Limiting freedom of testation: Evaluating 'discriminatory' stipulations in testamentary charitable trusts

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ABSTRACT

South Africa has a history of discrimination and differentiation, which has negatively affected society. Since the *Constitution of the Republic of South Africa* came into being, the legal position regarding the limitation of freedom of testation and potentially discriminatory stipulations in testamentary charitable trusts have been a relevant topic for discussion. In determining the extent to which freedom of testation may be limited, two seemingly opposing constitutional rights have to be weighed up against another; namely section 9 of the *Constitution* (the Right to Equality) and section 25 of the *Constitution* (the Right to Property) protecting freedom of testation.

Even though no right in the *Bill of Rights* is absolute, the concept of freedom of testation is deeply rooted in South African law and constitutes one of the founding principles of the Law of Succession. Therefore, courts have no easy task in deciding the extent to which freedom of testation may be limited.

The specific issue that will be addressed is the position where a testator has bequeathed funds to a testamentary charitable trust in order to benefit a specific group of students, to the express exclusion of other groups. It is clear that stipulations in testamentary charitable trusts based on race are unfairly discriminatory and cannot be enforced. However, 'discriminatory' provisions based on gender have previously been allowed. Should 'discriminatory' provisions based on language be allowed in testamentary charitable trusts?

This research discusses various common law and legislative limitations on freedom of testation. It furthers examines leading post-constitutional South African case law, such as *Minister of Education v Syfrets Trust*, *Emma Smith Educational Fund v University of KwaZulu-Natal* and *BOE Trust Ltd*. In order to gain an international perspective on the topic, Canadian case law is evaluated. Principles identified from case law are then applied to the factual setting dealing with 'discriminatory' provisions based on language in testamentary charitable trusts. Every matter must be adjudicated in light of its own circumstances.

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1 Introduction

1.1 A brief introduction

The topic of discrimination and differentiation is a relevant and largely controversial topic in South Africa. The country has a well-known history of discrimination and differentiation, which has negatively affected society. The legal position regarding the limitation of freedom of testation and bequests to testamentary charitable trusts[1] with potentially discriminatory stipulations have been a very relevant topic since the *Constitution of the Republic of South Africa*, 1996[2] came into being.[3] In the context of the limitation of freedom of testation, two seemingly opposing constitutional rights, namely section 25 and section 9 of the *Constitution*, are weighed up against one another.[4] The *Constitution* governs and regulates the most important human rights by means of the *Bill of Rights*.[5] It not only strives to address the injustices of the past, but protects and prevents further injustices from occurring in the constitutional state.

In light of this, a development has occurred in the testate law of succession regarding a testator's freedom to dispose of assets as he[6] deems fit.[7] The context of this literature research will be limited to seemingly 'discriminatory'[8] stipulations made in testamentary charitable trusts.[9]

A testamentary charitable trust can be registered with the intention to either benefit specified beneficiaries, or to serve a larger and impersonal public purpose.[10] It is trite

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1 Honoré defines a "trust" as "a legal institution in which a person, the trustee, subject to public supervision, holds or administers property separately of his or her own, for the benefit of another person or persons or for the furtherance of a charitable purpose."

2 Hereinafter referred to as the *Constitution.*

3 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-39.

4 Section 9 and 25 of the *Constitution*; De Waal *Annual Survey of SA Law* 1193.

5 Chapter 2 of the *Constitution.*

6 All masculine terms will be deemed to include the feminine for this research.

7 Anon *Bill of Rights Compendium* 3G1; Jamneck *et al The Law of Succession in South Africa* 115; De Waal and Schoeman-Malan *Law of Succession* 3, 134; Du Toit 2001 *Stellenbosch Law Review* 224; Du Toit 2012 *TECLF* 112.

8 Throughout the literature research the use of 'discriminatory' with single quotation marks will be used to refer to a case scenario where differentiation between groups of people does not necessarily amount to direct discrimination as such, but where the scenario is merely seemingly or possibly 'discriminatory'.

9 Discussions will be limited to testamentary trusts as opposed to *inter vivos* trusts, as the focus of this research is on freedom of testation.

10 Cameron *et al Honoré's South African Law of Trusts* 1; *Ex parte Henderson* 1971 4 SA 549 (D) 554A-B; De Waal and Schoeman-Malan *Erfreg* 193; Du Toit 2012 *TECLF* 115.

South African law that in order to register a charitable trust, there must be an element of public benefit.[11] This entails the state having a direct interest in the administration of such a trust.[12] These trusts are then referred to as charitable trusts.[13] Therefore, any trust established with the purpose of caring for the elderly in elderly homes, providing for the less fortunate or providing bursaries to students can be termed a "charitable trust".[14]

1.2 Problem statement

With regards to the above, the specific issue that will be addressed is the position where a testator has bequeathed funds to a testamentary charitable trust in order to benefit a specific group of students, to the express exclusion of other groups. As a result, only certain groups of students, based on gender, race, heritage, culture or religion, can receive a benefit due to these specific inherent factors, while others who do not possess these attributes, cannot benefit from these funds. It will be understandable that stipulations in testamentary charitable trusts based on race are unfairly discriminatory and should not be enforced. However, 'discriminatory' provisions based on gender have previously been allowed. Should 'discriminatory' provisions based on language be allowed in testamentary charitable trusts?

In recent years, relatively little attention was given by South African courts and the South African legislature to the limiting effect that the *boni mores* have on freedom of testation.[15] Before 2000, the latest authoritative decisions by the Supreme Court of Appeal on this topic dates back to the 1950's.[16] As a result of the Constitutional development, issues surrounding the limitation of freedom of testation have received

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11 Cameron *et al Honoré's South African Law of Trusts* 166,170; Du Toit 2012 *TECLF* 115.

12 Wood-Bodley 2007*SALJ* 695.

13 In the case of *Ex parte Henderson* 1971 4 SA 549 (D) 554A-B the court gave an extensive explanation of what can be understood under the term "charitable trust": It is sufficient for present purposes to say that there must be an element of public benefit in a bequest for charitable purposes, although not necessarily for the community at large; that the section or group to be advanced by the bequest must be sufficiently large or representative. It goes without saying that charitable purposes would include religious and educational purposes... The providing of assistance to comparatively small but distinct and identifiable groups of people in need thereof may be a charitable purpose, as may be the advancement of a small section of the community in any respect which is calculated to serve some public interest.

14 Cameron *et al Honoré's South African Law of Trusts* 166,170; De Waal and Schoeman-Malan *Erfreg* 194; Du Toit 2012 *TECLF* 115.

15 Du Toit 2000 *Stellenbosch Law Review* 359; Du Toit 2001 *Stellenbosch Law Review* 233.

16 Du Toit 2000 *Stellenbosch Law Review* 359.

more attention in recent years.[17] Since the *Interim Constitution* came into effect in 1994,[18] and eventually the *Constitution of the Republic of South Africa*, South African courts have been challenged on different occasions to adjudicate cases in which stipulations in testamentary charitable trusts were seemingly discriminatory.[19]

Although South Africa highly esteems freedom of testation, no right is absolute and can be limited in terms of the *Constitution*, especially if it infringes another right or is in conflict with public policy. In this context, research will be done regarding the rights contained in the *Bill of Rights*, which may limit freedom of testation. In essence, the right of a person to dispose of this property as he pleases, without being deprived thereof in section 25, will be weighed against the prospective beneficiary's right to equality in section 9. Since no right is absolute and may be limited, it is necessary that these rights be evaluated in light of section 36 of the *Constitution*.

This problem statement is not unique to South African law. There is currently limited South African case law available on this controversial topic. It may be beneficial to consider foreign law. In terms of section 39 of the *Constitution*, foreign law may be considered by courts when adjudicating a legal matter. The suggestion will be made to consider Canadian case law in order to compare the legal positions on this topic found in the South African and the Canadian context, respectively. Similar situations have arisen before Canadian courts. Therefore, guidance could be obtained by considering the lines of argumentation followed in Canadian case law. Valuable perspectives on the issue in question can be gained by comparing the legal perspectives of each jurisdiction.

1.3 Research question

With regards to the limitation of freedom of testation, a balance must be struck between the two seemingly opposing constitutional rights found in section 25 and section 9 of the *Constitution*. On the one hand, freedom of testation is protected by section 25 of the *Constitution*, while on the other hand unfair discrimination is prohibited by the equality clause in section 9. When courts face the balancing of

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17 Du Toit 2000 *Stellenbosch Law Review* 359; Du Toit 2001 *Stellenbosch Law Review* 233.
18 *Constitution of the Republic of South Africa* 200 of 1993.
19 Du Toit 2012 *TECLF* 97-98.

constitutional rights, caution must be applied in weighing these rights against one another. The main focus will be on how these two constitutional rights are weighed and in which circumstances freedom of testation ought to be limited. The research question is: To what extent may freedom of testation be limited where 'discriminatory' stipulations are made in testamentary charitable trusts?

The following aims will assist in answering the research question towards the end of this literary research:

- To establish whether or not racial discrimination amounts to unfair discrimination in relation to freedom of testation in testamentary charitable trusts;
- To establish whether or not 'discrimination' based on gender amounts to unfair discrimination in relation to freedom of testation in testamentary charitable trusts;
- To establish whether or not 'discrimination' based on language amounts to unfair discrimination in relation to freedom of testation in testamentary charitable trusts;
- Should the answer to the above aim be affirmative, to establish whether a testator's freedom of testation should be limited by a South African court by amending his will.

Furthermore, the research question will be answered with reference to an existing factual setting where the practical aspects thereof will be illustrated.

1.4 Case study

An existing factual setting will be used to illustrate South African courts' approach to a situation in which freedom of testation is limited in evaluating 'discriminatory' stipulations in charitable trusts. Furthermore, it will be determined what such an approach could entail upon considering Canadian case law. The following factual setting will be used:

In 1915, the testator, Johannes Henoch Marais, passed away. In his will, he created a testamentary trust and stipulated that after certain bequests had been made, the

residue of his estate was to devolve upon this trust fund, today known as the "Het Jan Marais Nationale Fonds".[20]

The testator was an influential philanthropist who funded a number of projects in his lifetime, as well as after his death. He provided funding for the erection of the Old Main Building on the main campus of the University of Stellenbosch. He further donated the Physical Science building of the same university; founded a local newspaper called *Die Burger*; donated thousands of rand towards the municipality with which the Stellenbosch community hall was built; funded the building of the Jan S. Marais Park and financially contributed to various churches, hospitals and orphanages, to name but a few. However, the testamentary trust established after his death was by far the greatest contribution to the public.[21]

Marais made a substantial contribution to the establishment and development of the University of Stellenbosch (£100 000 in 1915) by means of the Het Jan Marais Nationale Fonds. This trust fund aims to further the interests of South Africa's Afrikaans-speaking community, especially that of the Afrikaans community of the Stellenbosch district. The donation of this trust fund was made solely on the condition that Afrikaans remains an educational language for educational purposes at the University of Stellenbosch.[22] The stipulations to his last will and testament read:[23]

> Ter bevordering van het hoger onderwijs te Stellenbosch, doch meer beijzonder van het onderwijs in en door middel van de Hollandse taal in zijn beide vormen (dat wil zeggen Afrikaans zowel als Nederlands) en wel te dien einde dat in zodanige onderwijs de Hollandse taal in zijn beide vormen als voormeld geen mindere plaats dan de andere officiele landstaal zal innemen.[24]

To date, the Het Jan Marais Nationale Fonds has provided bursaries to students in need of tertiary education funding, as well as primary and secondary schooling for

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20 HJMNF 2017 http://hetjanmarais.co.za/; Sexton 1929 http://hetjanmarais.co.za/wp-content/uploads/2017/05/Universiteit-van-Stellenbosch-2.pdf.

21 HJMNF 2017 http://hetjanmarais.co.za/; De Vries 2001 http://hetjanmarais.co.za/wp-content/uploads/2017/05/Jan-H-Marais-2.pdf; Blommaert 1929 http://hetjanmarais.co.za/wp-content/uploads/2017/05/Marais-Park-2.pdf; Anon 2017 http://www.iol.co.za/lifestyle/home-garden/garden/a-special-space-comes-to-life-1.1516238.

22 HJMNF 2017 http://hetjanmarais.co.za/; De Vries 2001 http://hetjanmarais.co.za/wp-content/uploads/2017/05/Jan-H-Marais-2.pdf.

23 HJMNF 2017 http://hetjanmarais.co.za/.

24 English translation: To promote higher education in Stellenbosch, but more especially from education in and through the Dutch language in both forms (Afrikaans as well as Dutch) and to this end that in such an education the Dutch language in its both forms as aforesaid no lesser place than the other official national language will take.

the last hundred years.[25] The current value of the trust fund amounts to R32 000 000.[26] The fund therefore focuses on the interests of Afrikaans-speaking students in South Africa with specific emphasis on retaining Afrikaans as an official language of education, as well as the development thereof under all cultural groups.[27] In the words of Professor Thom, the previous rector of the University of Stellenbosch:[28]

> Oom Jannie... of 'n man ryk was of arm, wit of gekleurd – dit het vir hom geen saak gemaak nie; teenoor almal was hy vriendelik en hartlik.[29]

In this case study, the question which now arises is what effect the newly adopted Language Policy of Stellenbosch University will have on the administration of the Het Jan Marais Nationale Fonds with regards to his freedom of testation?

It was in accordance with the Het Jan Marias Nationale Fonds to make the funds available to the university and its students at the time Mr Marais drafted his will, since the main educational language was Afrikaans. However, the Language Policy has changed and as from 1 January 2017, multilingualism ensued as Stellenbosch University offers classes in English, Afrikaans and isiXhosa.[30] The purpose of the Language Policy is to "guide language planning, language management and language at SU (Stellenbosch University)."[31] The aims are to achieve Stellenbosch University's vision for 2030 and to implement multilingualism "as an important differentiating characteristic of SU."[32]

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25 Sexton 1929 http://hetjanmarais.co.za/wp-content/uploads/2017/05/Universiteit-van-Stellenbosch-2.pdf.

26 De Vries 2001 http://hetjanmarais.co.za/wp-content/uploads/2017/05/Jan-H-Marais-2.pdf.

27 HJMNF 2017 http://hetjanmarais.co.za/.

28 De Vries 2001 http://hetjanmarais.co.za/wp-content/uploads/2017/05/Jan-H-Marais-2.pdf.

29 English translation: Uncle Jannie ... whether a man was rich or poor, white or colored - it did not matter to him; to everyone he was friendly and cordial.

30 SU 2017 http://www.sun.ac.za/english/Documents/Language/Final%20Language%20Policy%20June%202016.pdf 2; SU 2017 https://www.sun.ac.za/english/maties/Pages/Admissions-LanguageAtUS.aspx; UWN 2016 http://www.universityworldnews.com/article.php?story=20160706120904383.

31 SU 2017 http://www.sun.ac.za/english/Documents/Language/Final%20Language%20Policy%20June%202016.pdf 3.

32 SU 2017 http://www.sun.ac.za/english/Documents/Language/Final%20Language%20Policy%20June%202016.pdf 3; SU 2017 https://www.sun.ac.za/english/maties/Pages/Admissions-LanguageAtUS.aspx.

It is evident that the testator only wanted the funds to be extended on the conditions that Afrikaans or Dutch be developed as a language of education. What are the implications now that Stellenbosch University aims to become a multilingual institution? Should the funds still be made available to Afrikaans-speaking students only, whatever the nationality; or should the fund be made available to all students, despite the change in the language policy? Indirectly, the question is whether the freedom of testation of Mr Marais should be upheld, resulting in 'discrimination' based on language or should it be limited, overriding his freedom of testation? It will also be considered how this position would have differed if the seemingly 'discriminatory' stipulations in the trust had been based on race or gender instead of language.

1.5 Chapter overview

In order to answer the research question, Chapter 2 will commence by considering freedom of testation as a right, as well as instances in which it may be limited by common law, legislation or the *Constitution*. Chapter 3 will follow with an exposition on the main post-constitutional South African judicial precedent pertaining to the limitation of freedom of testation and the evaluation of 'discriminatory' clauses in testamentary charitable trusts. Thereafter, case law pertaining to the same scenario in the Canadian context will be sought after in Chapter 4. Chapter 5 will follow with an evaluation of the above-mentioned case study, based on the principles evident in the South African and Canadian case law, in order to reach a conclusion in Chapter 6.

2 The theoretical aspects of freedom of testation

2.1 An overview on freedom of testation

Before considering the primary research question, namely: "To what extent may freedom of testation be limited where 'discriminatory' stipulations are made in testamentary charitable trusts?" the theoretical aspects pertaining to freedom of testation need to be considered. Ultimately, it has to be determined whether the freedom of testation of Mr Marais in the above factual setting ought to be upheld, providing only bursaries to Afrikaans-speaking people possibly resulting in 'discrimination' based on language; or whether his freedom of testation should be overruled by a court in order to provide the bursary to students of every language.

The idea of freedom of testation was first instituted by the Romans.[33] As far back as 450 BC it has already made its appearance in Roman law.[34] The purpose of freedom of testation was that it gave rise to the idea that an individual in society could own property to his own benefit and upon death, he could benefit whom he pleased with these assets.[35]

The idea of freedom of testation has not only crystallised Roman law as mentioned above, but also Roman-Dutch law and English law, and it has found a wide application in the law of succession of South African.[36] Freedom of testation has come to be one of the founding principles of the law of testate succession and is greatly reverenced by South African courts.[37] Generally, a testator of a will must exercise his freedom of testation personally and cannot delegate this freedom to

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33 Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 22; Du Toit 2001 *Stellenbosch Law Review* 240; Du Toit 2012 *TECLF* 109; Nussbaum 1937 *ABAJ* 183.

34 Du Toit 2001 *Stellenbosch Law Review* 240; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 22; Nussbaum 1937 *ABAJ* 183; Du Toit 2012 *TECLF* 109.

