

King v De Jager: Implications for Religion-Based Discrimination in Wills

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Online ISSN
1727-3781

P·E·R

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Date Submission

15 August 2021

Date Revised

2 March 2022

Date Accepted

2 March 2022

Date published

14 April 2022

Editor Prof G Viljoen

How to cite this article

Osman F and G Effendi "King v De Jager: Implications for Religion-Based Discrimination in Wills" *PER* / *PELJ* 2022(25) - DOI <http://dx.doi.org/10.17159/1727-3781/2022/v25i0a11989>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2022/v25i0a11989>

Abstract

In *King v De Jager* 2021 5 BCLR 449 (CC), the Constitutional Court held that a clause in a private will that unfairly discriminated against beneficiaries based on gender was unlawful and unenforceable. This note considers the implications of the judgment for religion-based discrimination in wills, and in particular wills that incorporate the gender-discriminatory Islamic system of inheritance. After explaining the Constitutional Court judgment, the note argues that the Court was well within its powers to consider the enforceability of discrimination in the private sphere. More importantly, we argue that the case rings a bell of caution regarding gender-discriminatory provisions in private wills. Gender-based discrimination in Islamic inheritance law perpetuates disadvantage against a historically disadvantaged group, and the courts and legislature have been emphatic in their stance against gender discrimination in inheritance. The note thus argues that a testator's religious beliefs are not enough to tip the scales and render gender discrimination justifiable. We urge individuals who want to dispose of their assets following their religious beliefs to seek estate planning advice, cognisant of the potential impact of *King v De Jager* CC.

Keywords

Freedom of testation; public policy; gender-based discrimination.

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1 Introduction

Imagine this scenario: Safiyyah Ebrahim, a devout Muslim woman, has two children, a son and a daughter, both of whom are financially independent and live on their own. When she dies, she provides in her will that her estate is to devolve in terms of Islamic law. The Master of the High Court accepts a certificate from a religious body as to the distribution of the estate, and Safiyyah's estate is distributed so that her son receives double her daughter's inheritance.¹ Her daughter challenges the distribution as being unenforceable because it conflicts with public policy. Most South African lawyers would have said that Safiyyah's daughter's prospects of success were slim, given the importance and centrality of freedom of testation in South African law. However, this must be reconsidered given the recent Constitutional Court judgment of *King v De Jager*,² in which the Court held that a clause that unfairly discriminated against beneficiaries based on gender was unlawful and therefore unenforceable.³

This note considers whether the *De Jager* judgment aligns with South Africa's current freedom of testation jurisprudence. It thereafter analyses the implications of the case for religion-based discriminatory wills and testators such as Safiyyah, but first the note provides an analysis of the judgment, including that of the court *a quo*.

2 Facts

The case concerned a will executed over a hundred years ago in 1902, which contained a *fideicommissum* substitution. The testators bequeathed various properties to their six children – four sons and two daughters.⁴ The *fideicommissum* provided that the grounds/land (hereafter the *fideicommissary* property) left to their sons and daughters would devolve to

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¹ The acceptance of a certificate from a religious body as to the distribution of an estate may breach the requirement that a testator exercises her freedom of testation personally. However, in terms of practice these provisions are currently accepted at the Master's offices and wills are executed accordingly. It is beyond the scope of this note to discuss whether such provisions contravene the prohibition of delegation of testamentary power.

² *King v De Jager* 2021 5 BCLR 449 (CC) (*King v De Jager* CC).

³ *King v De Jager* (CC).

⁴ *King v De Jager* CC para 3.

their children's sons upon the death of the children, and upon the death of the grandsons to their sons.⁵ In the event that any son did not leave a male descendant, his share would go to his brothers or their sons.⁶ It was thus clear that beyond the first generation the *fideicommissary* property would not devolve upon female descendants.⁷ The will was implemented as such until 2015.⁸ In 2015 a grandson of the testators (hereafter referred to as the deceased) died and a dispute arose as to the devolution of the *fideicommissary* property.⁹ In terms of the deceased's will, the deceased's five daughters inherited equally from the estate, including the *fideicommissary* property.¹⁰

The deceased's daughters claimed the *fideicommissary* property based on the deceased's will.¹¹ They claimed that the *fideicommissum* in the testator's will was discriminatory in that it excluded female descendants from inheriting.¹² On the other hand, the deceased's nephews claimed that as the deceased had no sons, the *fideicommissary* property devolved upon them in terms of the testator's will.¹³

3 Issue

The majority judgment, per Jafta J, articulated the issue as being whether a *fideicommissum* that gives rise to unfair discrimination (in a private will) may be enforced in the light of section 9 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).¹⁴ The minority judgment, per Mhlantla J, articulated the issue as being whether "a discriminatory out-and-out disinheritance provision in a private will can be declared unenforceable based on public policy".¹⁵ The majority judgment thus approached the issue through a direct application of the *Constitution*¹⁶ and the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (the *Equality*

⁵ *King v De Jager* CC para 4.

⁶ *King v De Jager* CC para 4.

⁷ *King v De Jager* CC para 5.

⁸ *King v De Jager* CC para 6.

⁹ *King v De Jager* CC para 7.

¹⁰ *King v De Jager* CC para 113.

¹¹ *King v De Jager* CC para 114.

¹² *King v De Jager* CC para 7.

¹³ *King v De Jager* CC paras 7, 114.

¹⁴ *King v De Jager* CC para 97.

¹⁵ *King v De Jager* CC para 19.

