made by Mr. Young at the time were exhibited. Presumably in providing such evidence the applicant had in mind the remarks of Thomas J. in Re Allen (1988) 1 Qd.R. 1 at 3.

The evidence indicates clearly that the intention of the testatrix at the time when she gave the instructions

was to dispose of her estate in the manner required of the trustee under the will and not to give, devise and bequeath it to the executrix absolutely.

The explanation given for inclusion of the provision which is sought to be omitted is that a new word-processing system had been brought into operation at about the time when the instructions were taken and that it was due to inadvertence in the operation of this machine that the provision in question was printed in the will.

A request for probate was made on 1st September, 1989. The Deputy Registrar's fiat was granted and the draft grant was settled on 22nd September, 1989. The present application was instituted by summons filed on 21st December, 1989 which was within six months of the grant. (See s. 31(2) of the Succession Act 1981-1987.)

The power to omit words accidentally or inadvertently inserted in a will is of long standing. Section 31 of the Succession Act recognises the existence of this power and extends it to a case, not previously recognised by the courts, where it is desired to insert words accidentally or inadvertently omitted from the will. However, it is not an unrestricted power of rectification.

Where it is desired to have words omitted from a will, the power extends only to cases where the will contains words which the testator did not intend to use as distinct from cases where it contains what he intended to say, although those words may not accurately convey his actual intention (cf. Re Allen (supra); Re Bradshaw (unreported, Derrington J., Supreme Court, 28th November, 1989)).

As Thomas J. said in Re Cummins (unreported, Supreme Court, 23rd November, 1987) the most familiar category of cases is where the testator's actual instructions can be shown to be different from the contents of the will as drawn.

On the material before me I am satisfied that the words sought to be omitted did not represent the testator's instructions and that it is appropriate to remove them. I find that they were accidentally or inadvertently inserted in the will.

Accordingly, I order that the words:-

"I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate or over which I may have any power of appointment disposition or control unto and to the said BERYL DUFFY absolutely."

be omitted from the probate copy of the will.

I further order that the order of the Deputy Registrar dated 22nd September, 1989 be varied so that the grant of probate of the will (subject to the formal requirements of the Registrar) issues in accordance with these orders.