35 Anon *Bill of Rights Compendium* 3FG1; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 22.

36 Matsemela 2015 *Journal of Law, Society and Development* 94; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 22; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2012 *TECLF* 110.

37 De Waal and Schoeman-Malan *Erfreg* 3; Matsemela 2015 *Journal of Law, Society and Development* 93; De Waal and Schoeman-Malan *Law of Succession* 3; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2001 *Stellenbosch Law Review* 234; Roux 2013 *De Rebus* 48; Du Toit 2012 *TECLF* 110.

another.[38] However, it seems that freedom of testation is more easily restricted in South Africa than in some other jurisdictions, such as Canada.[39]

The term "freedom of testation" points to the right of a testator to write a valid testament or will. Moreover, it is the right of a testator to make stipulations in such a testament or will, while exercising the right to have his estate and assets divided and distributed to his chosen heirs in the manner he pleases upon his decease.[40] A testator is free to have his estate and assets devolve as he prefers,[41] provided such stipulations are not *contra bonos mores.*[42] This means that a testator has the freedom to bequeath his assets to his relatives (or to disinherit them if he so pleases), charitable organisations, charitable trusts, *etcetera*.[43]

The Latin concept *voluntas testatoris servanda est*,[44] directs that the wishes of a testator, as stipulated in a testament or will, ought to be adhered to.[45] As a result, courts are under obligation to respect freedom of testation as it is important to give effect to the wishes of the testator after his decease.[46] Due to this principle, courts are rather reluctant to amend a testator's last will and testament, although it has the power to do so in certain instances.[47]

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38 Jamneck *et al The Law of Succession in South Africa* 115.

39 Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 11,40.

40 Anon *Bill of Rights Compendium* 3G1; Jamneck *et al The Law of Succession in South Africa* 115; De Waal and Schoeman-Malan *Law of Succession* 3, 134; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 9; Du Toit 2001 *Stellenbosch Law Review* 224; Du Toit 2012 *TECLF* 112.

41 De Waal and Schoeman-Malan *Erfreg* 134; Anon *Bill of Rights Compendium* 3G1; Matsemela 2015 *Journal of Law, Society and Development* 93; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 9; Du Toit 2001 *Stellenbosch Law Review* 224; Roux 2013 *De Rebus* 48.

42 According to the Trilingual Legal Dictionary, although the Latin term for the community's good morals is the *boni mores*, breach of such moral laws are termed *contra bonos mores.*

43 Anon *Bill of Rights Compendium* 3G1; De Waal and Schoeman-Malan *Erfreg* 2; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 10; Du Toit 2001 *Stellenbosch Law Review* 242; Roux 2013 *De Rebus* 48.

44 The latin term means: As it is made it will be kept.

45 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-35; De Waal and Schoeman-Malan *Erfreg* 3, 134; Du Toit 2012 *TECLF* 110; Du Toit 2005 *Journal for Juridical Science* 39; Du Toit 2012 *TECLF* 110.

46 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-35; Du Toit 2005 *Journal for Juridical Science* 39; Du Toit 2012 *TECLF* 110.

47 De Waal and Schoeman-Malan *Erfreg* 2; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-35; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance"11; Du Toit 2005 *Journal for Juridical Science* 39; Du Toit 2012 *TECLF* 110.

It is important to note that freedom of testation is not seen as an absolute right.[48] In certain instances, it may be limited by common law, legislation or the *Constitution.*[49] Due consideration must be given to differentiate between situations in which freedom of testation should be upheld and situations in which it should be limited.[50] Before paying attention to the above, with regards to seemingly discriminatory stipulations in charitable trusts, the limitations will be expounded upon.

2.2 Limitations of freedom of testation by common law and the boni mores

Various restrictions have been placed on freedom of testation. Some of these restrictions have arisen from common law and the principle of *boni mores*, while other restrictions have been expressly stipulated by legislation or enforced by the *Constitution*.[51] In the same manner that a testator is not allowed to manipulate his beneficiaries' actions and lifestyle,[52] a testator who benefits a certain group of people by means of a charitable trust, can be restricted should the stipulated provisions be contrary to the *boni mores*, common law, legislation or the *Constitution*.[53]

Regarding common law, any stipulation in a will that is unlawful, impossible to perform, vague or ultimately *contra bonos mores* (against public policy) cannot be enforced.[54] Regarding public policy, any stipulation that the community regards as not conforming to the widely accepted standards of morality, will be in conflict with

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48 De Waal and Schoeman-Malan *Erfreg* 134; Du Toit 2001 *Stellenbosch Law Review* 240; Matsemela 2015 *Journal of Law, Society and Development* 99; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2001 *Stellenbosch Law Review* 234; Roux 2013 *De Rebus* 49; Wood-Bodley 2007*SALJ* 689; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 588; Du Toit 2012 *TECLF* 110.

49 De Waal and Schoeman-Malan *Erfreg* 3,134; Matsemela 2015 *Journal of Law, Society and Development* 93; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2005 *Journal for Juridical Science* 39; Du Toit 2001 *Stellenbosch Law Review* 234; Du Toit 2012 *TECLF* 110.

50 Du Toit 2012 *TECLF* 110.

51 De Waal and Schoeman-Malan *Erfreg* 4, 134; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2005 *Journal for Juridical Science* 39; Du Toit 2001 *Stellenbosch Law Review* 234; Roux 2013 *De Rebus* 49; Modiri 2013 *PER* 589; Du Toit 2012 *TECLF* 110.

52 De Waal and Schoeman-Malan *Erfreg* 143; Du Toit 2001 *Stellenbosch Law Review* 227.

53 De Waal and Schoeman-Malan *Erfreg* 143; Du Toit 2012 *TECLF* 110.

54 Du Toit 2012 *TECLF* 110; De Waal and Schoeman-Malan *Erfreg* 4, 134, 141; Du Toit 2001 *Stellenbosch Law Review* 245; Modiri 2013 *PER* 589.

public policy and courts cannot allow effect to be given to such stipulations.[55] South African courts use the terms "*boni mores"* and "public policy" as synonyms.[56]

The difficulty with public policy is that it is a flexible and open-ended concept, which changes continuously. Public policy changes as the social conditions of a community change.[57] The effect thereof is that a provision or stipulation, which may have been completely acceptable by a community for a number of years, may no longer be acceptable should the larger community's view thereon have changed over time.[58] Public policy is now rooted in the *Constitution* by fundamental values such as the right to property (section 25) and the right to equality (section 9).[59] In the case of *Minister of Education v Syfrets Trust NO*,[60] the court held that constitutional values must be considered when considering public policy as the latter is rooted in the former and the *Constitution* protects these fundamental values.[61] Therefore, before considering the relevant legislative and constitutional provisions, specific common law limitations have to be considered.

2.2.1 Conditions prohibiting marital relations

One of the common law limitations is that a testator cannot make a bequest to an unmarried beneficiary subject to the condition that he may never marry.[62] Such a provision will be against the *boni mores* of the community and will therefore be invalid and unenforceable.[63] On the other hand, the *boni mores* allows a testator to provide that the surviving spouse will forfeit any inheritance in the case of remarriage after the testator's death.[64] Such a provision would be valid. In addition

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55 Du Toit 2012 *TECLF* 110; De Waal and Schoeman-Malan *Erfreg* 5; Jamneck *et al The Law of Succession in South Africa* 117.

56 Du Toit 2012 *TECLF* 111.

57 De Waal and Schoeman-Malan *Erfreg* 141; Jamneck *et al The Law of Succession in South Africa* 117; *Loock v Steyn* 1968 1 SA 602 (A); Steyn 2015 *Journal of Economic and Financial Sciences* 756; Du Toit 2001 *Stellenbosch Law Review* 359.

58 De Waal and Schoeman-Malan *Erfreg* 141; Jamneck *et al The Law of Succession in South Africa* 117; Steyn 2015 *Journal of Economic and Financial Sciences* 756; Du Toit 2001 *Stellenbosch Law Review* 359.

59 Steyn 2015 *Journal of Economic and Financial Sciences* 756.

60 2006 4 SA 205 (C) para 24; Jamneck *et al The Law of Succession in South Africa* 118; De Waal *Annual Survey of SA Law* 1195.

61 Jamneck *et al The Law of Succession in South Africa* 118; De Waal *Annual Survey of SA Law* 1195.

62 De Waal and Schoeman-Malan *Erfreg* 7,141; Jamneck *et al The Law of Succession in South Africa* 118; Du Toit 2001 *Stellenbosch Law Review* 234; Du Toit 2012 *TECLF* 111.

63 De Waal and Schoeman-Malan *Erfreg* 141; Du Toit 2012 *TECLF* 111.

64 Jamneck *et al The Law of Succession in South Africa* 118; Du Toit 2012 *TECLF* 111.

to these rules, a provision intending to destroy an existing marriage will always be invalid and unenforceable.[65]

2.2.2 Conditions forcing a beneficiary to reside at a specific place

Under the Common law, a testator had the capacity by means of his right to freedom of testation to include a stipulation in his will which bound a beneficiary to reside on a certain property should the beneficiary have wished to benefit from the testator's will (adiated the inheritance).[66] Such stipulations are valid except in the instances where it was vague or stipulated no specific consequences in the case of breach. These are the only two instances in which no effect would be given to the testator's wishes.[67] This is the current position that is, as yet, to be tested.

It is questionable to what extent the same would be valid when measured against the current constitutional values, as the *Constitution* protects both the rights of the testator and the beneficiary.[68] A *nudum praeceptum*, also called a "nude prohibition" will come into existence in the South African law.[69] A *nudum praeceptum* occurs when the testator purposes to bind the heir or beneficiary by making specific conditions in his last will and testament, aiming to bind the beneficiary to certain conditions. When these conditions are then found to be invalid, the stipulation will be termed a nude prohibition for its unenforceability.[70]

2.2.3 Conditions forcing a person to change his name

The last express limitation on freedom of testation by common law pertained to the condition that beneficiaries had to either change their own names or give their children certain names should they wish to benefit from the testator's will.[71] Previously, this was an accepted condition and could be enforced. However, because public policy is a fluid concept, testators should not be allowed to stipulate that their

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65 De Waal and Schoeman-Malan *Erfreg* 141; Jamneck *et al The Law of Succession in South Africa* 118; Du Toit 2012 *TECLF* 111.

66 Jamneck *et al The Law of Succession in South Africa* 121.

67 Jamneck *et al The Law of Succession in South Africa* 121.

68 Olivier and van den Berg *Praktiese boedelbeplanning* 131-132; Du Toit 2001 *Stellenbosch Law Review* 236.

69 Olivier and van den Berg *Praktiese boedelbeplanning* 131-132.

70 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-36; Olivier and van den Berg *Praktiese boedelbeplanning* 131-132.

71 *Loock v Steyn* 1968 1 SA 602 (A); *Ex parte Estate Edwards* 1964 2 SA 144 (C); Jamneck *et al The Law of Succession in South Africa* 121.

beneficiaries must have certain names in the scope of exercising their right to freedom of testation.[72]

2.3 Restrictions on freedom of testation though legislation

Various statutes limit freedom of testation.[73] These restrictions will be discussed in the following paragraphs:

2.3.1 Immovable Property (Removal or Modification of Restrictions) Act[74]

Under common law, a testator could direct by will that certain property had to remain within the family for generations.[75] This pertained to movable and immovable property. An example of this is long-term *fideicommissa*[76] for a lease of 99 years, as stipulated in the will.[77] As the community views have changed over time, it resulted in practical problems to such heirs and beneficiaries. However, this position was changed when the *Immovable Property (Removal or Modification of Restrictions) Act* came into operation.[78]

In terms of section 6, freedom of testation is limited to the extent that *fideicommissa* pertaining to immovable property are restricted to two generations, these generations are identified as *fideicommissaries*.[79] In addition, sections 2 and 3 allow beneficiaries who are bound to burdensome conditions by a testator's will to apply to court to have these restrictions removed. If, in the court's opinion, the removal of such conditions or restrictions be in the best interest of the beneficiary, it may rule accordingly and limit the testator's freedom of testation.[80]

In addition to the above, in terms of section 33(1) of the *General Law Amendment Act*,[81] a court may allow the alienation of immovable property, which is subject to

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72 Jamneck *et al The Law of Succession in South Africa* 122.
73 De Waal and Schoeman-Malan *Law of Succession* 4 ; Roux 2013 *De Rebus* 49.
74 Act 94 of 1965.
75 Matsemela 2015 *Journal of Law, Society and Development* 100.
76 According to the Trilingual Legal Dictionary, the plural form of *fideicommissum* is *fideicommissa.*
77 Jamneck *et al The Law of Succession in South Africa* 116; Matsemela 2015 *Journal of Law, Society and Development* 100.
78 De Waal and Schoeman-Malan *Erfreg* 4,134; Du Toit 2001 *Stellenbosch Law Review* 234.
79 Section 6 of Act 94 of 1965; De Waal and Schoeman-Malan *Erfreg* 4; Matsemela 2015 *Journal of Law, Society and Development* 100; Jamneck *et al The Law of Succession in South Africa* 116.
80 Sections 2 and 3 of Act 94 of 1965; Jamneck *et al The Law of Succession in South Africa* 116; De Waal and Schoeman-Malan *Erfreg* 134.
81 Act 62 of 1995.

certain stipulated restrictions in a testator's will, in the case of an unborn person being beneficiary thereof.[82] The court not only has the competency to allow the alienation of immovable property, but also the mortgaging of the immovable property, as if the unborn was already born, thus treating him as if he were a minor.[83]

2.3.2 Matrimonial Property Act[84]

Depending on the marital regime applied to the deceased and his surviving spouse, the *Matrimonial Property Act* has a direct influence on the division of a deceased's estate upon death.[85] In the case where they were married in community of property, the surviving spouse is entitled to a half share in the estate of the deceased, as a communal estate was in existence.[86] If, however, the deceased and the surviving spouse were married out of community of property, with the inclusion of the accrual system, a communal estate was not formed and a different legal position will apply.[87] Should the surviving spouse have the smaller estate between the two, she will have a claim against the deceased estate for half the difference in growth between their separate estates, since the date of marriage.[88]

As a result, the surviving spouse will have a claim against the deceased estate of her former spouse, even if the testator may have disinherited her in his will.

2.3.3 Maintenance of Surviving Spouses Act[89]

In terms of the *Maintenance of Surviving Spouses Act*, a testator's freedom of testation may be limited as it provides for a maintenance claim by the surviving

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82 Jamneck *et al The Law of Succession in South Africa* 117.

83 Section 33 of the *General Law Amendment Act* 62 of 1995; Jamneck *et al The Law of Succession in South Africa* 117.

84 Act 88 of 1984.

85 Robinson *et al Introduction to South African Family Law* 121; Roux 2013 *De Rebus* 49.

86 Section 14 of the *Matrimonial Property Act* 88 of 1984; Robinson *et al Introduction to South African Family Law* 121; Roux 2013 *De Rebus* 48.

87 Robinson *et al Introduction to South African Family Law* 121; Roux 2013 *De Rebus* 48; ENS Africa date unknown http://www.ensafrica.com/news/The-restrictions-on-a-testators-freedom-of testation? Id=1199&STitle=estate%20ENSight.

88 Robinson *et al* Introduction *to South African Family Law* 175; Roux 2013 *De Rebus* 48; ENS Africa date unknown http://www.ensafrica.com/news/The-restrictions-on-a-testators-freedom-of testation? Id=1199&STitle=estate%20ENSight.

89 Act 27 of 1990 *(The Maintenance of Surviving Spouses Act).*

spouse in certain circumstances.[90] Freedom of testation is indirectly limited by section 3 of this Act.[91] This means that in the case where a testator purposed to disinherit his spouse, the surviving spouse may still have a claim for maintenance against the deceased estate until her death or remarriage.[92] Various factors will be considered by court in determining whether the surviving spouse will be entitled to maintenance.

Firstly, courts will consider whether the surviving spouse is capable of providing for herself by own means.[93] Furthermore, the court will consider the amount available for distribution in the estate; the earning capacity that the surviving spouse may have; the monetary needs of the surviving spouse; the duration of the marriage; the standard of living of the surviving spouse during the subsistence of the marriage; and the age and life expectancy of the surviving spouse at the date of the deceased's death.[94]

As a result, a surviving spouse may be entitled to a claim for maintenance as a share of the deceased's estate, irrespective of the testator's wishes in his will.[95] It is clear that in certain circumstances, a testator's freedom of testation will be overruled and limited by a maintenance claim from the surviving spouse.[96]

2.3.4 *Pension Funds Act*[97]

According to Section 37C of the *Pension Funds Act*, pension benefits do not form part of the assets in a deceased estate.[98] Hence, a testator cannot bequeath pension

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90 De Waal and Schoeman-Malan *Erfreg* 4,135; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 11; Du Toit 2001 *Stellenbosch Law Review* 234; Roux 2013 *De Rebus* 49; ENS Africa date unknown http://www.ensafrica.com/news/The-restrictions-on-a-testators-freedom-of testation? Id=1199&STitle=estate%20ENSight.

91 Section 3 of the *Maintenance of Surviving Spouses Act*; De Waal and Schoeman-Malan *Erfreg* 4.

92 Jamneck *et al The Law of Succession in South Africa* 123; Matsemela 2015 *Journal of Law, Society and Development* 100; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance"16.

93 Section 2 of the *Maintenance of Surviving Spouses Act*.

94 Section 3 of the *Maintenance of Surviving Spouses Act*; Jamneck *et al The Law of Succession in South Africa* 123; Matsemela 2015 *Journal of Law, Society and Development* 100; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 16.

95 De Waal and Schoeman-Malan *Erfreg* 4; Matsemela 2015 *Journal of Law, Society and Development* 100.

96 Jamneck *et al The Law of Succession in South Africa* 123; De Waal and Schoeman-Malan *Erfreg* 4; Matsemela 2015 *Journal of Law, Society and Development* 100.