¹⁶ *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

Act),¹⁷ while the minority judgment evaluated the issue against the common law yardstick of public policy, as imbued with constitutional values.¹⁸

4 High Court

Bozalek J delivered the judgment in the High Court and commenced the discussion of the law by underscoring the importance of freedom of testation in the South African law of succession.¹⁹ The Court noted the limitations of freedom of testation and particularly that provisions contrary to public policy will not be given effect.²⁰ In this regard, the Court noted several cases in which discriminatory clauses in public testamentary trusts were not given effect.²¹ The court distinguished the discriminatory treatment of certain descendants in the case at hand from trusts that were public in nature, had an indefinite life and discriminated against one or more sectors of society.²²

Bozalek J then discussed the constitutional provisions and the *Equality Act*, which prohibit discrimination based on gender.²³ However, the Court found that the *Equality Act's* reference to discrimination in the context of succession pertains to systems of discrimination such as primogeniture found in customary law as opposed to that found in private wills.²⁴ The discriminatory provisions of the will were presumed to be unfair because of the constitutional presumption of unfairness where the discrimination is based on a listed ground such as gender.²⁵ However, the discrimination was held to be reasonable and justifiable.²⁶ The Court relied upon the importance of freedom of testation, the private nature of the will, and the limited application of the discriminatory provisions in its justifiability analysis.²⁷ For similar reasons, the Court found that the provisions did not conflict with public policy.²⁸ Accordingly, the High Court dismissed the application.²⁹ The Court appeared unwilling to second-guess private dispositions of property as it viewed this as a significant incursion into

¹⁷ *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (the *Equality Act*).

¹⁸ *King v De Jager* CC para 40.

¹⁹ *King v De Jager* 2017 6 SA 527 (WCC) para 28 (*King v De Jager* WCC).

²⁰ *King v De Jager* WCC para 28.

²¹ *King v De Jager* WCC paras 29-37.

²² *King v De Jager* WCC para 47.

²³ *King v De Jager* WCC paras 48-52.

²⁴ *King v De Jager* WCC para 53.

²⁵ *King v De Jager* WCC para 58.

²⁶ *King v De Jager* WCC paras 80.

²⁷ *King v De Jager* WCC para 74-75.

²⁸ *King v De Jager* WCC paras 81.

²⁹ The High Court made no order as to how the *fideicommissary* property should devolve though a declaratory order in this regard was sought.

freedom of testation, which might result in courts having to rewrite the provisions of a testator's will.

5 Supreme Court of Appeal

The Supreme Court of Appeal dismissed the appeal with no written reasons, effectively endorsing the reasoning of the High Court.³⁰ The majority judgment criticised the lack of reasons as a failure of the Supreme Court of Appeal to fulfil its obligation to provide reasons for its decision,³¹ particularly as it viewed the High Court's judgment as erroneous and "inaccurate in the articulation of its reasons".³² Indeed, the failure of the Supreme Court of Appeal to provide reasons prevented a proper ventilation of the matter and crystallisation of appropriate orders from which the Constitutional Court could draw in its judgment and arguably diminished the jurisprudence of the Constitutional Court.³³

6 Constitutional Court

The Constitutional Court was unanimous in its finding that the provisions of the will could not be enforced but was divided in its approach.

6.1 Majority (*per Jafta J*)

The majority judgment, penned by Jafta J with four other judges concurring, held that currently under the common law, unlawful wills and those contrary to public policy are unenforceable – thus rendering any development of the common law as argued for by the minority judgment and discussed later unnecessary.³⁴ The majority judgment firstly affirmed the constitutional protection and importance of freedom of testation, allowing testators to dispose of their property however they wish.³⁵ But freedom of testation must be exercised lawfully, and a testator cannot "after departing from this world,

³⁰ *King v De Jager* CC para 105.

³¹ *King v De Jager* CC para 105.

³² *King v De Jager* CC para 102. Also see paras 99-104.

³³ The Constitutional Court may be approached as a court of first instance, but it functions primarily as an appellate court. The Constitutional Court has previously stated that "experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised"; see *Bruce v Fleecytex Johannesburg* 1998 2 SA 1143 (CC) para 8. The Constitutional Court presumably expected lower courts to canvass issues and deliver judgments which could be considered on appeal. The lack of reasons by the Supreme Court of Appeal further deprived the litigants of an opportunity to refine their arguments on appeal.

³⁴ *King v De Jager* CC para 90.

³⁵ *King v De Jager* CC paras 123-124.

do what she could not achieve in her lifetime".³⁶ The majority thereafter considered whether the clause was inconsistent with the *Constitution* and thus unenforceable. It found that the discrimination based on gender created a presumption of unfair discrimination.³⁷ The respondents offered no justification for the discrimination, and rather conceded that the clause caused unfair discrimination.³⁸ The majority underscored the importance of the constitutional prohibition on direct or indirect discrimination on the grounds listed in the *Constitution* and noted that it restricts how testators may dispose of their property.³⁹

Furthermore, testamentary provisions may not violate the *Equality Act*, which prohibits unfair discrimination generally, and specifically the creation of a system "preventing women from inheriting family property".⁴⁰ The Constitutional Court rejected the High Court's interpretation that the clause did not create a system precluding women from inheriting family property as "overly narrow".⁴¹ Instead, adopting a purposive interpretation of the section that aligned with the section's general prohibition of unfair discrimination based on gender, the Constitutional Court found that excluding female descendants from inheritance violated the *Equality Act* and is unlawful.⁴² The majority thus overturned the High Court's judgment that there was no violation of the *Equality Act*.⁴³ The majority concluded that the unlawfulness – based on either inconsistency with the *Constitution* or a violation of the *Equality Act* – rendered the clause unenforceable.⁴⁴

The Court emphasised the importance of freedom of testation and the rights of testators to disinherit children, provided the disinheritance does not amount to unfair discrimination,⁴⁵ but the majority judgment criticised previous cases that sought to distinguish between trusts in the private and public sphere and explicitly stated that the private nature of bequests could never justify unfair discrimination.⁴⁶ A public trust deed that violates the *Constitution* has, according to the Court, the same impact as a private trust deed, and both are equally invalid.⁴⁷ However, this does not require

³⁶ *King v De Jager* CC para 125.

³⁷ *King v De Jager* CC para 130.

³⁸ *King v De Jager* CC para 131.

³⁹ *King v De Jager* CC paras 132-133.

⁴⁰ *King v De Jager* CC paras 134-135.

⁴¹ *King v De Jager* CC paras 135-136.

⁴² *King v De Jager* CC para 137.

⁴³ *King v De Jager* CC para 137.

⁴⁴ *King v De Jager* CC para 137.

⁴⁵ *King v De Jager* CC para 144.

⁴⁶ *King v De Jager* CC paras 148-153.

⁴⁷ *King v De Jager* CC para 150.

testators to distribute their property equally to their children or entail an entitlement to property on the part of children.⁴⁸ Testators may disinherit children or bequeath property in unequal shares provided the dispositions do not constitute unfair discrimination.⁴⁹

In summation, the majority judgment found that the clause discriminated based on gender, the discrimination was conceded to be unfair, and the clause was consequently unlawful and unenforceable.⁵⁰ The effect of the invalidity is that the *fideicommissary* property is regarded as having been transferred to the deceased without the *fideicommissary* condition. The property thus formed part of the deceased's estate to be distributed in terms of his will to his daughters in equal shares.⁵¹

6.2 Victor AJ (separate judgment concurring with the majority judgment)

Victor AJ concurred with the majority judgment but delivered a separate judgment in terms of the *Equality Act*. She held that the principle of constitutional subsidiarity requires that the framework of freedom of testation be analysed in terms of the *Equality Act*.⁵² According to Victor J, the provisions of the will constituted discrimination under the *Equality Act* as they withheld a benefit, namely being disqualified from a benefit on the basis of gender.⁵³ Considering the vulnerability of women in society, the historical discrimination against women in the context of inheritance, and the systemic patterns of disadvantage based on gender and sex, she found that the exclusion of women was egregious.⁵⁴ The only legitimate purpose that might be advanced by giving effect to the provisions would be freedom of testation.⁵⁵ Then, after a brief discussion of ubuntu and gender equality, Victor J concurred in the order of the majority judgment.

⁴⁸ *King v De Jager* CC para 153.

⁴⁹ *King v De Jager* CC para 154.

⁵⁰ *King v De Jager* CC para 156.

It is unclear whether the court will always accept a concession that discrimination is unfair or may exercise its *mero motu* powers to evaluate whether the discrimination is fair. An erroneous concession of unfair discrimination may have profound implications for third parties and the development of the law, but a discussion of this is beyond the scope of this note.

⁵¹ *King v De Jager* CC para 158.

⁵² *King v De Jager* CC para 165.

⁵³ *King v De Jager* CC para 229.

⁵⁴ *King v De Jager* CC para 234.

⁵⁵ *King v De Jager* CC para 235.

6.3 *Minority (per Mhlantla J)*

Mhlantla J delivered the minority judgment with three judges concurring. The minority judgment commenced by noting the importance of freedom of testation and the existing restrictions thereon.⁵⁶ In the pre-constitutional era, freedom of testation was almost unlimited with courts reluctant to interfere with testamentary bequests.⁵⁷ The advent of the *Constitution* saw the enforceability of testamentary bequests, particularly in relation to public charitable trusts, being challenged on the grounds of public policy.⁵⁸ The case at hand presented the novelty of a public policy challenge to an out-an-out disinheritance in the private sphere,⁵⁹ and the minority judgment questioned whether it warranted the development of the common law.⁶⁰

Mhlantla J held that the matter should be disposed of through an indirect application of the Bill of Rights, through the vehicle of public policy infused with constitutional values.⁶¹ The reasoning was that challenges to contractual terms are through public policy, and testamentary provisions are similar to contractual provisions.⁶² She held that applying the common law notion of public policy to the novel set of facts would constitute a development of the common law warranted in terms of section 39(2) of the *Constitution*.⁶³

Mhlantla J then discussed the principle of freedom of testation. While apparently neutral, she held that the principle traditionally manifests in a patriarchal manner to disinherit women from owning property.⁶⁴ After considering comparative law from Canada, the United States of America, Germany and the Netherlands, Mhlantla J noted that freedom of testation is always limited and public policy is used in varying degrees as a limitation.⁶⁵ In South Africa, freedom of testation is considered fundamental to testate succession and is protected indirectly by the constitutional rights to property, dignity and privacy.⁶⁶ Thus, public policy which is informed by the *Constitution* is infused with the principle of freedom of testation.⁶⁷ On the

⁵⁶ *King v De Jager* CC para 23.

⁵⁷ *King v De Jager* CC paras 24-48.

⁵⁸ *King v De Jager* CC paras 29-32.

⁵⁹ *King v De Jager* CC para 33.

⁶⁰ *King v De Jager* CC para 36.

⁶¹ *King v De Jager* CC para 39.

⁶² *King v De Jager* CC paras 38-39.

⁶³ *King v De Jager* CC paras 42-50.

⁶⁴ *King v De Jager* CC paras 53-55.

⁶⁵ *King v De Jager* CC paras 56-62.

⁶⁶ *King v De Jager* CC paras 64-65, 67-69.