97 Act24 of 1956 *(Pension Funds Act)*.

98 Section 37C of the *Pension Funds Act*; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 19.

benefits to his beneficiaries as he pleases by means of his freedom of testation.[99] Even so, trustees to a pension fund may find themselves under the obligation to pay the death benefits to the deceased's beneficiaries at the date of death.[100] In the case where the pension fund's requirements and stipulations are contrary to the will of the deceased, the stipulations of the *Pension Funds Act* will prevail.[101] This is another clear example of legislation which limits a testator's freedom of testation.

2.3.5 The Trust Property Control Act[102]

At this point, it is important to note the manner in which charitable trusts come into existence, as it stands central to this research. The purpose is to answer the research question, namely, to what extent freedom of testation ought to be protected or limited when possible 'discriminatory' provisions are made in such testamentary or charitable trusts.

It is worthy to note that before the *Trust Property Control Act* came into operation, South African courts did not have a general capacity to amend trust provisions[103] and sought to establish a testator's intentions upon deciding whether a testamentary bequest is against public policy or not.[104] This Act enables a court to amend the trust provisions, or even to terminate the trust if such charitable trust is found to contain 'discriminatory' provisions.[105] As part of financial planning, it frequently happens that a testator stipulates in his will that certain funds ought to be held in a testamentary

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99 Section 37C of the *Pension Funds Act*; ENS Africa date unknown http://www.ensafrica.com/news/The-restrictions-on-a-testators-freedom-of testation? Id=1199&STitle=estate%20ENSight. Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 19.

100 Section 37C of the *Pension Funds Act*; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 19.

101 De Waal and Schoeman-Malan *Erfreg* 4; Du Toit 2001 *Stellenbosch Law Review*; *Pension Funds Act*; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 19; ENS Africa date unknown http://www.ensafrica.com/news/The-restrictions-on-a-testators-freedom-of testation? Id=1199&STitle=estate%20ENSight; Du Toit 2001 *Stellenbosch Law Review* 234.

102 Act 57 of 1988 *(Trust Property Control Act)*.

103 Cameron *et al Honoré's South African Law of Trusts* 2-3; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-35; De Waal and Schoeman-Malan *Erfreg* 195; Du Toit 2012 *TECLF* 110.

104 Du Toit 2012 *TECLF* 111.

105 Section 13 of the *Trust Property Control Act*; Cameron *et al Honoré's South African Law of Trusts* 166; De Waal and Schoeman-Malan *Erfreg* 4; Du Toit 2005 *Journal for Juridical Science* 39; ENS Africa date unknown http://www.ensafrica.com/news/The-restrictions-on-a-testators-freedom-of testation? Id=1199&STitle=estate%20ENSight; Du Toit 2001 *Stellenbosch Law Review* 234.

trust (also called a *mortis causa* trust), only to be registered upon his death.[106] The testamentary trust is then registered by the executor of the deceased estate on behalf of the deceased, with the will acting as the trust deed.[107] Such a charitable trust will be administered by nominated trustees for the benefit of certain beneficiaries stipulated in the last will and testament of the deceased.[108] However, a problem arises when such a charitable trust is purposed to benefit one specific group of beneficiaries stipulated by the will to the express exclusion of other groups.[109] It is important to note that a charitable trust displays an element of public benefit and must, therefore, comply with the *boni mores* of the community.[110]

In terms of section 13 of the *Trust Property Control Act*, a court may limit freedom of testation should the stipulations in the will be in conflict with the provisions of this section.[111] It expressly stipulates that when a trustee challenges this matter in a court of law, a court may "delete or vary any such provision or make in respect thereof any order which such court deems just"[112] in the case where the offending provision either:

(a) hampers the achievement of the objects of the founder; or
(b) prejudices the interests of beneficiaries; or
(c) is in conflict with public interest.[113]

However, should the stipulations of a testamentary trust be altered, a court of law will always make the alterations as close as possible to the testator's initial wishes instead of contradicting it.[114]

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106 Cameron *et al Honoré's South African Law of Trusts* 6; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-6.

107 Cameron *et al Honoré's South African Law of Trusts* 6; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-6; Jamneck *et al The Law of Succession in South Africa* 122.

108 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-5; Jamneck *et al The Law of Succession in South Africa* 122.

109 Du Toit 2005 *Journal for Juridical Science* 39.

110 Cameron *et al Honoré's South African Law of Trusts* 166; De Waal and Schoeman-Malan *Erfreg* 4; Du Toit 2001 *Stellenbosch Law Review* 228.

111 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-38; De Waal and Schoeman-Malan *Erfreg* 4; Matsemela 2015 *Journal of Law, Society and Development* 101; Du Toit 2012 *TECLF* 111.

112 Section 13 of the *Trust Property Control Act.*

113 Section 13 of the *Trust Property Control Act;* De Waal and Schoeman-Malan *Erfreg* 195; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-38; Du Toit 2017 *Manitoba Law Journal* 154; Matsemela *Journal of Law, Society and Development* 101; Du Toit 2005 *Journal for Juridical Science* 40; Du Toit 2001 *Stellenbosch Law Review* 227; Du Toit 2012 *TECLF* 111.

114 Du Toit 2005 *Journal for Juridical Science* 39.

In the *William Marsh* case,[115] it was illustrated how courts may apply section 13 of the *Trust Property Control Act* in order to alter the testamentary provisions in a testamentary trust.[116] In this case, a testator stipulated in his last will and testament that the remainder of his entire estate was to be held in a testamentary trust. It was to be used to create and maintain a home for destitute children of a specified race.[117] Upon the execution of the will in 1899, the provisions of the testamentary trust were not in conflict with the *boni mores* of that time. However, the socio-economic circumstances of South Africa changed in later years along with the community's views on public policy.[118] The number of destitute children of the specified race decreased over time. Even though the children's home was capable of housing 120 children, it only housed half the number of children, while there were in actual fact many destitute children of other races who had no place to reside.[119]

In terms of section 13, an application was brought to court for the amendment of this trust provisions. The court limited the testator's freedom of testation and ordered that the provisions in the testamentary trust be altered.[120] Even though it was initially not the testator's wishes to house children of different races, the court deemed it within the public's interest to order that the provisions in the testamentary trust be altered to include children of all races.[121]

The reasoning behind this decision was that, in terms of section 13, at the time of drafting his will, there was no way that the testator could foresee the future change in socio-economic circumstances.[122] It is noteworthy that this case was decided

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115 *Ex parte president of the Conference of the Methodist Church of Southern Africa: in re William Marsh Will Trust* 1993 2 SA 697 (C) (the *William Marsh* case).

116 De Waal and Schoeman-Malan *Erfreg* 196; Du Toit 2005 *Journal for Juridical Science* 44; Du Toit 2012 *TECLF* 115.

117 Du Toit 2005 *Journal for Juridical Science* 44; Du Toit 2001 *Stellenbosch Law Review* 229; Wood-Bodley 2007*SALJ* 693; Du Toit 2012 *TECLF* 115.

118 Du Toit 2001 *Stellenbosch Law Review* 229; De Waal and Schoeman-Malan *Erfreg* 196; Du Toit 2005 *Journal for Juridical Science* 44.

119 De Waal and Schoeman-Malan *Erfreg* 196; Du Toit 2005 *Journal for Juridical Science* 46; Du Toit 2001 *Stellenbosch Law Review* 229.

120 Du Toit 2005 *Journal for Juridical Science* 44; Du Toit 2001 *Stellenbosch Law Review* 229.

121 Cameron *et al Honoré's South African Law of Trusts* 172; Du Toit 2001 *Stellenbosch Law Review* 230; De Waal and Schoeman-Malan *Erfreg* 196; Du Toit 2005 *Journal for Juridical Science* 44-46; Wood-Bodley 2007*SALJ* 693; Du Toit 2012 *TECLF* 115.

122 The *William Marsh* case 417; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-36; De Waal and Schoeman-Malan *Erfreg* 135, 196; Matsemela 2015 *Journal of Law, Society and Development* 101; Du Toit 2001 *Stellenbosch Law Review* 227.

before the *Constitution* came into being; and therefore, freedom of testation has not only been limited after the *Constitution* came into being, but also before.

2.4 Constitutional limitation of freedom of testation

The law of succession and freedom of testation cannot be separated from the fundamental rights and values embodied in the *Constitution.*[123] As previously mentioned, the idea of freedom of testation is one of the founding principles of the law of testate succession and is recognised in South African law.[124] However, since the *Constitution* is the supreme law of South Africa, it directly influences the manner in which courts interpret freedom of testation.[125]

The *Constitution* currently embodies the changes that have occurred over the years in relation to public policy and what is viewed as being against the *boni mores* of the community.[126] The *Bill of Rights* (Chapter 2 of the *Constitution*), is known as the cornerstone of the *Constitution* as it not only protects human rights,[127] but also secures that public policy and the right to not be unfairly discriminated against, is safeguarded.[128] Hence, it is possible for unfair discriminatory testamentary stipulations to be declared invalid under the *Constitution*, in effect, directly limiting freedom of testation.[129]

Various fundamental rights contained in the *Bill of Rights* may be affected in the process of deciding whether freedom of testation needs to be limited.[130] These include: The Application of the *Bill of Rights* (section 8), the right to Human Dignity (section 10), Privacy (section 14), Freedom of Religion, Belief and Opinion (section 15), Freedom of Association (section 18), Political Rights (section 19), Freedom of Movement and Residence (section 21), as well as the Interpretation of the *Bill of*

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123 De Waal and Schoeman-*Malan Erfreg* 4, 142.

124 De Waal and Schoeman-Malan *Erfreg* 3; Matsemela 2015 *Journal of Law, Society and Development* 93; De Waal and Schoeman-Malan *Law of Succession* 3; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2001 *Stellenbosch Law Review* 234.

125 Rautenbach 2003 *TSAR* 167; Matsemela 2015 *Journal of Law, Society and Development* 102.

126 Du Toit 2012 *TECLF* 117; Du Toit 2017 *Manitoba Law Journal* 146.

127 Steyn 2015 *Journal of Economic and Financial Sciences* 112; Du Toit 2012 *TECLF* 112.

128 Anon *Bill of Rights Compendium* 3I5; Steyn 2015 *Journal of Economic and Financial Sciences* 112; Du Toit 2012 *TECLF* 117.

129 Jamneck *et al The Law of Succession in South Africa* 122; De Waal and Schoeman-Malan *Erfreg* 134; Du Toit 2001 *Stellenbosch Law Review* 240; Matsemela 2015 *Journal of Law, Society and Development* 99; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2001 *Stellenbosch Law Review* 234.

130 De Waal and Schoeman-Malan *Erfreg* 143.

Rights (section 39). However, the main focus will be placed on the constitutional Right to Property (section 25) and the Right to Equality (section 9), and how these two interact.[131] The rights in the *Constitution*, which aim to protect a testator's freedom of testation, will be considered before looking at the specific rights, which may limit a testator's freedom of testation.

2.4.1 Section 8 of the Constitution – Application of the Bill of Rights

With reference to the above-mentioned, it is necessary to take note of section 8 of the *Constitution*. This section regulates the application of the *Bill of Rights* in society[132] and provides for the direct and horizontal application of fundamental rights enshrined in the *Bill of Rights*.[133] This means that the rights contained in the *Bill of Rights* may be enforced against the state as well as against any other individual.[134]

In terms of section 8(1), the *Bill of Rights* is binding on all law in South Africa, as well as on the three independent powers regulating the South African legal system, consisting of the executive authority, legislative authority and the judiciary.[135] Subsection 8(2) makes it clear that the *Bill of Rights* is binding on both natural and juristic persons.[136] Furthermore, subsection 8(3) stipulates that when courts are in the process of interpreting the *Bill of Rights* to either natural or juristic persons, the court may develop common law should it be necessary.[137] Therefore, it is evident that the *Constitution* finds application both vertically and horizontally.[138]

2.4.2 Section 25 of the Constitution – Constitutional rights protecting freedom of testation

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131 De Waal and Schoeman-Malan *Erfreg* 143; Du Toit 2001 *Stellenbosch Law Review* 231-139.

132 Section 8 of the *Constitution*; Du Toit 2012 *TECLF* 113.

133 Anon *Bill of Rights Compendium* 3FB3; Du Toit 2001 *Stellenbosch Law Review* 231; Du Toit 2017 *Manitoba Law Journal* 146.

134 Currie and De Waal *The Bill of Rights Handbook* 553; Du Toit 2017 *Manitoba Law Journal* 146; Du Toit 2001 *Stellenbosch Law Review* 358.

135 Section 8 of the *Constitution*; Anon *Bill of Rights Compendium* 3FB3; Du Toit 2001 *Stellenbosch Law Review* 23; Du Toit 2012 *TECLF* 113.

136 Anon *Bill of Rights Compendium* 3FB3; Kok 2002 *SAJHR* 61; Du Toit 2001 *Stellenbosch Law Review* 231; Du Toit 2012 *TECLF* 113.

137 Du Toit 2017 *Manitoba Law Journal* 146; Du Toit 2012 *TECLF* 117; Du Toit 2001 *Stellenbosch Law Review* 233-234; Kok 2002 *SAJHR* 68.

138 Anon *Bill of Rights Compendium* 3FB3; Du Toit 2001 *Stellenbosch Law Review* 233; Du Toit 2017 *Manitoba Law Journal* 146.

Section 25 of the *Constitution* protects freedom of testation.[139] This provision protects the constitutional right to property and stipulates that no person may be deprived of his property unless the law of general application is applicable.[140] Also, no such person may be arbitrarily deprived of his property by law.[141] Under section 25, a person has the right to own private property and also to dispose of such property in the manner he wishes at his death by means of a valid last will and testament.[142] Thus interpreted, section 25 guarantees the principle of freedom of testation.[143]

The term "property" is so broad that one specific definition cannot be given to it.[144] As a result, in accordance with Roman-Dutch tradition, "property" refers to the legal relationship between a person and a thing, be it either corporeal or incorporeal.[145] Section 25 of the *Constitution* does not necessarily refer to certain rights, real rights or even ownership; it refers to "property", which is a much broader and inexact term.[146]

In the *BOE Trust Ltd* case,[147] the Supreme Court of Appeal stated that in seeking confirmation that the right to freedom of testation is protected under the South African *Constitution*, reference must be made to section 25 of the *Constitution*.[148] The court held that it is evident that the right to freedom of testation is included in

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139 *Ex Parte BOE Trust Ltd* 2009 6 SA 460 (WCC) para 9; Section 25(1) of the *Constitution*; Anon *Bill of Rights Compendium* 3FB2; De Waal and Schoeman-Malan *Erfreg* 4; Matsemela 2015 *Journal of Law, Society and Development* 107; Du Toit 2001 *Stellenbosch Law Review* 233; Wood-Bodley 2007 *SALJ* 691; Du Toit 2012 *TECLF* 112.

140 Section 25(1) of the *Constitution*; Anon *Bill of Rights Compendium* 3FB2; Rautenbach 2014 *PER* 2260; Rautenbach 2003 *TSAR* 182; Currie and De Waal *The Bill of Rights Handbook* 533; De Waal and Schoeman-Malan *Erfreg* 4; Du Toit 2001 *Stellenbosch Law Review* 233.

141 Section 25(1) of the *Constitution;* Anon *Bill of Rights Compendium* 3FB2; Rautenbach 2014 *PER* 22260; Rautenbach 2003 *TSAR* 182; Du Toit 2012 *TECLF* 112; Du Toit 2001 *Stellenbosch Law Review* 233.

142 De Waal and Schoeman-Malan *Erfreg* 4; Matsemela 2015 *Journal of Law, Society and Development* 107; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 9; Du Toit 2001 *Stellenbosch Law Review* 359; Du Toit 2012 *TECLF* 111.

143 Anon *Bill of Rights Compendium* 3FB6; De Waal and Schoeman-Malan *Erfreg* 4.

144 Rautenbach 2003 *TSAR* 182.

145 Anon *Bill of Rights Compendium* 3FB5.1; Currie and De Waal *The Bill of Rights Handbook* 535; Du Toit 2001 *Stellenbosch Law Review* 233.

146 Anon *Bill of Rights Compendium* 3FB6; Rautenbach 2003 *TSAR* 182; Wood-Bodley 2007 *SALJ* 688; Currie and De Waal *The Bill of Rights Handbook* 535; Du Toit 2001 *Stellenbosch Law Review* 234.

147 *Ex Parte BOE Trust Ltd* 2009 6 SA 460 (WCC) para 9 (hereafter refered to as *BOE Trust* case [court *a quo*]); *BOE Trust Ltd NNO* 2013 3 SA 236 (SCA) para 26 (hereafter refered to as *BOE Trust* case).

148 *BOE Trust* case (court *a quo*) para 9; De Waal and Schoeman-Malan *Erfreg* 2; Anon *Bill of Rights Compendium* 3G6; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; Du Toit 2012 *TECLF* 112.

the right to property. The court's reasoning was that a testator should be allowed to give enforceable instructions regarding the disposal of his assets at the date of his death.[149]

Furthermore, the court held that if this was not the case, the possibility would exist for the state to benefit from a person's death by infringing upon the deceased's property rights, which would have been protected while the owner was still alive.[150] Interestingly, the court also noted that the right to human dignity (section 10 of the *Constitution*) comes into play, as the living and the dead should be allowed the peace of mind to know that their last wishes will be respected upon death.[151]

Hence, the idea of freedom of testation is a protected notion in that:

> Private ownership and the concomitant right of an owner to dispose property owned (the *ius disponendi*) constitute the basic tenets of the South African law of property… the acknowledgement of private ownership and the power of disposition of an owner therefore serve as a sound foundation for the recognition of private succession as well as freedom of testation in South African law.[152]

As a result, it is clear that the right to own private property, the disposition thereof during the life of the owner, as well as the testator's wishes to dispose of the property as he pleases upon his death, forms part of the property clause under section 25 of the *Constitution*.[153]

2.4.3 Constitutional rights limiting freedom of testation

2.4.3.1 Section 9 of the *Constitution* – The equality clause

The question that now arises is whether the other rights contained in the *Bill of Rights* has an influence on a testator's freedom of testation. In this regard, section 9 of the *Constitution,* being the Equality clause, is of particular importance.[154] As with

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149 *BOE Trust* case (court *a quo*) para 9; Du Toit 2012 *TECLF* 112; De Waal and Schoeman-Malan *Erfreg* 4.