⁶⁷ *King v De Jager* CC para 69.

other hand, the *Constitution* embeds the values of constitutional supremacy, equality, non-racialism and non-sexism in both the public and private sphere. Thus courts have to balance freedom of testation against the principle of non-discrimination in the private sphere.⁶⁸ Mhlantla J held that an out-and-out disinheritance clause in a private will had to be examined for enforceability on public policy grounds.⁶⁹

Mhlantla J did this by affirming the centrality of equality in the *Constitution* and the country's international obligations to address discrimination against women.⁷⁰ She acknowledged the private nature of testamentary bequests, which relate to intimate, personal relationships and stated that where courts intervene in private bequests there ought to be a "lower level of judicial scrutiny".⁷¹ However, where bequests discriminate against descendants – whom the testator has never met – solely based on immutable characteristics such as womanhood, the bequests bear greater scrutiny.⁷² Mhlantla J held that it could "never accord with public policy for a testator, even in the private sphere, to discriminate against lineal descendants unknown to her or him purely on the ground of gender". She held that the discrimination was against public policy and unenforceable and the property should devolve upon the deceased's daughters in equal shares.

7 Did the Constitutional Court overstep its mark?

The *De Jager* judgment finds that freedom of testation is restricted by the constitutional prohibition on unfair discrimination. While this may appear remarkable at first, we argue that the judgment is not anomalous and rather congruent with our current jurisprudence.

First, freedom of testation is undoubtedly hailed as a central feature of the South African law of testate succession. Open any textbook on the South African law of succession or read any judgment pertaining thereto, and there is a foregrounding of the importance of freedom of testation in our law – as is found in the minority and majority judgments.⁷³ The principle of freedom of testation is further supported by the notions that the courts must give effect to the testator's wishes as appears from the testator's will. The courts

⁶⁸ *King v De Jager* CC para 70.

⁶⁹ *King v De Jager* CC para 70.

⁷⁰ *King v De Jager* CC paras 76-80.

⁷¹ *King v De Jager* CC para 82.

⁷² *King v De Jager* CC paras 83-84.

⁷³ Corbett, Hofmeyr and Kahn *Law of Succession* 39; Jamneck *et al Law of Succession* 125; De Waal and Schoeman-Malan *Law of Succession* 128.

have no general power to vary the terms of a will.⁷⁴ Furthermore, in the constitutional era freedom of testation finds indirect protection in section 25 of the *Constitution*.⁷⁵

Nonetheless, freedom of testation is – and always has been – subject to limitation. First, there are indirect limitations on freedom of testation in the form of maintenance claims from children and surviving spouses. Children and spouses may have claims against the deceased estate even where they have been disinherited by the deceased.⁷⁶ These claims, which are paid out before any bequests, reduce the size of the estate available for distribution – thus indirectly limiting how the testator may dispose of his estate. More directly, section 37C of the *Pension Fund Act*⁷⁷ excludes certain death benefits from the deceased's estate and confers the power on the trustees of the relevant fund to distribute the benefits.⁷⁸

A more pertinent consideration for the purposes of this note is the test of public policy. Bequests contrary to public policy (*contra bonos mores* or against the good morals of society) are unenforceable.⁷⁹ Public policy changes from time to time and it is the community's sense of justice, as reflected by the legislature and in the courts, and today rooted in our *Constitution*.⁸⁰ Previously, courts have found general restraints on marriages or conditions aimed at interfering in a marriage to be contrary to public policy and unenforceable.⁸¹ The courts have thus used public policy to test the enforceability of bequests in the private sphere.

Testamentary intent, motive or purpose are also crucial to assessing whether a bequest is against public policy.⁸² Clauses which may inadvertently discourage marriage or disrupt the marital relationship but

⁷⁴ Du Toit 2012 *Tul Eur & Civ L F* 110. Section 13 of the *Trust Property Control Act* 57 of 1988 empowers the court to vary trust provisions where the provisions bring about consequences the founder did not contemplate or foresee and the provision is against the public interest. This deals with trust provisions specifically and does not empower the court to alter the provisions of a will. A discussion of s 13 of the *Trust Property Control Act* is beyond the ambit of this note.

⁷⁵ *Ex parte BOE Trust Ltd* 2009 6 SA 470 (WCC); Du Toit 2001 *Stell LR* 233-234; Rautenbach 2014 *Acta Juridica* 145-146.

⁷⁶ *Maintenance of Surviving Spouses Act* 27 of 1990; Jamneck *et al Law of Succession* 133.

⁷⁷ *Pension Funds Act* 24 of 1956.

⁷⁸ For a discussion of the statutory limitations of freedom of testation, see Corbett, Hofmeyr and Kahn *Law of Succession* 40-41.

⁷⁹ Jamneck *et al Law of Succession* 127-132.

⁸⁰ *Minister of Education v Syfrets Trust Ltd* 2006 3 All SA 373 (C) para 24.

⁸¹ Du Toit 2012 *Tul Eur & Civ L F* 111; Jamneck *et al Law of Succession* 128-130.