150 *BOE Trust* case para 26; De Waal and Schoeman-Malan *Erfreg* 5; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 9.

151 *BOE Trust* case para 27; De Waal and Schoeman-Malan *Erfreg* 5.

152 Du Toit 2001 *Stellenbosch Law Review* 224.

153 De Waal and Schoeman-Malan *Erfreg* 4; Steyn 2015 *Journal of Economic and Financial Sciences* 759; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 9; Du Toit 2012 *TECLF* 112.

154 Venter 2001 *PER* 16; Anon *Bill of Rights Compendium* 3I1; Rautenbach 2014 *PER* 2260; De Waal and Schoeman-Malan *Erfreg* 5; Du Toit 2001*Stellenbosch Law Review* 236; Du Toit 2012 *TECLF* 112.

section 8, section 9 operates horizontally between both natural and juristic persons.[155]

When a testator decides to directly or indirectly benefit only a specific group of persons, to the express exclusion of all other groups, by means of a testamentary trust, certain challenges arise. In this regard, a testator's freedom of testation is primarily limited by the equality clause.[156]

In the South African constitutional state, the concept of "equality" is a difficult and controversial social ideal.[157] The argument upon which "equality" is founded is that people who are similarly situated ought to be treated similarly and be entitled to similar rights.[158] To this extent, it includes the "full and equal enjoyment of all rights and freedoms."[159] Section 9 aims to prevent all forms of unfair discrimination.[160] According to section 9 of the *Constitution*, everyone is equal before law and no person may be unfairly discriminated against, either directly or indirectly, on any one of the following grounds:

> race, gender, sex, pregnancy, marital status, ethic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[161]

It may, however, be difficult to ascertain which stipulations in a will can be viewed as unfairly discriminatory. The *Promotion of Equality and Prevention of Unfair Discrimination Act*[162] aims to give effect to section 9 of the *Constitution.*[163] The

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155 Section 9 of the *Constitution*; Jamneck *et al The Law of Succession in South Africa* 122; De Waal and Schoeman-Malan *Erfreg* 5; Du Toit 2012 *TECLF* 112.

156 De Waal and Schoeman-Malan *Erfreg* 5; Anon *Bill of Rights Compendium* 3I1; Matsemela 2015 *Journal of Law, Society and Development* 107; Du Toit 2012 *TECLF* 112.

157 Currie and De Waal *The Bill of Rights Handbook* 210, 218.

158 Anon *Bill of Rights Compendium* 3I1; Venter 2001 *PER* 17; Currie and De Waal *The Bill of Rights Handbook* 210,218.

159 Anon *Bill of Rights Compendium* 3I1, 3I5; Section 9(2) of the *Constitution of the Republic of South Africa*; Currie and De Waal *The Bill of Rights Handbook* 211; Venter 2001 *PER* 16.

160 Anon *Bill of Rights Compendium* 3I1; Venter 2001 *PER* 16; Rautenbach 2014 *PER* 2260; Du Toit 2012 *TECLF* 112.

161 Section 9(3) and 9(4) of the *Constitution*; Anon *Bill of Rights Compendium* 3G8; De Waal and Schoeman-Malan *Erfreg* 5; Venter 2001 *PER* 16; Du Toit 2012 *TECLF* 112; Matsemela 2015 *Journal of Law, Society and Development* 107; Du Toit 2001 *Stellenbosch Law Review* 236; Kok 2002 *SAJHR* 61; Venter 2001 *PER* 16.

162 4 of 2002 (the *Equality Act*); The *Equality Act* is the most important anti-discrimination legislation promulgated after 1994 when the first democratic elections took place in South Africa and the *Interim Constitution* was drafted. It aims to achieve substantive equality and to facilitate socio-economic transformation.

163 Anon *Bill of Rights Compendium* 3I5; Jacobs and Wagner 2012 *SA Merc LJ* 248.

Equality Act clearly states that, "neither the State nor any person may unfairly discriminate against any person."[164] A "person" is defined as "a juristic person, a non-juristic entity" or "a group or category of persons" and therefore, includes testamentary charitable trusts.[165]

Furthermore, the *Equality Act* contains a list of unfair practices that ought to be guarded against as it does not necessarily prohibit all forms of discrimination, but it prohibits unfair discrimination.[166] This includes not withholding bursaries or scholarships from pupils of any particular group identified by prohibited grounds in an unfairly discriminatory manner.[167] There are various factors set out in the Act in deciding whether a certain practice is unfair.[168] These include considering whether the discrimination is reasonable and justifiable; the context of discrimination; whether human dignity is impaired; the impact thereof on the complainant; past discrimination; and the purpose, nature and extent of the discrimination, to mention only a few.[169] Furthermore, in the case of *Harksen v Lane*, a test was decided upon in order to ascertain whether a person's right to equality has been infringed.[170]

The Constitutional Court stated that the stages of enquiry ought to consist of the following: Firstly, the question of whether the conduct in question differentiates between groups of people, must be asked.[171] It must be established whether the differentiation has a legitimate purpose. Secondly, it must be established whether this differentiation amounts to unfair discrimination.[172] In order to ascertain the same, it must be clear whether the differentiation pertains to one of the listed grounds in section 9. It will also have to be determined whether another person's human dignity has possibly been infringed upon. Differentiation on one of the listed

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164 Section 6 of the *Equality Act*; Kok 2002 *SAJHR* 65.
165 Section 1 of the *Equality Act*; Kok 2002 *SAJHR* 65.
166 Anon *Bill of Rights Compendium* 3I5; Kok 2002 *SAJHR* 61.
167 Section 14 of the *Equality Act*; Wood-Bodley 2007*SALJ* 692, 701; Jacobs and Wagner 2012 *SA Merc LJ* 248; De Waal *Annual Survey of SA Law* 1195; Kok 2002 *SAJHR* 72-75.
168 Anon *Bill of Rights Compendium* 3I5.
169 Section 14 of the *Equality Act*; Kok 2002 *SAJHR* 72-75; Kok 2008 *SAJHR* 460, 467, 469; Jacobs and Wagner 2012 *SA Merc LJ* 248.
170 *Harksen v Lane* 1998 1 SA 300 (CC) para 51-53; Du Toit 2012 *TECLF* 118; Du Toit 2017 *Manitoba Law Journal* 146; Matsemela 2015 *Journal of Law, Society and Development* 104.
171 *Harksen v Lane* 1998 1 SA 300 (CC) para 53; Venter 2001 *PER* 17.
172 *Harksen v Lane* 1998 1 SA 300 (CC) para 53; Venter 2001 *PER* 17; Rautenbach 2014 *PER* 2260.

grounds or differentiation impairing another's human dignity will amount to discrimination.[173]

The test for unfairness focuses on the impact that the discrimination has on the person or persons who are discriminated against. If, at this stage, the differentiation in question does not amount to unfair discrimination, no violation will have ensued in terms of section 9 of the *Constitution*.[174] However, should the discrimination have amounted to unfair discrimination, it must be decided whether the discrimination will be justifiable in terms of section 36 of the *Constitution*, called the limitations clause.[175]

2.4.3.2 Section 36 of the *Constitution* – Limitation of rights

Section 36 of *the Constitution* is the general limitation clause.[176] It is referred to as the general limitation clause because it applies to all the rights generally embodied in the *Bill of Rights*.[177] Any right in the *Bill of Rights* may be restricted under the prescribed conditions that the restriction takes place by the "law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society."[178]

A two-staged approach must be followed in order to determine whether a right in the *Bill of Rights* has been infringed upon.[179] Firstly, the right in question must have been infringed upon or limited. Secondly, it must be proven that the so-called infringement

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173 *Harksen v Lane* 1998 1 SA 300 (CC) para 51-53; Kok 2008 *SAJHR* 469; Currie and De Waal *The Bill of Rights Handbook* 216; Du Toit 2012 *TECLF* 118; Jacobs and Wagner 2012 *SA Merc LJ* 248; Matsemela 2015 *Journal of Law, Society and Development* 104.

174 Currie and De Waal *The Bill of Rights Handbook* 216; Du Toit 2012 *TECLF* 118; Matsemela 2015 *Journal of Law, Society and Development* 104.

175 *Harksen v Lane* 1998 1 SA 300 (CC) para 53; Anon *Bill of Rights Compendium* 3FB3; Venter 2001 *PER* 17; Currie and De Waal *The Bill of Rights Handbook* 216; Du Toit 2012 *TECLF* 112; Matsemela 2015 *Journal of Law, Society and Development* 104; De Waal and Schoeman-Malan *Erfreg* 5; Kok 2008 *SAJHR* 469.

176 Section 36 of the *Constitution*; Anon *Bill of Rights Compendium* 1A44; Currie and De Waal *The Bill of Rights Handbook* 575; De Waal and Schoeman-Malan *Erfreg* 5; Du Toit 2001 *Stellenbosch Law Review* 232; Du Toit 2012 *TECLF* 113; Rautenbach 2014 *PER* 2243.

177 Rautenbach 2014 *PER* 2260; De Waal and Schoeman-Malan *Erfreg* 5; Currie and De Waal *The Bill of Rights Handbook* 557; Du Toit 2001 *Stellenbosch Law Review* 232; Wood-Bodley 2007 *SALJ* 691; Du Toit 2012 *TECLF* 113.

178 Section 36 of the *Constitution*; Anon *Bill of Rights Compendium* 1A44, 1A46; Rautenbach 2014 *PER* 2243; Du Toit 2012 *TECLF* 113; Wood-Bodley 2007 *SALJ* 691.

179 Anon *Bill of Rights Compendium* 3FB3; Currie and De Waal *The Bill of Rights Handbook* 557.

is a justifiable limitation of such right.[180] In order to prove this, the criteria as set out in section 36 must be satisfied, namely:

> The right that has been limited by the law of general application for reasons that can be considered reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[181]

As a result, in order for a court to make use of section 36 in the balancing of rights, section 8(3) of the *Constitution* must outweigh the principle of freedom of testation when weighed against the competing constitutional right, in this case the right to equality.[182]

Therefore, in terms of section 36 of the *Constitution* a testator's freedom of testation can be limited by a court of law should it be reasonable and justifiable to do so, if it is found that in exercising freedom of testation, another right in the *Bill of Rights* is infringed upon.[183] This aspect will be discussed in depth in Chapter 3 by means of case law.

2.4.4 Section 39 of the Constitution – Interpretation of the Bill of Rights

Important to note, in accordance with section 39 of the *Constitution*, a court of law has the obligation to consider international law upon interpreting any right in the *Bill of Rights*. In addition, such a court has discretion on whether to take foreign law into account or not.[184]

Section 39 is very important to this research question because it allows South African courts to look into foreign law on this very issue of when freedom of testation ought to be limited in the case where 'discriminatory' bequests are made to charitable trusts for the express benefit of one group of people to the exclusion of others. Should such a bequest to one group infringe on the right to equality of another group, it is clear that a South African court will have the power to amend such a

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180 Anon *Bill of Rights Compendium* 1A44; Currie and De Waal *The Bill of Rights Handbook* 557.

181 Section 36 of the *Constitution*; Anon *Bill of Rights Compendium* 3FB3, 1A44; Rautenbach 2014 *PER* 2243; Currie and De Waal *The Bill of Rights Handbook* 557; Du Toit 2012 *TECLF* 113; Du Toit 2001 *Stellenbosch Law Review* 231.

182 Du Toit 2001 *Stellenbosch Law Review* 235.

183 Section 36 of the *Constitution*; De Waal and Schoeman-Malan *Erfreg* 5; Rautenbach 2014 *PER* 2260.

184 Section 39 of the *Constitution*; Anon *Bill of Rights Compendium* 2C15.

testamentary provision in order to protect the constitutional right that has been infringed upon.[185]

At this stage, it is important to take into account that the most important theoretical aspects to freedom of testation have been pointed out, as well as the most important limitations; be it by common law, legislation or by the *Constitution*. With these theoretical aspects in mind, the case law to be discussed will be better understood and ultimately, an answer to the case study as set out in Chapter 1 will be sought. In this regard, recent Canadian case law will be considered in Chapter 4 after expounding on post-constitutional South African case law in Chapter 3.

185 Du Toit 2012 *TECLF* 113.

3 The legal position with regard to post-constitutional South African case law

A limited number of South African cases have been decided on the limitation of freedom of testation. In South Africa's constitutional dispensation, some testamentary stipulations in charitable trusts, which have previously been accepted as valid, are currently seen as discriminatory and unconstitutional.[186] Such testamentary provisions will "no longer pass muster in the light of the South African Constitution's equality and non-discrimination imperatives."[187] South African courts have been rather stern in condemning racially-based discriminatory provisions in charitable trusts and rightly so in light of the past racial injustices that the majority of South Africans have suffered.[188]

Therefore, a balance must be struck between freedom of testation and the norm of non-discrimination.[189] The most prominent post-constitutional case law on this topic will be expounded upon below in order to see how South African courts have struck this balance. The most notable cases to be reflected upon are *Minister of Education v Syfrets Trust*, *Emma Smith Educational Fund v University of KwaZulu-Natal* and *BOE Trust Ltd*.

3.1 Minister of Education v Syfrets Trust[190]

The *Syfrets Trust* case was the first reported case where South African courts had to weigh the protection of freedom of testation against the limitation thereof in order to protect other rights in the *Bill of Rights*.[191]

3.1.1 Facts

The facts of this case were that the testator, Mr Scarbrow, signed a will in 1920 in which he stipulated that in the case where his wife would predecease him and if his sons had no offspring, the residue of his estate had to be kept in a charitable

186 Du Toit 2012 *TECLF* 113.
187 Du Toit 2012 *TECLF* 113.
188 Du Toit 2017 *Manitoba Law Journal* 146.
189 Du Toit 2012 *TECLF* 113; Du Toit 2001 *Stellenbosch Law Review* 235.
190 2006 4 SA 205 (C) (the *Syfrets Trust* case).
191 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 117; Wood-Bodley 2007*SALJ* 687; Matsemela 2015 *Journal of Law, Society and Development* 102.

testamentary trust.[192] The "Scarbrow Bursary Fund Testamentary Trust" was established in 1965 with the sole purpose to "provide bursaries for deserving white, non-Jewish male students" who wished to study overseas.[193] However, in the early 2000's a notice was placed in one of the local newspapers encouraging students of the University of Cape Town who complied with the conditions of this will, to apply for the bursary in order to further their studies overseas.[194] When this matter came to the attention of the Minister of Education in 2002, he opposed the 'discriminatory' provisions of this testamentary trust and brought an application to court for the alteration thereof, alleging that the provisions of the trust were discriminatory and ought to be altered by court.[195]

3.1.2 Legal question

The question before court was whether the stipulations to the testamentary trust were against public policy, and therefore, whether these provisions were enforceable or not.[196]

3.1.3 Arguments and court decision

The arguments upon which the application was based was firstly, that the bequests were contrary to the *boni mores* of the community in that the provisions were immoral, illegal and unfairly discriminatory.[197] To this argument, the court pointed out that a testator's freedom of testation is not an absolute right and therefore, it may be limited by public policy.[198] South African courts cannot give effect to a provision that is against public policy, even if the provision did not offend public

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192 Jamneck *et al The Law of Succession in South Africa* 117; De Waal and Schoeman-Malan *Erfreg* 143; Roux 2013 *De Rebus* 49; Du Toit 2012 *TECLF* 118.

193 *Syfrets Trust* case para 1, 5; De Waal and Schoeman-Malan *Erfreg* 143; Du Toit 2017 *Manitoba Law Journal* 146; Matsemela 2015 *Journal of Law, Society and Development* 102; Roux 2013 *De Rebus* 49; Wood-Bodley 2007 *SALJ* 687; Du Toit 2012 *TECLF* 118.

194 Du Toit 2017 *Manitoba Law Journal* 146; Wood-Bodley 2007 *SALJ* 687; Roux 2013 *De Rebus* 49.

195 *Syfrets Trust* case para 6, 7, 9; De Waal and Schoeman-Malan *Erfreg* 143; Matsemela 2015 *Journal of Law, Society and Development* 102; Wood-Bodley 2007 *SALJ* 687.

196 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; De Waal and Schoeman-Malan *Erfreg* 143; Wood-Bodley 2007 *SALJ* 688; De Waal *Annual Survey of SA Law* 1064.

197 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; *Syfrets Trust case* para 32; Du Toit 2017 *Manitoba Law Journal* 146; Roux 2013 *De Rebus* 49; Wood-Bodley 2007 *SALJ* 688, 691.

198 *Syfrets Trust case* para 39; De Waal and Schoeman-Malan *Erfreg* 144; Roux 2013 *De Rebus* 49-50.

policy at the time that it came into existence.[199] The court decided that public policy had to be interpreted as it is currently understood, and not in the manner that it was interpreted when the will was executed.[200]

Due to public policy being a fluid concept, which changes over time as society changes, the court held that these discriminatory provisions of the testamentary trust had to be removed in order to include students of both genders and all races. The reason being, that these provisions are offensive to public policy in the current South African constitutional era.[201]

The second argument was based upon the provisions of section 13 of the *Trust Property Control Act*,[202] which stipulates that a South African court may alter or remove trust provisions, should such a provision have consequences which could not have been foreseeable by the testator at the time that these stipulations were created (as discussed in Chapter 2).[203] The court agreed that the testator could not have foreseen that the stipulations to his last will and testament would have become offensive due to a change in public policy.[204]

Although the High Court did not directly apply the provisions of section 9 of the *Constitution*, it decided the case on existing common law principles and by taking into account the spirit and purport of the *Bill of Rights.*[205] The applicant made a strong argument that the stipulations of the trust, which specifically purposes to only benefit one group of people to the express exclusion of all others, was in conflict with section 9 of the *Constitution*, which protects the right to equal treatment under the *Constitution.* Although the court did not elaborate on this point, the court ruled

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199 *Syfrets Trust* case para 12; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; Jamneck *et al The Law of Succession in South Africa* 117; Matsemela 2015 *Journal of Law, Society and Development* 102-104.