⁸² Du Toit 2012 *Tul Eur & Civ L F* 111.

were never intended to do so have been held to be valid and not in contravention of public policy.⁸³ Furthermore, historically, testamentary forfeiture clauses which provided that a beneficiary forfeited benefits should they marry a person of a given race, nationality or religion were considered enforceable and not against public policy.⁸⁴

In the constitutional era the curtailment of freedom of testation continued but with public policy now informed by constitutional values. Courts in the constitutional era have refused to enforce bequests in testamentary charitable trusts that discriminated based on race, gender and religion.⁸⁵ But as the High Court in *De Jager* correctly noted, these cases involve trusts operating in the public sphere, leaving commentators to believe that such trusts operate under a greater level of scrutiny than schemes in the private sphere.⁸⁶

But this does not mean that the private sphere is totally immune from scrutiny. Could we reasonably expect courts to uphold blatantly unfair discriminatory bequests? Imagine a testator who discriminated between his grandchildren based on race; a testator who provided that only grandchildren of pure white descent would inherit, as they were a superior race. Should such a bequest be upheld? De Waal argues yes, dispositions that discriminate on racial grounds, gender, sexual orientation or religious convictions are permissible in the private sphere.⁸⁷ He argues that the testator's freedom of testation may limit a beneficiary's equality rights because it is necessary to give effect to freedom of testation; nobody has a fundamental right to inherit; testators are in the best position to select their beneficiaries; and it avoids the practical problems associated with courts' rewriting wills.⁸⁸ But surely we have an interest in courts' refusing to enforce such gratuitously racist bequests. We echo the majority judgment's

⁸³ Du Toit 2012 *Tul Eur & Civ L F* 111.

⁸⁴ Du Toit 2001 *Stell LR* 225-227.

⁸⁵ *Minister of Education v Syfrets Trust Ltd* 2006 3 All SA 373 (C); *Emma Smith Educational Fund v The University of KwaZuluNatal* 2010 6 SA 518 (SCA). For a discussion of the cases, see Rautenbach, Du Plessis and Pienaar 2006 *SAJHR* 99; Rautenbach 2014 *Acta Juridica* 146-152. It should be noted that the courts in the aforementioned cases acted in terms of s 13 of the *Trust Property Control Act* 57 of 1988, which empowers a trust to vary the provisions of a trust if the provisions of a trust bring about consequences which the founder of the trust did not foresee and which conflict with the public interest. Nonetheless, the cases are instructive of the courts' understanding of public policy. For a discussion of s 13 see Du Toit 2005 *JJS* 39.

⁸⁶ Rautenbach 2014 *Acta Juridica* 153; De Waal 2010 *Annual Survey of South African Law* 1198.

⁸⁷ De Waal "Law of Succession and the Bill of Rights" 3G9.

⁸⁸ De Waal "Law of Succession and the Bill of Rights" 3G9.

statement that racist conduct considered unlawful when the testator is alive should not become lawful upon the testator's death. Imagine a scenario where an individual while alive offered his property for sale only to his white children on racist grounds such as those discussed above. The children have no right to be offered the property for purchase, but we argue that our courts would scrutinise carefully such unfairly discriminatory conduct. Why should a testator be allowed to execute such provisions in his will? Of course, the matter is likely to be more nuanced – bequests are unlikely to discriminate so blatantly, and testamentary intent may be hard to determine as we discuss in the next section.

Up until the *De Jager* case, courts had been afforded an opportunity to consider only those discriminatory provisions that operated in the public sphere. *De Jager* simply appears to be the first time a court has been asked to consider discrimination in the private sphere. We concur with the reasoning of the majority on the basis that courts have always had the power to test the provisions of a will – including those operating in the private sphere – against public policy.

8 Implications of the *De Jager* judgment

The more pressing question is the implications of the *De Jager* judgment for discriminatory provisions in a will? Does the judgment sound the death knell for freedom of testation? We do not think so. On the contrary, we believe that the *De Jager* case signals that unfair discrimination in the private sphere is unlawful and unenforceable, but every bequest has to be evaluated on a case-by-case basis.

The *De Jager* case is clear that unfair discrimination in wills cannot be tolerated. But this does not prohibit discrimination that is fair. Unfortunately, in the matter at hand, no case was made on the fairness of the discrimination. Fortuitously then, courts have previously indicated when discrimination may be considered fair and enforceable. In the *BOE* case the Western Cape High Court suggested that discriminatory bursary bequests that may have served the legitimate objective of retaining the expertise of white scholars in the country and promoting the importation of skills obtained overseas may not be unfair and against public policy.⁸⁹ In *Emma Smith* the Supreme Court of Appeal removed racially restrictive clauses from an educational trust. It rejected the idea that its judgment would have

⁸⁹ *Ex parte BOE Trust Ltd* 2009 6 SA 470 (WCC) paras 14-17. The clause excluded non-white students based on race. However, the court ultimately gave effect to the testatrix's nominated substituted beneficiaries, and this was *obiter*.

a chilling effect on future private educational bequests. The Court held that it was not deciding upon cases in which a testator created a trust to benefit fellow members of his faith or children of fellow members in a club.⁹⁰ The court alluded to the fact that in certain instances – such as when the testator wants to benefit a certain group of individuals as opposed to merely excluding others – discrimination can be fair. Testamentary intent and motive are thus critical in determining the fairness of discrimination.

In the leading South African case on religion-based discrimination, the Appellate Division in *Aronson v Estate Hart*⁹¹ upheld a clause that a beneficiary would forsake his/her benefits should s/he marry a person not of the Jewish faith or forsake the Jewish faith. The judgment, rooted in the protection of freedom of testation,⁹² has been severely criticised for conflicting with the principle of freedom of religion⁹³ and allowing a testator to influence the personal and intimate decisions of beneficiaries through material incitement.⁹⁴ Du Toit⁹⁵ thus argues that a reconsideration of the judgment is long overdue, and it is doubtful whether it would be followed today.

It thus may be helpful to consider comparative jurisprudence on the issue of discriminatory bequests. In Canada, where the Charter of Rights and Freedoms does not apply to private individuals, the British Columbia Court and Ontario Court of Appeal have adopted polar opposite positions. In British Columbia courts are empowered by the *Wills Variation Act*, RSBC, 1996, C490 to make an order that is adequate, just and equitable if the will does not, in the Court's opinion, make adequate provision for the proper maintenance and support of the testator's children.⁹⁶ The phrase "adequate, just and equitable" takes into account both the legal and moral obligations of the testator, with moral claims looking at "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards".⁹⁷ Employing this standard – which sounds very similar to that of our public policy – courts have found that discrimination based on gender or cultural beliefs is not allowed and have thus varied a will to provide a greater inheritance for the

⁹⁰ *Emma Smith Educational Fund v The University of KwaZuluNatal* 2010 6 SA 518 (SCA) para 41.

⁹¹ *Aronson v Estate Hart* 1950 1 SA 539 (A).

⁹² Du Toit 2001 *Stell LR* 226.

⁹³ Joubert 1968 *SALJ* 420.

⁹⁴ Hahlo 1950 *SALJ* 242.

⁹⁵ Du Toit 2001 *Stell LR* 227.

⁹⁶ *Prakash v Singh* 2006 BCSC 1545 para 48.

⁹⁷ *Prakash v Singh* 2006 BCSC 1545 paras 49-50.

testator's daughters, which was not provided for in the will.⁹⁸ In another instance, the Court varied a will to provide an equal inheritance to a son disinherited because of his sexual orientation.⁹⁹

On the other hand, in Ontario succession laws favour adherence to the testator's intention.¹⁰⁰ The Ontario Court of Appeal has upheld a testator's disinheritance of his daughter when extrinsic evidence suggested that the disinheritance was motivated by race – his daughter had a child with a white man and the child was considered to be of mixed race.¹⁰¹ The court found that the will was not discriminatory on the face of it but even if it was, it was the testator's private and intentional disposition of property with which the Court should not interfere.¹⁰² Testamentary freedom allows testators to dispose of their property unconditionally and select beneficiaries even on discriminatory grounds.¹⁰³ Canadian jurisprudence thus yields a mixed bag rather than a determinative approach to discriminatory testamentary bequests.

We now consider our fictional testator to explore whether discrimination based on religious grounds may be considered fair. Safiyyah executes a will in accordance with her religious beliefs that discriminate based on gender. Discrimination on such a basis would be presumed to be unfair, as it is a ground listed in section 9(3) of the *Constitution*. Those seeking to enforce the will would have to demonstrate the fairness of the discrimination. In this regard, courts would have to balance Safiyyah's right to freedom of testation and religion against the beneficiary's right to equality and non-discrimination. The religious motivation for the bequest distinguishes the case from the *De Jager* case, which was devoid of any such religious rationale. It is thus critical to understand the right to freedom of religion in South Africa and whether it would protect such bequests.

Section 15(1) of the South African *Constitution* confers a right to freedom of religion and provides that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion".¹⁰⁴ The Constitutional Court has held that religious beliefs are often deeply held and personal and

⁹⁸ *Prakash v Singh* 2006 BCSC 1545.

⁹⁹ *Peden v Peden, Smith* 2006 BCSC 1713 para 53. The plaintiff was left a benefit in terms of the will, but the court held that the way the will was structured meant that it was "close to disinheritance".

¹⁰⁰ *King v De Jager* CC para 57.

¹⁰¹ *Spence v BMO Trust Company* 2016 ONCA 196.

¹⁰² *Spence v BMO Trust Company* para 72-73.

¹⁰³ *Spence v BMO Trust Company* para 75.

¹⁰⁴ Section 15(1) of the *Constitution*.

shape an individual's sense of self and identity.¹⁰⁵ They may dictate all aspects of an individual's life from dress or diet to what an individual considers his or her purpose in life or acceptable behaviour.¹⁰⁶ Thus, religious freedom is broader than just the right to hold a belief and encompasses the right to manifest a belief in practice.¹⁰⁷ The protection extends to voluntary religious practices, as such protection is consistent with the spirit of the *Constitution*, which not only permits diversity but promotes and celebrates it.¹⁰⁸ Accordingly, it is arguable that religious freedom would protect the right of individuals to dispose of their property in accordance with closely-held beliefs.

However, religious freedom is not absolute and may be limited in terms of the Bill of Rights.¹⁰⁹ For example, in *Christian Education South Africa v Minister of Education*,¹¹⁰ the Constitutional Court invalidated the defence of moderate and reasonable chastisement with the effect that Christian parents are precluded from disciplining their children in accordance with their religious beliefs. Religious practices are thus not guaranteed and may not be upheld when they conflict with the rights of others. The *Constitution* further prohibits discrimination, directly or indirectly, on the grounds, amongst others, of gender and sex.¹¹¹ The *Equality Act* also prohibits discrimination based on gender with particular reference to a system preventing women from inheriting family property and any religious practice which impairs the dignity of women and undermines equality between the sexes.¹¹² Thus, Safiyyah's testamentary freedom, even when based on her religious beliefs, may be subject to limitation.

Abduroaf analyses a will like Safiyyah's through the prism of a section 36 analysis. He argues that the will should be upheld because changing the consequences of a will would require the courts to redistribute benefits from

¹⁰⁵ *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 62. In *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 36 the South African Constitutional Court held that religious beliefs may define individuals, their conduct and relationship with others. Also see Conkle 1987-1988 *NWU L Rev* 1164; Marshall 1993-1994 *DePaul L Rev* 247.

¹⁰⁶ Osman *Freedom of Religion and the Headscarf* 10.

¹⁰⁷ *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC) para 92; *Prince v President, Cape Law Society* 2002 2 SA 794 (CC) para 38.

¹⁰⁸ *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 65.

¹⁰⁹ Section 36 of the *Constitution*.

¹¹⁰ *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC).

¹¹¹ Section 9(3) of the *Constitution*.