200 *Syfrets Trust* case para 26; De Waal and Schoeman-Malan *Erfreg* 143.

201 *Syfrets Trust case* para 12, 16, 20; Jamneck *et al The Law of Succession in South Africa* 117; Du Toit 2017 *Manitoba Law Journal* 146; Matsemela 2015 *Journal of Law, Society and Development* 102-104.

202 Section 13 of the *Trust Property Control Act*.

203 *Syfrets Trust* case para 9; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; De Waal and Schoeman-Malan *Erfreg* 135; Matsemela 2015 *Journal of Law, Society and Development* 102-104; Wood-Bodley 2007*SALJ* 688.

204 *Syfrets Trust case* para 9; Matsemela 2015 *Journal of Law, Society and Development* 102-104; Wood-Bodley 2007*SALJ* 688; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-36; Sedutla 2013 *De Rebus* 45.

205 *Syfrets Trust case* paras 16, 32; De Waal and Schoeman-Malan *Erfreg* 143; Wood-Bodley 2007*SALJ* 688; De Waal *Annual Survey of SA Law* 1064.

that the testamentary provisions in Mr Scarbrow's will amounted to unfair discrimination that offended public policy.[206]

In essence, the court weighed the constitutional right to equality and freedom from discrimination; against the right to own property and its correlation to freedom of testation. The conclusion was that the former outweighed the latter and that freedom of testation had to be limited.[207] Therefore, this case was decided along the same lines as the *William Marsh* case. Those who were discriminated against had to be included as potential beneficiaries.[208]

Regarding the stipulation that the bursary was only available to white persons, it was held that this was indirectly discriminatory on the ground of colour and race.[209] The specific exclusion of persons of Jewish heritage and females was found to be directly discriminatory on the grounds of religion, race and gender.[210] As a result, the offending provisions were removed from the trust.[211] It is noteworthy that unlike the *William Marsh* case, the court did not alter the trust deed in terms of section 13 of the *Trust Property Control Act*, but that it was altered due to the fact that the stipulations were against public policy in light of the *Constitution*.[212] One of the main considering factors was that a group of people who had suffered discrimination in the past, were discriminated against. This added much weight to the fact that the trust provisions could not remain unaltered.[213] It is important to note that previous discrimination is one of the factors mentioned in the *Equality Act* (as discussed in

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206 *Syfrets Trust case* paras 15, 16, 33, 36; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; De Waal and Schoeman-Malan *Erfreg* 144; Du Toit 2017 *Manitoba Law Journal* 146; Wood-Bodley 2007*SALJ* 688; Du Toit 2012 *TECLF* 119.

207 *Syfrets Trust case* paras 39-44, 48; De Waal and Schoeman-Malan *Erfreg* 144; Du Toit 2017 *Manitoba Law Journal* 146; Roux 2013 *De Rebus* 49; Wood-Bodley 2007*SALJ* 695; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 119.

208 Du Toit 2012 *TECLF* 119.

209 *Syfrets Trust case* paras 33, 48; De Waal and Schoeman-Malan *Erfreg* 144; Du Toit 2017 *Manitoba Law Journal* 146; Wood-Bodley 2007*SALJ* 692.

210 De Waal and Schoeman-Malan *Erfreg* 144; Du Toit 2017 *Manitoba Law Journal* 146; Sedutla 2013 *De Rebus* 45.

211 *Syfrets Trust case* paras 19-21; De Waal and Schoeman-Malan *Erfreg* 144; Du Toit 2017 *Manitoba Law Journal* 146; Matsemela 2015 *Journal of Law, Society and Development* 102-104; Wood-Bodley 2007*SALJ* 689.

212 De Waal and Schoeman-Malan *Erfreg* 196.

213 Du Toit 2017 *Manitoba Law Journal* 150.

Chapter 2) that needs to be considered in order to determine whether unfair discrimination has taken place or not.[214]

For purposes of further discussion, it is important to note that the court held:

> This conclusion does not, of course, mean that the principle of freedom of testation is being negated or ignored; it simply enforces a limitation of the testator's freedom of testation that has existed since time immemorial. It also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions – which discriminate *unfairly* on the grounds of race, gender and religion – are invalid. There are many other examples of differentiation in this field, which will have to be considered by another court on another occasion.[215]

Therefore, it is clear that not all clauses in wills and testamentary trusts that 'discriminate' against different groups of people amount to unfair discrimination per se.[216] The principle of freedom of testation cannot simply be ignored.[217]

Furthermore, concerning the charitable trust having an element of public benefit, the court made mention of the fact that the university is "a public agency or quasi-public body."[218] For this reason "a trust ... created by a private individual or group is an institution of public concern."[219] It is important to note the presence of an element of public benefit since the state has a direct interest in the administration of a trust with an element of public benefit (as mentioned in Chapter 1).[220]

3.2 Emma Smith Educational Fund v University of KwaZulu-Natal[221]

The *Emma Smith* case is the second reported case (the *Syfrets Trust* case being the first) in which the constitutional limitation of freedom of testation was dealt with.[222]

3.2.1 Facts

The facts of this case were that at his death in 1941, a certain Mr Smith established a testamentary trust through his will in the memory of his mother.[223] He directed

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214 Section 14 of the *Equality Act*; Kok 2002 *SAHRJ* 74.
215 *Syfrets Trust case* para 48.
216 *Syfrets Trust case* para 48; Sedutla 2013 *De Rebus* 45; Du Toit 2012 *TECLF* 117.
217 *Syfrets Trust case* para 48; De Waal and Schoeman-Malan *Erfreg* 144.
218 *Syfrets Trust case* paras 45-46; Du Toit 2012 *TECLF* 119.
219 *Syfrets Trust case* paras 45-46; Du Toit 2012 *TECLF* 119.
220 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-38; Wood-Bodley 2007 *SALJ* 695.
221 2010 6 SA 518 (SCA) (the *Emma Smith* case).
222 Du Toit 2017 *Manitoba Law Journal* 147; Matsemela 2015 *Journal of Law, Society and Development* 102-114.

that three tenths of the residue of his estate was to be held in the "Emma Smith Educational Fund" and administrated to provide bursaries to 'European' girls born of 'Dutch South African' or 'British South African' parents in order to complete their studies in various fields of art.[224] Due to his admiration for the town he resided in, namely Durban, he added another stipulation specifying that the applicants had to have resided in Durban for a minimum period of three years before they would be considered as a potential beneficiary for the trust funds.[225]

In 1999, the University of KwaZulu-Natal brought an application to the Durban High Court for an order seeking to vary the trust deed due to the discriminatory provisions of only benefiting one group of persons to the express exclusion of other groups.[226] The applicant sought that the words 'European', 'Dutch South African' and 'British South African' be deleted from the testamentary trust provisions and that the Durban municipality be specifically listed instead of the Durban council (for purposes of this discussion we will not focus on the latter aspect).[227]

3.2.2 Legal question

Once again, the question before court was whether the discriminatory provisions in the will were against public policy and had to be deleted.[228]

3.2.3 Arguments and court decision

The following arguments were relied upon: Firstly, the applicants followed the same argument as in the *Syfrets Trust* case in that the testamentary provisions were against public policy and that in terms of section 13 of the *Trust property Control Act*, the testator could not have foreseen the consequences of the stipulations under

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223 De Waal *Annual Survey of SA Law* 1194.

224 *Emma Smith* case paras 4, 8, 12; De Waal and Schoeman-Malan *Erfreg* 144; Du Toit 2017 *Manitoba Law Journal* 147; Modiri 2013 *PER* 586; De Waal *Annual Survey of SA Law* 1194; Du Toit 2012 *TECLF* 121.

225 Du Toit 2012 *TECLF* 121; Matsemela 2015 *Journal of Law, Society and Development* 110-111.

226 Matsemela 2015 *Journal of Law, Society and Development* 110-114; De Waal *Annual Survey of SA Law* 1193; Du Toit 2012 *TECLF* 121.

227 Du Toit 2017 *Manitoba Law Journal* 147; De Waal *Annual Survey of SA Law* 1193; Du Toit 2012 *TECLF* 121.

228 *Emma Smith* case para 24; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; Du Toit 2017 *Manitoba Law Journal* 147; De Waal *Annual Survey of SA Law* 1197; Du Toit 2012 *TECLF* 121.

the current constitutional regime of South Africa.[229] Furthermore, the University of KwaZulu-Natal argued that the discriminatory provisions could expose the university to detrimental legal proceedings in terms of the *Equality Act*. This Act was promulgated to prohibit unfair discrimination and to give effect to section 9 of the *Constitution* (as discussed in Chapter 2).[230]

The court decided that it would be correct to alter the testamentary trust provisions in terms of the *Trust property Control Act* by deleting the racially restrictive stipulations.[231] The court reasoned that the right to equality was infringed upon and that the testator's right to freedom of testation was to be limited in order to protect the right to equality.[232] The fundamental values of the *Constitution* have to take precedence over freedom of testation.[233] It is important to note that unlike the *Syfrets Trust* case, the court based its decision on section 13 of the *Trust Property Control* Act and not common law.[234] As a result, the bursaries were then extended to women of all racial, social and ethnic origins.[235]

Therefore, interestingly, the racial 'discriminatory' provisions were declared invalid and had to be deleted, but the 'discriminatory' provisions regarding gender, namely that only women could benefit, was allowed.[236] The reason for the above was, as stated in the *Syfrets Trust* case, is that the principle of freedom of testation is still valued and cannot be ignored.[237] The inference can be drawn that certain other

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229 Du Toit 2012 *TECLF* 121; De Waal and Schoeman-Malan *Erfreg* 135; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-37; Du Toit 2017 *Manitoba Law Journal* 147.

230 De Waal *Annual Survey of SA Law* 1195.

231 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; De Waal and Schoeman-Malan *Erfreg* 196; Modiri 2013 *PER* 586; De Waal *Annual Survey of SA Law* 1195-1196; Du Toit 2012 *TECLF* 121.

232 *Emma Smith* case paras 35-37, 42; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; Du Toit 2017 *Manitoba Law Journal* 147; De Waal *Annual Survey of SA Law* 1196; Du Toit 2012 *TECLF* 121.

233 *Emma Smith* case paras 35-38; Du Toit 2017 *Manitoba Law Journal* 147; Matsemela 2015 *Journal of Law, Society and Development* 114; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 121.

234 *Emma Smith* case para 40; De Waal and Schoeman-Malan *Erfreg* 145; Modiri 2013 *PER* 586; De Waal *Annual Survey of SA Law* 1193; Du Toit 2012 *TECLF* 121.

235 *Emma Smith* case paras 35-37, 42; Du Toit 2017 *Manitoba Law Journal* 147; De Waal *Annual Survey of SA Law* 1196; Du Toit 2012 *TECLF* 121.

236 De Waal and Schoeman-Malan *Erfreg* 145; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 121.

237 *Emma Smith* case para 41; De Waal and Schoeman-Malan *Erfreg* 145.

forms[238] of 'discrimination' would also be allowable under South African law (to be discussed in Chapter 5).[239]

In the *Emma Smith* case, it has been suggested *obiter dictum*[240] that it would be allowable under South African law for a person of one religion to register a trust to the sole benefit of others of the same religion.[241] In the same sense, it may be acceptable for one person of a specific club to register a trust for the benefit of other club members' children and dependants.[242] Furthermore, from the *Emma Smith* case, it is clear that it is not unconstitutional to provide bursaries by means of a charitable trust to persons of a certain area, or limit the bursaries to a certain university or field of study.[243] This opens the proverbial door to much debate on the extent to which freedom of testation ought to be limited in such cases. This specific argument will be elaborated on in Chapter 5 in the Marais scenario.

3.3 BOE Trust Ltd[244]

The case of *BOE Trust* is another important case concerning the protection, limitation and constitutionality of freedom of testation. In this 2013 case, unlike the cases of *Syfrets Trust* and *Emma Smith*, the freedom of testation was upheld due to alternative provisions stipulated in the will of the deceased.[245]

3.3.1 Facts

Briefly, the facts of the matter were that in 2002, the testatrix, Mrs de Villiers, stipulated in her last will and testament that after the various bequests to family members, the residue of the estate had to be kept in a testamentary trust.[246] The "Jean Pierre De Villiers Trust" funds were to be utilised for the express purpose to

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238 If 'discriminatory' provisions based on gender can be allowed, one can argue that 'discriminatory' provisions based on language (as with the factual setting in Chapter 1) ought to be allowed as well; as long as the 'discriminatory' provisions are not racially discriminatory.

239 De Waal and Schoeman-Malan *Erfreg* 145; Du Toit 2017 *Manitoba Law Journal* 148.

240 This is an incidental remark as the opinion of a judge, but it is not essential to the decision.

241 *Emma Smith* case para 41; De Waal and Schoeman-Malan *Erfreg* 145; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 121.

242 *Emma Smith* case para 41; De Waal and Schoeman-Malan *Erfreg* 145; De Waal *Annual Survey of SA Law* 1064.

243 De Waal and Schoeman-Malan *Erfreg* 145.

244 *BOE Trust* case (as cited before in Chapter 2).

245 *BOE Trust* case paras 24, 31; De Waal and Schoeman-Malan *Erfreg* 145; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 588; De Waal *Annual Survey of SA Law* 1064.

246 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 584; Du Toit 2012 *TECLF* 119.

provide bursaries to 'white' South Africans who wished to further their studies overseas in organic chemistry, subject to the provisions that they would return to South Africa in order to further the South African economy.[247]

Very importantly, the trust conditions stated that should there be any reason for impossibility of the former provisions, the residue was to be divided between ten specific charities listed in the will instead.[248]

All the universities, namely the University of Cape Town, the University of Stellenbosch, the University of the Free State and the University of Pretoria, which were approached by the trustees of the trust, refused to accept the bursaries.[249] None were willing to offer it to students who complied with the 'discriminatory provisions' for the reason that the provisions were deemed to be unfairly discriminatory based on race. Should the word 'white', however, be deleted from the testamentary provisions, the universities would be willing to accept the bursaries.[250] Accordingly, an application to court was made by the trustees for the alteration to be made[251] by means of a *rule nisi*.[252]

3.3.2 Legal question

The question before court was whether the word 'white' had to be deleted from the will since provision was made in the will that in the case of impossibility, the funds would be distributed equally among the listed charities.[253]

3.3.3 Arguments and court decision

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247 *BOE Trust* case paras 3-4; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-41; Du Toit 2017 *Manitoba Law Journal* 148; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 584; Du Toit 2012 *TECLF* 119.

248 *BOE Trust* case paras 2-3; Matsemela 2015 *Journal of Law, Society and Development* 106; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 584.

249 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 584; Du Toit 2012 *TECLF* 119.

250 *BOE Trust* case (court *a quo*) para 4; Matsemela 2015 *Journal of Law, Society and Development* 106; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 585; Du Toit 2012 *TECLF* 119.

251 *BOE Trust* case (court *a quo*) para 4; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; Matsemela 2015 *Journal of Law, Society and Development* 106; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 585.

252 An order of court which has no enforceability until a certain condition is met.

253 De Waal *Annual Survey of SA Law* 1064; Du Toit 2017 *Manitoba Law Journal* 148; Du Toit 2012 *TECLF* 119.

The applicants argued that the word 'white' directly, as well as indirectly, discriminated against any other potential beneficiaries of another colour or race.[254] The trust stipulations not only infringed the right to equality, embodied in section 9 of the *Constitution*, but also the provisions of the *Equality Act* (as discussed in Chapter 2).[255]

The court reasoned that the principle of freedom of testation is an intricate part of the South African law of succession and that it ought to be protected under section 25 of the *Constitution*.[256] This provision in effect holds that neither the testator, nor the beneficiaries may be deprived of property unless it is limited under the law of general application.[257] No law may allow the arbitrary deprivation of property.[258] Therefore, the testatrix had the right to dispose of her property as she pleases at her death as long as the bequest complies with the provisions of the *Constitution*.[259]

As a result, the court found that the trust provisions were not to be altered, as it was not in conflict with the public policy.[260] The discrimination was fair in the sense that it aimed to achieve a noble goal of bringing skills back into South Africa.[261] The court stated that it will not alter the trust provisions in terms of section 13 of the *Trust Property Control Act*, because "it could not be said that the testatrix did not foresee that the new constitutional dispensation would render the bequest contrary to public policy…"[262]

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254 *BOE Trust* case para 3; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; Sedutla 2013 *De Rebus* 45; Du Toit 2012 *TECLF* 120.

255 Anon *Bill of Rights Compendium* 3I1; Sedutla 2013 *De Rebus* 45.

256 *BOE Trust* case (court *a quo*) para 9; *BOE Trust* case SCA para 26; Anon *Bill of Rights Compendium* 3G6; Du Toit 2012 *TECLF* 112; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 587.

257 Section 25 of the *Constitution*; Matsemela 2015 *Journal of Law, Society and Development* 106-107; Sedutla 2013 *De Rebus* 45.

258 Section 25 of the *Constitution*; *BOE Trust* case para 26; Matsemela 2015 *Journal of Law, Societyand Development* 106-107; Modiri 2013 *PER* 587.

259 Section 25 of the *Constitution*; Matsemela 2015 *Journal of Law, Society and Development* 106-107.

260 *BOE Trust* case para 24; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; De Waal and Schoeman-Malan *Erfreg* 145; Du Toit 2017 *Manitoba Law Journal* 148; Sedutla 2013 *De Rebus* 45; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 120.

261 *BOE Trust* case (court *a quo*) para 15; Du Toit 2017 *Manitoba Law Journal* 148; Du Toit 2012 *TECLF* 113; Matsemela 2015 *Journal of Law, Society and Development* 107; Sedutla 2013 *De Rebus* 45; Du Toit 2012 *TECLF* 120.

262 *BOE Trust* case paras 21-22; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; Matsemela 2015 *Journal of Law, Society and Development* 107; Sedutla 2013 *De Rebus* 45; Du Toit 2012 *TECLF* 120.

In essence, the court held that it would not alter the trust provisions.[263] Since the trustees were not administering the funds according to the testatrix's wishes, in that they applied for the amendment of the trust provisions, it has resulted in the bequest becoming impossible.[264] Hence, the trust funds were to be divided among the specific charities listed in the testatrix's last will and testament.[265] It is clear that the reason why the Supreme Court of Appeal did not alter the will of the Testatrix is because an alternative was provided for in the will.[266]

Again, in the *BOE Trust* case, the court made mention of the fact that freedom of testation cannot be ignored.[267] The court stated that freedom of testation largely involves the right to dignity and the right to property, the former in a fundamental way.[268] It is evident that differentiation in charitable trust provisions would be acceptable in South African law, should there exist a "legitimate objective" such as the need to redress injustices of the past pertaining to race or gender.[269]

Should there have existed no alternative in the will, it is safe to assume that the Court would have made a similar finding as in the *Syfrets Trust* case and the *Emma Smith* case in altering the will. However, as this case was only heard by the Supreme Court of Appeal, it stands to reason what the lines of argumentation would have been should the Constitutional Court have presided over the case.

Considering these three cases, it is evident that although South African courts have the power to amend a trust deed in which 'discriminatory' stipulations are embodied, freedom of testation is still a principle in our law which ought to be protected.

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263 De Waal and Schoeman-Malan *Erfreg* 145; Du Toit 2017 *Manitoba Law Journal* 148; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 585; De Waal *Annual Survey of SA Law* 1064.

264 *BOE Trust* case SCA paras 24, 31; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; De Waal and Schoeman-Malan *Erfreg* 145; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 588; De Waal *Annual Survey of SA Law* 1064.

265 *BOE Trust* case para 31; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; De Waal and Schoeman-Malan *Erfreg* 145; Du Toit 2017 *Manitoba Law Journal* 148; Matsemela 2015 *Journal of Law, Society and Development* 108; Modiri 2013 *PER* 588.

266 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; De Waal and Schoeman-Malan *Erfreg* 145; Du Toit 2017 *Manitoba Law Journal* 148; Matsemela 2015 *Journal of Law, Society and Development* 108.

267 *BOE Trust* case (court *a quo*) para 14; *BOE Trust* case paras 10, 15, 26-27; De Waal and Schoeman-Malan *Erfreg* 145; Sedutla 2013 *De Rebus* 45; Du Toit 2012 *TECLF* 120.

268 *BOE Trust* case par 27; Olivier, Strydom and van den Berg *Trust Law and Practice* 2-42; Du Toit 2017 *Manitoba Law Journal* 148; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 11.

269 *BOE Trust* case (court *a quo*) para 14; Du Toit 2017 *Manitoba Law Journal* 148; De Waal and Schoeman-Malan *Erfreg* 145; Du Toit 2012 *TECLF* 120.

Discrimination based on race will not be tolerated. However, 'discrimination' based on gender has been tolerated in the past and, hence, the question remains whether 'discrimination' based on other factors such as language may be allowed.[270] Before considering these questions, the approach followed by Canadian courts will be considered in the following Chapter to see how Canada has dealt with this issue.

[270] At this point it is important to note that in all of the above cases, the trustees to the trusts were public trustees, for example, universities. It would be interesting to know what the situation would have been if the trustees were private persons or private entities.

4 The legal position relating to Canadian case law

In comparison to South African case law, similar cases have been decided by Canadian courts concerning the limitation of freedom of testation. In accordance with section 39 of the *Constitution* (as discussed in Chapter 2), South African courts have the liberty and discretion to consider foreign law when interpreting the Bill of Rights.[271] The section on equality in the *Canadian Charter of Rights and Freedoms*[272] closely resembles that of section 9 of the South African *Constitution*.[273] For this reason, specific research will be made into Canadian case law to compare the legal positions on this topic found in the South African and Canadian context, respectively. It may be beneficial to South African courts to consider the arguments followed in these foreign court cases. Before examining the cases, a short background on the Canadian view of freedom of testation will be provided.

Previously, freedom of testation used to be an absolute right.[274] This meant that a testator had the liberty to dispose of all assets in the manner he wished, even if it was capricious.[275] Currently there are three main restrictions on freedom of testation.[276] Firstly, most Canadian jurisdictions have enacted legislation to the effect that dependants of a testator may apply to court for support in the case of being disinherited. Secondly, unworthy heirs are precluded from inheriting, for example, an heir who murdered the testator or terrorist organisations. Lastly, much like the South African approach, effect will not be given to stipulations that are against public policy. These stipulations include: conditions to bequests that are illegal, conditions which hinder the relationship between a parent and child, conditions restraining marriage and, very importantly, certain discriminatory bequests.[277]

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271 Section 39 of the *Constitution.*

272 *Canadian Charter of Human Rights and Freedoms* (the *Canadian Charter*).

273 Anon *Bill of Rights Compendium* 3I1.

274 Nussbaum 1937 *ABAJ* 183; Dainow 1938 *Michigan Law Review* 1124.

275 Dainow 1938 *Michigan Law Review* 1124.

276 Thomson 2016 https://www.lexology.com/library/detail.aspx?g=4be70641-bf23-421b-9f30-d610f01dc720.

277 Thomson 2016 https://www.lexology.com/library/detail.aspx?g=4be70641-bf23-421b-9f30-d610f01dc720.

In both Canada and South Africa, the furtherance of equality has previously played an immense role and continues to do so today.[278] The *Canadian Charter* aims to ensure equality in Canada.[279] Section 15(1) of the *Canadian Charter* states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.[280]

Hence, in light of the above, the main cases to be examined in order to see how Canadian courts have struck a balance between preserving and limiting freedom of testation include: *Canada Trust Co v Ontario*, *University of Victoria v British Columbia* and *Esther G. Castanera Scholarship Fund.*

4.1 Canada Trust Co (Leonard Trust) v Ontario[281]

4.1.1 Facts

In April 1990, the *Leonard Trust* case was heard by the Canadian Appeal Court. The facts before court pertained to an *inter vivos* trust[282] where the income of the trust was apportioned to provide an exclusive group of people with educational scholarships.[283] In 1923, a certain Mr Reuben Wells Leonard founded the *inter vivos* trust, which was named the "Leonard Foundation".[284] These scholarships were called "The Leonard Scholarships".[285] The trust deed set out four specific stipulations in terms of which only a certain group of people could benefit from this trust fund, to the express exclusion of others.[286] These stipulations were argued to be discriminatory on various grounds, which included mainly race and religion, and to a

278 Venter 2001 *PER* 14; Anon *Bill of Rights Compendium* 3I1.
279 Venter 2001 *PER* 14; Anon *Bill of Rights Compendium* 3I1.
280 The *Canadian Charter*; Anon *Bill of Rights Compendium* 3I1.
281 1990 74 O.R. (2d) 481 (ONCA) (the *Leonard Trust* case).
282 An *inter vivos* trust differs from a testamentary or *mortis causa* trust in that the trust commences while the founder of the trust is still alive. The latin term *inter vivos* literally translated, means 'between the living'.
283 Du Toit 2017 *Manitoba Law Journal* 143; Milley *Council of Christian Charities* 2; Du Toit 2012 *TECLF* 100.
284 The *Leonard Trust* case 11; Harding 2016 *CJCCL* 232.
285 Harding 2016 *CJCCL* 232; Milley *Council of Christian Charities* 2.
286 Du Toit 2017 *Manitoba Law Journal* 143; Du Toit 2012 *TECLF* 100; Milley *Council of Christian Charities* 2.

lesser extent, also ancestry, citizenship and ethnic origin.[287] The provisions of the trust deed read as follows:

> WHEREAS the Settlor believes that the White Race is, as a whole, best qualified by nature to be entrusted with the development of civilization and the general progress of the World along the best lines:
>
> AND WHEREAS the Settlor believes that the progress of the World depends in the future, as in the past, on the maintenance of the Christian religion:
>
> AND WHEREAS the Settlor believes that the peace of the World and the advancement of civilization depends very greatly upon the independence, the stability and the prosperity of the British Empire as a whole, and that this independence, stability and prosperity can be best attained and assured by the education in patriotic Institutions of selected children, whose birth and training are such as to warrant a reasonable expectation of their developing into leading citizens of the Empire:
>
> AND WHEREAS the Settlor believes that, so far as possible, the conduct of the affairs of the British Empire should be in the guidance of christian (sic) persons of British Nationality who are not hampered or controlled by an allegiance or pledge of obedience to any government, power or authority, temporal or spiritual, the seat of which government, power or authority is outside the British Empire. For the above reason the Settlor excludes from the management of, or benefits in the Foundation intended to be created by this Indenture, all who are not Christians of the White Race, all who are not of British Nationality or of British Parentage, and all who owe allegiance to any Foreign Government, Prince, Pope, or Potentate, or who recognize any such authority, temporal or spiritual.[288]

In effect, scholarships would only be advanced to people who could be classified as "a British Subject of the White Race and of the Christian Religion"[289] while it expressly excluded any person not complying with these express provisions, and also any educational institution dominated by a person not complying with these provisions.[290] The above stipulations, therefore, made the allegation and assumption that the 'white race' is the only race best qualified to see to the development of society and civilisation.[291] It further held that the progression of the entire world

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287 The *Leonard Trust* case 11; Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 232; Milley *Council of Christian Charities* 2; Du Toit 2012 *TECLF* 100.

288 The *Leonard Trust* case para 11; The *University of Victoria* case para 21; *G. Castanera Scholarship Fund* 2015 MBQB 28 para 25; Du Toit 2012 *TECLF* 100.

289 Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 232; *Esther G. Castanera Scholarship Fund* 2015 MBQB 28 para 26; Milley *Council of Christian Charities* 2; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

290 Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 232; Milley *Council of Christian Charities* 2; Du Toit 2012 *TECLF* 100.

291 Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 232; Du Toit 2012 *TECLF* 100; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1.

depended on the exercising of the Christian faith and in effect the progression of civilisation depended on the British Empire and the prosperity thereof.[292] Moreover, the trust deed stipulated that only one quarter of the total funds was allowed to be allocated to women in any one year, therefore, being discriminatory based on gender as well.[293]

4.1.2 Legal question

The legal question before the Canadian courts was whether freedom of testation found prevalence over the notions and legislation pertaining to equality.[294] Alternatively, the question before court was whether freedom of testation had to be limited concerning human equality.[295]

4.1.3 Arguments and court decision

The argument before court was that the right of an owner of property to dispose of this property in the manner chosen by the owner had to prevail.[296] This is a legal principle firmly rooted in the Canadian law and has been recognised and protected by society for a long time.[297] However, the counter-argument was made that although the right of an owner to dispose of his assets as he pleases, is a firmly rooted principle in Canadian law, it is not an absolute right and may be limited should the provisions be in conflict with public policy.[298] In this case, the provisions of the trust deed were in direct conflict with public policy and the modern day social values, so that the trust could not be allowed to operate as set out in the trust deed.[299]

Although the court of first instance found that the charitable trust did not offend public policy, the appeal court applied the cy-pres doctrine. The common law cy-pres

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292 Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 2.

293 Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 233.

294 Harding 2016 *CJCCL* 233.

295 Harding 2016 *CJCCL* 233; Milley *Council of Christian Charities* 2.

296 The *Leonard Trust* case 353.

297 The *Leonard Trust* case 334, 353; Milley *Council of Christian Charities* 2; Harding 2016 *CJCCL* 232.

298 The *Leonard Trust* case 334-335,353; Harding 2016 *CJCCL* 232; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria; Milley P *Council of Christian Charities* 2.

299 The *Leonard Trust* case 334-335; Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 232; Du Toit 2012 *TECLF* 100; Milley *Council of Christian Charities* 2.

doctrine entails that a court of law may interpret a trust deed "as close as possible" to the original purpose and intents of the founder should these purposes and intents become unenforceable, in effect, altering the trust deed.[300] In terms hereof, it was found that the trust was discriminatory on the grounds of race, religion, nationality and gender, and the court struck out all restrictions regarding these discriminatory aspects.[301]

According to Rule 14.05(3)(a) of the Canadian *Rules of Civil Procedure*, a Canadian court of law is endowed with the necessary jurisdiction to resolve issues pertaining to potential discriminatory provisions in a trust.[302] The court found that charitable trusts are seen as public instruments where the right to equality carries a heavier weight when balanced with freedom of testation in the case where discrimination is at hand.[303] Moreover, in the end the court found that the trust provisions were both blatantly racist and promoted religious superiority, which is against public policy.[304] It is important to note this argument of court, as similar arguments have already arisen in the South African context, more specifically, in the case of *Syferts Trust* (as discussed in Chapter 3).

First of all, it could not be advocated that the white race is best qualified to preserve and develop civilisation.[305] Secondly, it was conflicting with public policy to say that only persons for the white race, being of the Protestant Christian religion, and who were British in ethnic origin would be suited to develop civilisation.[306] As a result, these discriminatory provisions were found to be unfairly discriminatory and the owner's right to dispose of his assets as he pleases was limited when weighed

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300 Olivier, Strydom and van den Berg *Trust Law and Practice* 2-37; Du Toit 2012 *TECLF* 100.

301 Harding 2016 *CJCCL* 233; Du Toit 2012 *TECLF* 100.

302 Freedman 2013 *Estates, Trusts & Pensions Journal* 383.

303 Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 235; Du Toit 2001 *Stellenbosch Law Review* 235; Du Toit 2012 *TECLF* 101.

304 Du Toit 2017 *Manitoba Law Journal* 143; Harding 2016 *CJCCL* 232; Du Toit 2012 *TECLF* 100; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 2; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

305 Du Toit 2017 *Manitoba Law Journal* 143; Du Toit 2012 *TECLF* 99.

306 Du Toit 2017 *Manitoba Law Journal* 143; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 2; Du Toit 2012 *TECLF* 100; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

against the fundamental right of human equality.[307] To allow a charitable trust to continue on the basis of discrimination would be unheard of as it directly conflicts with public policy. The right of the owner of a property to dispose of his assets by means of a charitable trust must adhere to both legislation and public policy, where all races and all religions are treated equally in line with the fundamental right of human equality.[308] What happens to the trusts? Are the deeds amended?

Remarkably, however, the court stated that this decision cannot blindly be applied to every case that pertains to scholarships of charitable trusts containing certain conditions that may violate a category of discrimination.[309] Each case must be considered individually and there are certain acceptable forms of discrimination in the Canadian law.[310]

4.2 University of Victoria v British Columbia[311]

4.2.1 Facts

In 2000, the *University of Victoria* case was heard by a Canadian Supreme Court. A certain Ms. Florence Gertrude McConnell decided to leave a vast sum on money to the University of Victoria upon her death in 1994[312] in order to provide two types of scholarships to students interested in studying education and also to students interested in studying music.[313] The University of Victoria was approached in this regard to act as one of the trustees of the testamentary charitable trust.[314] The role of the University was not to render any services on behalf of the trust, but merely to

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307 Du Toit 2017 *Manitoba Law Journal* 143; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 2; Du Toit 2012 *TECLF* 100.

308 Du Toit 2012 *TECLF* 100; Milley *Council of Christian Charities* 2.

309 The *Leonard Trust* case 37 - 40; *Esther G. Castanera Scholarship Fund* 2015 MBQB 28 para 30; Milley *Council of Christian Charities* 2; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

310 The *Leonard Trust* case 37- 40; *Esther G. Castanera Scholarship Fund* 2015 MBQB 28 para 30; Milley *Council of Christian Charities* 2; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

311 2000 BSCS 445 (the *University of Victoria* case).

312 The *University of Victoria* case para 4.

313 The *University of Victoria* case paras 1, 4; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

314 Arthur "Validating Scholarships Limited by Gender" 2015; *Drache Aptowitzer LLP Newsletter* 1; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

act as an intermediary between the charitable trust and the students receiving the scholarships.[315]

The potential problem that arose in this case is that the recipients of these scholarships had to be Roman Catholics in religion,[316] to the express exclusion of any other religion or faith.[317] The trust deed stipulated that:

> (vii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA**, as a bursary for a practicing Roman Catholic student in the third or fourth year of Education;
>
> (viii) **TO TRANSFER** and deliver One (1) of such equal shares to the **UNIVERSITY OF VICTORIA** for a bursary in music to be given to a Roman Catholic student preferably interested in the liturgy of the Roman Catholic Church.[318]

The University of Victoria approached the Canadian courts in order to obtain guidance regarding whether or not the above-mentioned provision constituted unfair discrimination.[319]

4.2.2 Legal question

The question before court was whether the trust stipulations was in breach of any of the human rights and ultimately against the public policy.[320] This would determine whether the University of Victoria would continue to act as intermediary for this charitable trust.[321]

4.2.3 Arguments and court decision

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315 The *University of Victoria* case para 13; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

316 Harding 2016 *CJCCL* 248; Du Toit 2012 *TECLF* 99.

317 Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Du Toit 2012 *TECLF* 99.