¹¹² Section 8(d) reads "any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child".

one beneficiary to another.¹¹³ This rewriting of a will without understanding the motivations of a testator undermines freedom of testation.¹¹⁴ The disinheritance of a beneficiary is supported by the notion that no person has a right to inherit as a testate beneficiary in South African law.¹¹⁵ He concedes that the bequest may infringe on a beneficiary's equality rights but argues that there are no less restrictive means to give effect to testators' constitutional right to practise their religion, based on the right to freedom of testation.¹¹⁶ The right to freedom of religion, freedom of testation and the right to own property, he argues, would trump the equality rights of beneficiaries.¹¹⁷ Abduroaf wrote in 2019 before the *De Jager* judgment was handed down. His arguments must be re-examined in light of the current jurisprudence and the court's willingness to strike down discriminatory bequests.

First, it should be noted that Safiyyah's intention is to execute her will in accordance with her religious beliefs and not to actively disinherit a child. Furthermore, it is often speculated that the rationale for the discrimination in Islamic inheritance law between sons and daughters is that females have a right to be cared for by their male relatives. A greater portion is thus allocated to males to enable them to discharge their obligations.¹¹⁸ There is no malice or ill-will behind Safiyyah's bequest, but rather a genuine desire to live in accordance with her deeply held religious beliefs, which are intended to protect women.

In addition, Safiyyah, knowing that her daughter would inherit less, may have given more to her daughter while alive. Would the courts nonetheless be willing to rewrite the will to ensure children inherit equally, or would they unilaterally decide the proportion of an inheritance? These are the difficulties alluded to by Abduroaf with courts rewriting wills. If the intestate rules of succession were applied, this might result in persons the testator never contemplating inheriting from the estate.¹¹⁹

Moreover, in cases like that of Safiyyah, where the children are not in financial need, it entails weighing the competing interests of the testator and

¹¹³ Abduroaf 2019 *De Jure* 264.

¹¹⁴ Abduroaf 2019 *De Jure* 265.

¹¹⁵ Abduroaf 2019 *De Jure* 265.

¹¹⁶ Abduroaf 2019 *De Jure* 265-266.

¹¹⁷ Abduroaf 2019 *De Jure* 266.

¹¹⁸ Amien 2014 *Acta Juridica* 199-200; Abduroaf 2020 *De Jure* 115. However, Abduroaf notes that there is no definitive evidence to support the justification that sons inherit more favourably because of their financial obligations; Abduroaf *Impact of South African Law on the Islamic Law of Succession* 174.

¹¹⁹ De Waal "Law of Succession and the Bill of Rights" 3G9.

the beneficiaries without taking other legal considerations into account, such as maintenance claims children may have against the deceased's estate.¹²⁰ It is arguable that for the right to freedom of testation to have any meaning, Safiyyah's discriminatory bequests must be found to be fair. As Du Toit stated, the value of freedom of testation is found when it protects the bequests of those who have beliefs that do not conform with those of the majority of society – as it would with those with conforming beliefs.¹²¹ Thus, discriminatory bequests should not be considered unfair just because the majority of the population do not agree with them. Finally, while Islamic law discriminates between sons and daughters, there are instances where women and men inherit equally, and women may at times inherit even more than men.¹²²

Nonetheless, there are several compelling countervailing arguments as to why Safiyyah's bequest should not be upheld. First, while there may be instances where men and women inherit equally in Islamic law, the issue is whether the particular bequest which discriminates between beneficiaries based on gender is unenforceable. The evaluation of whether to uphold the bequest should not be expanded to the entire Islamic system of inheritance and we caution against broad declarations that Islamic inheritance – which is complex and nuanced – is discriminatory based on a single example of a distribution. Furthermore, the fact that there are other instances where Islamic succession law does not discriminate between men or women or may indeed treat women more favourably does not render the discrimination in the bequest fair. Moreover, it should be noted that wherever the potential beneficiaries are children of the testator – which is likely to be the more common scenario – Islamic succession law discriminates based on gender.

The historical and social reality of Muslim women in South African society must also be considered. As Wood-Bodley so aptly states, "[w]here the criterion for exclusion coincides with one of the historic fault lines in South African society — such as prejudice against black persons, against women, or against gay and lesbian persons — then it is more likely that the differentiation will amount to unfair discrimination, ...".¹²³ Muslim women are a vulnerable group, who have historically suffered social and financial prejudice. Gabru notes in the context of divorce that Muslim clerics often fail to enforce the financial duties of men towards their wives and women are

¹²⁰ Corbett, Hofmeyr and Kahn *Law of Succession* 41.

¹²¹ Du Toit 2012 *Tul Eur & Civ L F* 125.

¹²² Abduroaf 2020 *De Jure* 115.

¹²³ Wood-Bodley 2007 *SALJ* 701.

often trapped in marriages where men exploit their position of power, and state law does not provide recourse.¹²⁴

In the context of succession, male heirs, like sons and brothers who are meant to be responsible for their mothers and sisters, often jettison their responsibilities, leaving them financially destitute. The (oft-neglected) responsibilities of the male heir to care for relatives do not counterbalance the disproportion in inheritance. Thus, regardless of Safiyyah's good intentions, the discriminatory system of inheritance implemented prejudices her daughter. While her daughter may not currently be in financial need, she is denied the security and investment it offers, based on her gender, under the guise that she will be cared for by her brother, which in most likelihood will never materialise.