318 The *University of Victoria* case para 4.

319 Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

320 The *University of Victoria* case para 1; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 2; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

321 The *University of Victoria* case para 13; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

In the first instance, it was argued before court that this scholarship was not considered to be a "service customarily available to the public."[322] *The Human Rights Code*[323] has the sole purpose of preventing discrimination and would have been applicable to this set of facts if the scholarship was considered to be a service available to the general public.[324] However, a private relationship existed between Ms. McConnell, being the deceased, and recipients of the scholarships.[325] As a result of the relationship being private, the provisions of the charitable trust providing only Roman Catholics with scholarships, was not discriminatory as the *Human Rights Code*[326] did not find its application.[327] This argument must be kept in mind in the South African context as one may argue that the element of public benefit should not be strictly adhered to. The relationship between the testator and the beneficiaries should rather be the determining factor in deciding whether the relationship is private or public.

The court also stated that should the alternative have been the case at hand, in that the relationship had been of a public nature between the university itself and the potential scholarship recipients, the 'discriminatory' provisions would have been subject to the *Human Rights Code*.[328] The question of whether the 'discriminatory' provisions could be justifiable would then have to be asked.[329] The court would have to test whether the 'discriminatory' provisions were justifiable by posing the following question: Would there be a *bona fide* and reasonable reason for the discrimination?[330]

For the following reasons, the court found that the discrimination would be reasonably justifiable: Firstly, the court found that the language used in this case

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322 The *University of Victoria* case para 12; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

323 The *Human Rights Code* (CCSM c H175).

324 The *University of Victoria* case para 12; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

325 Harding 2016 *CJCCL* 234.

326 The *Human Rights Code*.

327 The *University of Victoria* case para 25; Du Toit 2017 *Manitoba Law Journal* 144; Harding 2016 *CJCCL* 232; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

328 The *Human Rights Code*.

329 Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

330 The *University of Victoria* case para 15; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

was rather harmless in comparison to the language used in the *Leonard Trust* case.[331] In the latter, the language used in the trust provisions was blatantly racist and was based on religious superiority, which is against public policy.[332] Secondly, the Canadian court found that a person's choice of religion is a basic human right and that if the scholarships were to be stopped because it was based on religion, then multiple other scholarships based on other human rights such as gender, disability, origin, race, *etcetera* had to be terminated as well.[333]

Furthermore, the court found that by terminating all scholarships that were offered to those who suffered adversely as a result from historic discrimination, would constitute an unreasonable and unacceptable limitation on a testator's right of freedom of testation.[334] Lastly, should Ms. McConnell have left the funds to a private institution, the *Human Rights Code*[335] would not be applicable, and therefore, it can be deduced that in declaring the current provisions discriminatory for the sole reason that the funds were left to the University of Victoria, which is a public institution, would be wrong.[336]

The court compared the current set of facts to the *Leonard Trust* case[337] and concluded that, unlike the *Leonard Trust* case, the current set of 'discriminatory' provisions was not in contravention with public policy.[338] The court found that the 'discriminatory' provisions were not offensive, in that should a testator of one particular religion or faith wish to only benefit persons of that same religion or faith,

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331 Du Toit 2017 *Manitoba Law Journal* 143; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

332 The *University of Victoria* case para 16; Du Toit 2017 *Manitoba Law Journal* 143; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 2; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

333 The *University of Victoria* case para 17; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

334 Harding 2016 *CJCCL* 248; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

335 The *Human Rights Code*.

336 Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

337 1990 74 O.R. 2d 481 (ONCA).

338 The *University of Victoria* case paras 17, 26-27; Du Toit 2017 *Manitoba Law Journal* 144; Du Toit 2012 *TECLF* 99; Queen's University date unknown http://www.queensu.ca/humanrights/hrlg/meeting-headlines/meeting-4/university-victoria.

there is no conflict with public policy, unless the benefit was motivated by ideals of religious supremacy as in the *Leonard Trust* case.[339]

4.3 Esther G. Castanera Scholarship Fund[340]

4.3.1 Facts

In 2015, the *Castanera* case was heard by the Court of the Queen's Bench in Manitoba.[341]

In 1991, Dr. Esther Castanera, who had obtained her Bachelor of Science degree from the University of Manitoba and her Ph.D in biochemistry from the University of California,[342] had consulted with certain representatives of the University of Manitoba.[343] She was interested in creating a scholarship fund in favour of certain students by means of establishing a charitable trust upon her death.[344] The Scholarship funds were to be specifically allocated to women,[345] to the express exclusion of males, who not only attended the same High School as Dr. Castanera in Steinbach, but also wished to study science.[346] Hence, there were three basic requirements that potential recipients of the scholarship had to comply with in order to be considered as a potential scholarship recipient.

In the course of time, Dr. Castanera had her will drafted and included the provisions that half of the residue of her estate was to be held in a charitable trust for the purposes agreed with the University of Manitoba.[347] Upon her death in 1997, the bequest read as follows:

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339 The *University of Victoria* case paras 16, 23; Du Toit 2017 *Manitoba Law Journal* 144; Harding 2016 *CJCCL* 248; Du Toit 2012 *TECLF* 99; Milley *Council of Christian Charities* 2.

340 2015 MBQB 28 (the *Castanera* case).

341 Harding 2016 *CJCCL* 248; Oh 2015 *Carters Charity and NFP Law Update* 15; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 1.

342 *Castanera* case para 1.

343 *Castanera* case para 2.

344 Du Toit 2017 *Manitoba Law Journal* 142; Harding 2016 *CJCCL* 248; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1.

345 Oh 2015 *Carters Charity and NFP Law Update* 15; Du Toit 2017 *Manitoba Law Journal* 142.

346 *Castanera* case para 2; Du Toit 2017 *Manitoba Law Journal* 142; Harding 2016 *CJCCL* 248; Milley *Council of Christian Charities* 1; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1.

347 Du Toit 2017 *Manitoba Law Journal* 141; Oh 2015 *Carters Charity and NFP Law Update* 15; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1.

> I give, devise and bequeath the remaining fifty percent (50%) of my residuary estate to the UNIVERSITY OF MANITOBA, Winnipeg, Canada, for scholarships at the University of Manitoba for needy and qualified women graduates of the Steinbach Collegiate Institute who will study for a Bachelor of Science degree with a major in one of the basic sciences of chemistry, physics, mathematics, biochemistry or molecular biology. This bequest shall be known as the "Esther G. Castanera Scholarship Fund." It shall be administered upon such conditions as the governing body of the University of Manitoba shall prescribe.[348]

The other half of the residue of her estate was to be held in a charitable trust, based on the same terms for female students at the University of California working towards a doctoral degree in Biochemistry.[349] Remarkably, it was evident that it was Dr. Castanera's intention to benefit women who came from the same district she grew up in and who were interested in the same field of study that she had dedicated her life to.[350]

At the date of her death the capital amount available to the University of Manitoba amounted to $270 120.33. However, because these funds were left untouched for a period of almost 10 years, the capital amount had grown to be an amount of $563 233.93 in 2015.[351]

The reason why the funds were left untouched for such a long time is that many years before this fund became available, the University of Manitoba had adopted a policy of "Non-acceptance of Discriminatory Scholarships, Bursaries and Fellowships," which had been in place since 1979, of which Dr. Castanera was seemingly unaware.[352] This policy explicitly stated that it would not administer any scholarships that "discriminate on the basis of race, creed, political belief, colour, ethnic or

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348 The *Castanera* case para 2; Milley *Council of Christian Charities* 1; Oh 2015 *Carters Charity and NFP Law Update* 15; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1.

349 *Castanera* case para 3; Du Toit 2017 *Manitoba Law Journal* 141; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

350 The *Castanera* case para 4; Oh 2015 *Carters Charity and NFP Law Update* 15; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 4.

351 The *Castanera* case para 7; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

351 The *Castanera* case para 7; Du Toit 2017 *Manitoba Law Journal* 143; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

352 *Castanera* case para 8; Oh 2015 *Carters Charity and NFP Law Update* 15; Milley *Council of Christian Charities* 1; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

national origin, sex or age."[353] Furthermore, the policy provided for an exception to this rule, which stipulated that:

> Any exceptions to this principle shall be made only with the consent of the unit concerned, the Senate Committee on Awards, and the Senate. A request for such exceptions shall be indicated by the Committee on Awards.[354]

Based on the above-mentioned provision, the trustees of the charitable trust sought relief from the University of Manitoba in accepting the scholarship fund.[355] The Faculty of Science requested of the Senate Awards Committee to make an exception to the policy terms, based on the reason that in the past, women have been underrepresented in these fields of science in comparison to men.[356] By accepting this scholarship, an exception would be made to the policy and it would constitute affirmative action instead of discrimination.[357] The Senate Awards committee rejected the request because recent statistics showed that women are no longer underrepresented.[358]

A second request was made to the Senate Awards Committee by the Dean of the Faculty.[359] The request to accept the "Esther G. Castanera Scholarship Fund" as exception to the policy on the grounds that the actual number of women who graduated from this degree was less than the number of men who graduated.[360] Once again the Senate Awards Committee rejected the request and informed the Faculty that other reasons would have to be given in support of their request for the four main fields of Science, namely mathematics, biochemistry, chemistry and physics, to be exempted from the provisions of the policy.[361]

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353 The *Castanera* case para 8; Oh 2015 *Carters Charity and NFP Law Update* 15; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

354 *Castanera* case para 8; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

355 Oh 2015 *Carters Charity and NFP Law Update* 15.

356 *Castanera* case para 9; Oh 2015 *Carters Charity and NFP Law Update* 15; Milley *Council of Christian Charities* 1.

357 *Castanera* case paras 9, 23-24; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2; Milley *Council of Christian Charities* 2.

358 The *Castanera* case para 10; Du Toit 2017 *Manitoba Law Journal* 143; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2; Milley *Council of Christian Charities* 1.

359 *Castanera* case par 10; Milley *Council of Christian Charities* 1.

360 *Castanera* case para 10; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

361 *Castanera* case para 10; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 3; Milley *Council of Christian Charities* 1.

Hereafter, a third request was made to the Senate Awards Committee. However, once again the request was rejected, but this time the reason was that the underrepresentation of women would only be a valid argument if the actual percentage of women in any one of the four disciplines of science, namely mathematics, biochemistry, chemistry and physics was a percentage less than 40%.[362] Hereafter, the charitable trust funds were neglected for a period of 12 years, from 2000 to 2012, as no efforts were made to deal with the matter at hand.[363]

4.3.2. Legal question

With no action being taken for such a long time, the University of Manitoba referred the matter to the Court of the Queen's Bench in Manitoba.[364] The University of Manitoba made an application to Court for the alteration of the charitable trust's provisions in order to include both men and women.[365] The question before court was whether the explicit stipulations in Dr. Castanera's Last will and Testament, that stipulated the scholarship fund was only to be used for women graduates, conflicted with the *Human Rights Code* or public policy as a whole.[366]

4.3.3 Arguments and court decision

In order to reach a decision, the Court had to consider all applicable legislation, which stated that gender was a ground of discrimination and had to be prohibited. Contrariwise, the Court also had to consider all legislation, which allowed affirmative action and a ground of exception to discrimination.[367] Arguments of both the *Leonard Trust* case and the *University of Victoria* case (as set out earlier in this Chapter) were considered in order to have reached a just decision.[368]

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362 *Castanera* case para 11; Milley *Council of Christian Charities* 1.

363 *Castanera* case para 12; Du Toit 2017 *Manitoba Law Journal* 141; Milley *Council of Christian Charities* 1.

364 Du Toit 2017 *Manitoba Law Journal* 143; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 1; Milley *Council of Christian Charities* 2.

365 Du Toit 2017 *Manitoba Law Journal* 143; Oh 2015 *Carters Charity and NFP Law Update* 15.

366 *Castanera* case paras 12, 14, 16; Du Toit 2017 *Manitoba Law Journal* 143; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 3; Milley *Council of Christian Charities* 2.

367 Oh 2015 *Carters Charity and NFP Law Update* 15; Milley *Council of Christian Charities* 2.

368 *Castanera* case para 25-35; Du Toit 2017 *Manitoba Law Journal* 143; Milley *Council of Christian Charities* 3.

In the light of the above two cases, the court emphasised that the reasons, history and purpose behind the 'discrimination' had to be sought after in order to establish whether the 'discrimination' was unfair or justifiable as affirmative action.[369] This is also important in the South African context.

With regards to the above-mentioned cases, the court stated that the motivation in the *Castanera* case was to benefit women in the field of science, which had been dominated by males in the past; whereas in the *Leonard Trust* case, the motivation was blatant religious superiority and racism, which was in direct conflict with public policy and unacceptable in society.[370]

However, concerning the *University of Victoria* case, the court decided to accept this case as the legal precedent in this area of law in that the benefiting of certain people with similar religious beliefs are acceptable, depending on the circumstances at hand. The court stated that it could not be seen as discrimination when a testator wishes to limit bequests to potential scholarship recipients of a certain religious background, as long as the scholarship was not based on the idea of religious supremacy or gender supremacy.[371] In this present case, one of the factors that had to be considered was that in the past, inequality existed between the number of males and females who were entered into this specific science program.[372]

One of the main arguments before court was that although women were not underrepresented in the science program at that time, there were other factors that had to be taken into account in order to ensure that there was substantial equality in the program.[373] The Court stated that in the situation where a woman who has much experience in one field be desirous to promote other women in that same field where

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369 Oh 2015 *Carters Charity and NFP Law Update* 15; Milley *Council of Christian Charities* 3.

370 Du Toit 2017 *Manitoba Law Journal* 143-145; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 4; Milley *Council of Christian Charities* 3.

371 Milley *Council of Christian Charities* 4; Du Toit 2017 *Manitoba Law Journal* 144; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 4.

372 The *Castanera* case para 36; Du Toit 2017 *Manitoba Law Journal* 143; Oh 2015 *Carters Charity and NFP Law Update* 15; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 4; Milley *Council of Christian Charities* 4.

373 The *Castanera* case para 38; Du Toit 2017 *Manitoba Law Journal* 145; Oh 2015 *Carters Charity and NFP Law Update* 15; Milley *Council of Christian Charities* 4.

they were previously underrepresented, a just and reasonable cause exists to allow such so-called 'discrimination'.[374]

Furthermore, an aspect to be considered in the South African context is the following words of the court:

> where that purpose was not unreasonable at the time the gift was contemplated, it is not unreasonable for a University to administer such a gift even when progress towards equality has been achieved, unless the gift in the mind of the public has become so offensive as to require a variation.[375]

It further expounded on the fact that there is not simply one criterion that can be followed to establish whether a stipulation is offensive to public policy or not. It is a wide concept and various factors must be taken into account. These include the individual facts of the case, as well as the intention of the testator at the time that the bequest was made.[376]

In addition, the court explained that a careful balance ought to be struck between the wishes of the testator and the possibility of the provisions being 'discriminatory'.[377] Every charitable bequest had to be assessed and evaluated in its own context.[378] There is no specific manner by which a testator can be sure that his charitable bequest will be administered in the manner he had envisioned it.[379]

As a result, the Court decided that the charitable trust provisions as drafted by Dr. Castanera, were to remain the same and were not to be altered.[380] The scholarship fund would only be extended to female students in the field of science, with the express exclusion of men and this 'discriminatory' provision was not found to be in conflict with the *Human Rights Code*, nor with public policy in the wider context.[381] It

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374 *Castanera* case paras 37-38; Du Toit 2017 *Manitoba Law Journal* 145; Oh 2015 *Carters Charity and NFP Law Update* 15.

375 *Castanera* case para 38.

376 *Castanera* case para 39; Milley *Council of Christian Charities* 4; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

377 *Castanera* case para 39; Du Toit 2017 *Manitoba Law Journal* 145; Milley *Council of Christian Charities* 4.

378 *Castanera* case paras 41-42.

379 *Castanera* case para 41; Milley *Council of Christian Charities* 5.

380 *Castanera* case para 47; Du Toit 2017 *Manitoba Law Journal* 141; Oh 2015 *Carters Charity and NFP Law Update* 15; Milley *Council of Christian Charities.*

381 *Castanera* case paras 40, 44, 46; Du Toit 2017 *Manitoba Law Journal* 141; Oh 2015 *Carters Charity and NFP Law Update* 15; Milley *Council of Christian Charities* 5; Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 2.

has been said that the outcome of this case has to be "applauded as a victory for common sense."[382]

When a testator wishes to exercise his freedom of testation in leaving funds to charitable trusts in order to provide scholarships to students, it is important for the testator to ensure that the stipulations he places in his will or testamentary charitable trust are not against either the trustees' existing policies, any existing human rights legislation such as the *Human Rights Code* or public policy in general.[383]

In conclusion of this Chapter, it is important to note that the Canadian approach to 'discriminatory' bequests to charitable trusts seems to be that as long as the provisions do not specifically conflict with human rights legislation or public policy, and where the testator's bequest involves a historically justifiable reason for the 'discrimination' the testator's wishes will be respected and remain as drafted by him.[384] It is clear that provisions to charitable trusts, which are in conflict with public policy, must be removed or altered by court in order to make it acceptable to society. However, the alteration of testamentary charitable bequests will be the exception to the rule.[385] Canadian courts place great value on freedom of testation and aim to ensure a testator that his charitable bequest will be treated in the way he anticipated while he was still in life. It can be concluded that Canadian courts purpose to preserve freedom of testation in so far that it does not conflict with public policy.[386] In the following Chapter, the main arguments from South African case law (Chapter 3) and Canadian case law (Chapter 4) will be applied to the Marais scenario.

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382 Arthur "Validating Scholarships Limited by Gender" 2015 *Drache Aptowitzer LLP Newsletter* 5.
383 Du Toit 2017 *Manitoba Law Journal* 145; Milley *Council of Christian Charities* 5.
384 Du Toit 2017 *Manitoba Law Journal* 145.
385 Milley *Council of Christian Charities* 5; Du Toit 2017 *Manitoba Law Journal* 145.
386 Du Toit 2017 *Manitoba Law Journal* 145-146; Harding 2016 *CJCCL* 234; Milley *Council of Christian Charities* 5.