It is further worth noting that the Constitutional Court has previously found the principle of male primogeniture (the principle that males inherit to the exclusion of females) in the context of customary law intestate succession to be unconstitutional.¹²⁵ While the matter is distinguishable in that it dealt with intestate succession and male primogeniture resulted in the complete disinheritance of females, it is instructive on the court's views of discriminatory systems of inheritance. The *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009* was also enacted to give effect amongst other matters to the constitutional declaration of the invalidity of male primogeniture.¹²⁶ This position is cemented by the *Equality Act* and its prohibition of systems that prevent women from inheriting family property. In the light of the above, Rautenbach argues that it would not be possible to revive the principle of male primogeniture by invoking it in a will.¹²⁷ Our jurisprudence and statutory law thus strongly suggests that purporting to implement a system of inheritance that discriminates on gender would be unlawful.

In light of the foregoing discussion, we submit that the courts would likely find Safiyyah's bequest to be unlawful and unenforceable. The historical discrimination experienced by Muslim women, the current legislative and judicial interventions are prohibiting discriminatory systems of inheritance, and the justification for the discrimination – that men will take care of women – not holding true in contemporary times, all point to the discrimination's

¹²⁴ Gabru 2004 *PELJ* 6-9.

¹²⁵ *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 1 SA 580 (CC).

¹²⁶ Preamble to the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009*

¹²⁷ Rautenbach 2014 *Acta Juridica* 155.

being unfair. This is especially true, given that the factual matrix of most cases will not accord with our utopian, hypothetical scenario in which the beneficiaries are financially independent. Beneficiaries are more likely to be in financial need and discrimination, which gives a son a larger share, will have harsh consequences for females.

In addition, the historical arguments for upholding the bequest are questionable today. The *De Jager* judgment illustrates that courts are willing to strike down bequests, regardless of the resultant practical difficulties of redistributing benefits. The Court did not set down a strict rule on how to do this, and it seems that it would be done on a case-by-case basis. Furthermore, while the Court affirmed the importance of freedom of testation in our law, it is by no means sacrosanct. It cannot be exercised in a manner that unfairly discriminates against others. A clear limitation post the *De Jager* case is that discriminatory testamentary bequests based on gender with no justification would be unlawful and unenforceable. In the light of the discussion above, we submit that the religious motivations of a testator are not sufficient to render the discrimination fair.

On a final note, there are various permutations through which an individual may purport to give effect to the Islamic rules of inheritance. For example, Safiyyah may have named her beneficiaries and the ratios in which they were to inherit, namely two thirds for her son and one third for her daughter. Would such a bequest that treated beneficiaries unequally but did not explicitly seek to implement a discriminatory system of inheritance have been enforceable? Abduroaf argues that if the ratios of inheritance were specified with no reference to the Islamic law of intestate succession, then it would be almost impossible to prove the will was based on a system of discrimination with the implication that the will would be upheld.¹²⁸ In a similar vein Rautenbach, in the context of customary law succession, argues that a testator may give effect to the principle of male primogeniture through testamentary vehicles such as a *modus* or substitution.¹²⁹

Indeed, testators, wary that discriminatory bequests may not be upheld, may attempt to mask their testamentary intent by specifying the bequests without reference to a discriminatory system of inheritance. We caution, however, that post the *De Jager* judgment, courts may scrutinise testamentary dispositions more closely. In *De Jager* the testators employed a *fideicommissum* construction in the will to which the Court did not give

¹²⁸ Abduroaf 2019 *De Jure* 261.

¹²⁹ Rautenbach 2014 *Acta Juridica* 158-159.

effect because it amounted to unfair discrimination. Similarly, it is likely that the courts would not give effect to testamentary vehicles that give effect to male primogeniture or other discriminatory systems of inheritance unless the discrimination can be shown to be fair. The mere couching of the discrimination in complex testamentary vehicles does not render it fair. If there is incontrovertible evidence, by way of example, that the discriminatory bequests are based on gender, the bequests may be challenged. It would, of course, be harder to prove such discrimination, as bequests to particular beneficiaries may be motivated by a range of reasons – such as a closer relationship with a particular child or a reward for care in old age – and do not implement a system of gender discrimination against unnamed beneficiaries. The question of the enforceability of the provisions may thus ultimately come down to what can be proven in each case. Testators are nonetheless cautioned that courts may look beyond complex testamentary constructions. If it can be proven that the testator intends to discriminate on gender, there is a risk that the bequest may be struck down.

9 Conclusion

The *De Jager* case made headlines for its curtailment of freedom of testation. But freedom of testation has always been limited. We submit that the case clarifies that unfair discrimination in private testamentary bequests is unlawful and will not be given effect. The judgment does not outlaw fair discrimination, so freedom of testation remains an important principle of the South African succession law. Unfortunately, the respondents in the case, perhaps assuming like many commentators that freedom of testation would be treated as an inviolable principle in the private sphere, conceded that the discrimination was unfair and made no case for the fairness of discrimination.

This note examined the implications of the *De Jager* case and whether the discrimination motivated by religious beliefs could be considered fair discrimination. Does the testator's testamentary intent and religious beliefs tip the scales and justify the discrimination? We think not. The discrimination perpetuates disadvantage against a historically disadvantaged group when the courts and legislature have been emphatic in their stance against gender discrimination in inheritance. The testator's intent and religious beliefs are unlikely to be enough to justify the harsh consequences that discrimination may have on women. In this regard, individuals who want to dispose of their assets in accordance with their religious beliefs should seek estate planning advice cognisant of the potential impact of the *De Jager* case.

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Trust Property Control Act 57 of 1988

Wills Variation Act, RSBC, 1996, C490

List of Abbreviations

DePaul L Rev

DePaul Law Review

JJS

Journal for Juridical Science

PELJ

Potchefstroom Electronic Law Journal

NWU L Rev

Northwestern University Law Review

SAJHR

South African Journal on Human Rights

SALJ

South African Law Journal

Stell LR

Stellenbosch Law Review

Tul Eur & Civ L F

Tulane European and Civil Law Forum

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