5 Application to the Marais scenario

5.1 Jan S. Marais Trust Fund

In the light of both preceding Chapters, the initial set of facts portrayed as a case study in the introduction will now be considered. It is evident that the testator, Johannes Henoch Marais only wanted the funds of the Het Jan Marais Nationale Fonds to be made available to students of the University of Stellenbosch on the conditions that Afrikaans or Dutch be developed as an educational language. What should the effect be now that Stellenbosch University purposes to become a multilingual institution? Should the funds still be administered, but only to Afrikaans speaking students of whatsoever nationality, or should the fund be made available to all students despite the change in the language policy? Should the freedom of testation of Mr Marais be upheld, resulting in discrimination based on language or should it be limited, overriding his freedom of testation?

The answer to the above question can only be derived by considering the principles evident in the South African case law as discussed in Chapter 3 and the principles evident in Canadian case law as exposed in Chapter 4, should foreign law be considered in terms of section 39 of the *Constitution*. These principles and arguments are then to be applied to the case study in order to arrive at a conclusion.

5.2 Previous judgement based on language

In each of the South African cases, indication was made that South African courts would be willing to alter a testator's will should charitable bequests be seen as unfairly discriminatory in order to give effect to section 9 of the *Constitution*.[387] However, neither South African case law nor Canadian case law on 'discriminatory' bequests to testamentary charitable trusts based on language has occurred in the past and, therefore, there is no clear judgement directly applicable to the Het Jan Marais Nationale Fonds. As a result, various principles of both South African and Canadian case law have to be considered.

5.3 Application of principles from case law

5.3.1 Freedom of testation

[387] *Syfrets trust* case, Emma Smith case, *BOE Trust* case; Du Toit 2017 *Manitoba Law Journal* 142.

South Africa and Canada came to a similar conclusion regarding the concept of freedom of testation. In the Canadian case of *Castanera* the judge held that freedom of testation is important as it provides "the necessary comfort to a testator that his gift will be treated in the manner anticipated by them."[388] This view is mirrored in the South African case of *BOE Trust*. Here the judge specifically made mention of the fact that freedom of testation cannot be ignored.[389] The court stated that freedom of testation largely involves both the right to dignity and the right to property, the former in a fundamental way.[390] Although different arguments lead to it in each instance, the same conclusion was reached in both of these cases, namely, that it is important to protect freedom of testation.[391]

5.3.2 Public policy

Furthermore the concept of non-discrimination applies to testamentary charitable trusts alone, because charitable trusts contain an element of public benefit, and do not operate in the private sphere.[392] This same fact was made mention of in the *Leonard Trust* case where it was said that the "decision does not affect private, family trusts. By that I mean that it does not affect testamentary dispositions or outright gifts that are not also charitable trusts."[393]

In the South African context, a similar remark was made in the *Emma Smith* case. It was said that under the *Constitution*, South African courts have a constitutional duty resting upon them to eradicate unfairly discriminatory clauses that conflict with public policy, particularly in clauses relating to educational testamentary charitable trusts.[394] It is clear in both Canadian and South African law that freedom of testation is subject to public policy considerations.[395]

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388 *Castanera* case para 42; Du Toit 2017 *Manitoba Law Journal* 160-161.

389 *BOE Trust* case (court *a quo*) para 14; *BOE Trust* case paras 10, 15, 26-27; De Waal and Schoeman-Malan *Erfreg* 145; Sedutla 2013 *De Rebus* 45; Du Toit 2012 *TECLF* 120.

390 *BOE Trust* case para 27; Du Toit 2017 *Manitoba Law Journal* 148; Lehmann "Testamentary freedom versus testamentary duty: in search of a better balance" 11; Du Toit *Manitoba Law Journal* 161.

391 Du Toit 2017 *Manitoba Law Journal* 161.

392 Du Toit 2017 *Manitoba Law Journal* 162.

393 *Leonard Trust* case para 107.

394 *Emma Smith* case para 42; Du Toit 2017 *Manitoba Law Journal* 163.

395 De Waal and Schoeman-Malan *Erfreg* 134; Du Toit 2001 *Stellenbosch Law Review* 240; Matsemela 2015 *Journal of Law, Society and Development* 99; Du Toit 2001 *Stellenbosch Law Review* 358; Du Toit 2001 *Stellenbosch Law Review* 234; Roux 2013 *De Rebus* 49; Wood-Bodley 2007*SALJ* 689; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 588; Du Toit 2012 *TECLF* 110.

In support of the above, it was held in the *Leonard Trust* case, as well as in the *Syfrets Trust* and *Emma Smith* cases that the trust deeds had to be amended in order to eliminate the unfairly discriminatory provisions as this was in conflict with public policy. In *Emma Smith,* it was specifically said that in the case where freedom of testation was to be weighed against the constitutional principle of equality, freedom of testation had to be limited.[396] A similar line of argument was followed in the *Leonard Trust* case which confirms this principle.[397]

5.3.3 Individual facts of a case

In addition, one very important aspect must be considered. In both the Canadian and South African jurisdictions the conclusion was reached that the facts and circumstances of each case ought to be the deciding factor of whether a testator's freedom of testation should be limited or not. Each case has to be evaluated based on its own facts and circumstances.[398]

In the *Leonard Trust* case, it was said that the situation was "mandated by the unique provisions of the trust document"[399] and that "these trusts will have to be evaluated on a case by case basis, should their validity be challenged."[400] Similarly, in the *Castanera* case the judge explicitly said that a "one-size-fits-all policy" would be disruptive of the freedom of testation."[401]
In the South African context, the courts hold a similar view. In the case of *Syfrets Trust*, the judge said that:

> The conclusion does not of course mean that the principle of freedom of testation is being negated or ignored... it also does not mean that all clauses in wills or trust deeds that differentiate between different groups of people are invalid; simply that the present conditions – which discriminate unfairly on the grounds of race, gender and religion – are invalid.[402]

This principle is also clear in the *BOE Trust* case where it was stated that it is inherent to the principle of freedom of testation to benefit certain persons over

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396 *Emma Smith* case para 42.
397 *Leonard Trust* case paras 37-40.
398 Du Toit 2001 *Stellenbosch Law Review* 384; De Waal *Annual Survey of SA Law* 1198.
399 *Leonard Trust* case para 42.
400 *Leonard Trust* case para 103.
401 *Castanera* case para 42.
402 *Syfrets trust* case para 48.

others[403] and, therefore, emphasis must placed on the facts and circumstances of the individual case at hand as a decisive factor in judgement.[404]

5.3.4 Grounds of discrimination

As the deduction is made that every case ought to be judged in the light of its own circumstances, should the testator's freedom of testation be limited in the Marias scenario as exposited in Chapter 1 above? The reason why there is no straightforward answer is because the judicial precedents such as explained in Chapter 3 cannot be followed blindly. The Marais scenario should not only be adjudicated at hand of its own facts and circumstances, but the 'discriminatory' provisions of the testamentary charitable trust which relates to language, unlike any of the other cases. Du Toit[405] is of the following opinion:

> Given South Africa's racially divided past, the position taken by South African courts on race-based clauses is, arguably, understandable. But what about restrictive clauses based on other grounds specified in the South African Constitution's equality clause?

In essence, the question the academic writer is posing is: When is the proverbial Rubicon crossed?

At this point, the decision of *Emma Smith* deserves particular attention as the idea of a charitable trust for females only was thought to be acceptable.[406] Interestingly, the racial discriminatory provisions were declared invalid and had to be deleted, but the 'discriminatory' provisions regarding gender, namely, that only women could benefit, was allowed.[407] The reason was, as stated in the *Syfrets Trust* case, that the principle of freedom of testation is still valued and cannot be ignored.[408] This corresponds with the *Castanera* decision, which allowed testamentary charitable bequests to women to the express exclusion of men.[409] In both of these cases, being

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403 *BOE Trust* case para 16.
404 Du Toit 2017 *Manitoba Law Journal* 165.
405 Du Toit 2012 *TECLF* 122.
406 Du Toit 2017 *Manitoba Law Journal* 166-167.
407 De Waal and Schoeman-Malan *Erfreg* 145; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 121.
408 *Emma Smith* case para 41; De Waal and Schoeman-Malan *Erfreg* 145.
409 *Castanera* case paras 9-12.

Canadian and South African, charitable trusts in favour of women to the exclusion of men were not condemned.[410]

If we consider these two cases as an example, the debatable point is where South African courts will draw the line when it comes to 'discriminatory' bequests to charitable trusts. It can be derived that certain other forms of 'discrimination' would also be allowable under South African law.[411] If testamentary charitable trusts can be administered to the benefit of women alone, would South African courts allow bursary funds to be made available to scholars of a specific language as with the Marais scenario? It is clear that in both Canadian and South African law, discrimination based on race will not be condoned.[412] However, the Het Jan Marais Nationale Fonds were extended to all nationalities, the only condition being that Afrikaans or Dutch as an educational language has to be developed and enhanced.[413]

In the Marais scenario, the two constitutional rights weighed up against one another are section 25 and section 9 of the *Constitution* (as explained in Chapter 2). The right of the testator to dispose of this property as he pleases, without being deprived thereof, will be weighed against the prospective beneficiary's right to equality; as the list contained in section 9(3) of *the Constitution* specifically states that no person may be unfairly discriminated against on the basis of language.[414]

5.3.5 Evaluation of the Marais scenario

In light of the cases above, the following is clear: freedom of testation is an important principle in the law of succession and needs to be protected.[415] In the Het Jan Marais Nationale Fonds, the testator's freedom of testation cannot be ignored[416] because it directly involves the right to dignity and the right to property under

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410 Du Toit 2017 *Manitoba Law Journal* 167.

411 De Waal and Schoeman-Malan *Erfreg* 145; Du Toit 2017 *Manitoba Law Journal* 148, 168.

412 Du Toit 2017 *Manitoba Law Journal* 167; *Emma Smith* case paras 12, 40; *Castanera* case paras 9-12.

413 HJMNF 2017 http://hetjanmarais.co.za/.

414 Section 9(3) and 9(4) of the *Constitution*; De Waal and Schoeman-Malan *Erfreg* 5; Du Toit 2012 *TECLF* 112; Matsemela 2015 *Journal of Law, Society and Development* 107; Du Toit 2001 *Stellenbosch Law Review* 236; Du Toit 2012 *TECLF* 112.

415 *Castanera* case para 42; Du Toit 2017 *Manitoba Law Journal* 160-161.

416 *BOE Trust* case (court *a quo*) para 14; *BOE Trust* case paras 10, 15, 26-27; *Castanera* case para 42; De Waal and Schoeman-Malan *Erfreg* 145; Sedutla 2013 *De Rebus* 45; Du Toit 2012 *TECLF* 120.

sections 8 and 25 of the *Constitution*.[417] However, it must be remembered that the Het Jan Marais Nationale Fonds is still subject to the notions of public policy in South Africa in terms of the community *boni mores* since the fund contains an element of public benefit.[418] Even so, the Het Jan Marias Nationale Fonds must be adjudicated in the light of its individual facts and circumstances, as not all 'discriminatory' bequests are invalid.[419] It is clear that discrimination based on race is not condoned, and rightly so. The Het Jan Marais Nationale Fonds was created for all Afrikaans-speaking students, irrespective of their nationalities. The 'discriminatory' grounds in this case do not pertain to race, but to language.

As a result of the above, the argument which was followed in the *Emma Smith* case and confirmed in the *Castanera* case, can be applied. Both of these cases allowed 'discriminatory' bequests based on gender.[420] If gender-based 'discrimination' is allowed in the post-Constitutional era that South Africa finds itself in, surely 'discrimination' based on language can be allowed, as long as the discrimination is not based on race.

According to a Stellenbosch University Professor, S Liebenberg, the *Constitution* places a just and equal access to education at the core thereof:

> [The *Constitution*] does not guarantee the unqualified right to mother tongue education. **It also doesn't preclude the existence of single-medium institutions** (own emphasis). And, importantly, it sets out very specific factors the state must consider by implementing the right. These are equity, practicability and the issue of redress.[421]

From a practical point of view, it is necessary to consider that at the same time that Stellenbosch University adopted a new language policy to treat English and Afrikaans

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417 *BOE Trust* case para 27; Du Toit 2017 *Manitoba Law Journal* 148; Lehmann"Testamentary freedom versus testamentary duty: in search of a better balance" 11; Du Toit *Manitoba Law Journal* 161.

418 *Emma Smith* case para 42; *Leonard Trust* case para 107; Du Toit 2017 *Manitoba Law Journal* 163; De Waal and Schoeman-Malan *Erfreg* 134; Matsemela 2015 *Journal of Law, Society and Development* 99; Du Toit 2000 *Stellenbosch Law Review* 358; Roux 2013 *De Rebus* 49; Wood-Bodley 2007*SALJ* 689; Sedutla 2013 *De Rebus* 45; Modiri 2013 *PER* 588; Du Toit 2012 *TECLF* 110.

419 *Leonard Trust* case para 103; *Castanera* case para 42; *Syfrets trust* case para 48; *BOE Trust* case para 16; Du Toit 2017 *Manitoba Law Journal* 165; Du Toit 2001 *Stellenbosch Law Review* 384; De Waal *Annual Survey of SA Law* 1198.

420 *Emma Smith* case para 41; *Castanera* case paras 9-12; De Waal and Schoeman-Malan *Erfreg* 145; De Waal *Annual Survey of SA Law* 1064; Du Toit 2012 *TECLF* 121; Du Toit 2017 *Manitoba Law Journal* 167.

421 UWN 2016 http://www.universityworldnews.com/article.php?story=20160706120904383.

as equal mediums as languages for education, the University of Pretoria also adopted a new language policy in which English was made the sole language of education.[422] The Student Representative Council of the University of Pretoria mainly consists of members of the Economic Freedom Fighters Students Command (EFFSC).[423] Spokesperson, P Keetse stated to much dismay:

> This falling of Afrikaans is a sweet victory for us, for it goes far as validating our aspirations towards a transformed University...[424]

In my opinion, should the same line of argumentation be followed as seen above, it would suffice to reach the conclusion that in such circumstances, the Het Jan Marias Nationale Fonds should be administered in such a way as to protect Mr Marais' freedom of testation. Upon weighing section 25 against section 9, a testator should be allowed to benefit students of a specific language. This will not be unfairly discriminatory when considering the *Emma Smith* case and the case of *Castanera*.

422 UWN 2016 http://www.universityworldnews.com/article.php?story=20160706120904383.
423 UWN 2016 http://www.universityworldnews.com/article.php?story=20160706120904383.
424 UWN 2016 http://www.universityworldnews.com/article.php?story=20160706120904383.

6 Conclusion

Various similarities between South African and Canadian courts' approach to 'discriminatory' charitable trusts have been highlighted. The main convergences are: Firstly, the notion that freedom of testation ought to be protected as far as possible, as long as it is not against public policy.[425] Another factor to consider will be the community's *boni mores* and whether the testator's bequests are against public policy.[426] The injustices of the past ought to be taken in account when deciding such cases.[427] Evidently, differentiation in charitable trust provisions would be acceptable in South African law, should there exist a "legitimate objective" such as the need to redress injustices of the past pertaining to race.[428] The two legal systems further agree that the question of the extent to which freedom of testation may be limited where 'discriminatory' stipulations are made in testamentary charitable trusts, rely on the fact that each case must be considered in the light of its own circumstances.[429]

Although there are similarities between South African courts' and Canadian courts' approach to the limitation of freedom of testation regarding bequests to charitable trusts, in my opinion, it seems that Canadian courts are eager to protect the principle of freedom of testation. As a result, Canadian courts will more leniently allow certain 'discriminatory' provisions to be enforced, for example, discrimination based on religion was allowed in the *University of Victoria* case and gender-based discrimination was allowed in the *Castanera* case.[430] On this premise, I believe South African courts could allow 'discriminatory' provisions concerning language, as long as it is not based on race.

In the *Emma Smith* case, 'discriminatory' bequests based on gender were allowed.[431] Therefore, I believe that if gender-based 'discrimination' can be allowed in the post-Constitutional era South Africa finds itself in, surely 'discrimination' based on language ought to be condoned as well. A testator such as Mr Marais, who had the intentions of developing a specific language in South Africa, should be afforded the peace of mind that his death wishes will be strictly adhered to. The trust fund should

425 See paras 2.1; 2.2.3; 2.4; 2.4.2; 3.1; 3.2; 3.3; 4.1; 4.2; 4.3; 5.3.1; 5.3.5 above.
426 See paras 2.2; 2.2.3; 2.3.5; 2.4; 3.1; 3.2; 3.3; 4.1; 4.2; 4.3; 5.3.2; 5.3.5 above.
427 See paras 2.4.3.1; 3.1.3; 3.3.3; 4.2.3; 4.3.3; 5.3.4 above.
428 See paras 2.4.3.1; 2.4.3.2; 3.3.3 above.
429 See paras 3.1.3; 3.3.3; 4.1.3; 4.3.3; 5.3.5 above.
430 See paras 4.2.3; 4.3.3 above.
431 See paras 3.2.1; 3.2.3 above.

be administered to the sole purpose of benefiting Afrikaans speaking students of all nationalities.[432]

In my opinion, from an estate planning perspective, although freedom of testation should be protected, a testator who wishes to make a 'discriminatory' bequest in a charitable trust has the responsibility to ensure that his death wishes are not unfairly discriminatory. It is clear that discrimination based on race will not be condoned in South Africa and, therefore, it would not be advisable to make any race-based discriminatory bequests. However, with any other form of 'discriminatory' bequest in a charitable trust, such as gender or language, it would be wise for the testator to follow the same approach as the testatrix in the case of *BOE Trust.*[433]

In this case, the testatrix stipulated that should there be any reason for impossibility of the initial provisions, her estate was to be divided between specific charities listed in the will instead.[434] I would advise any testator to create a so-called "safety net" by making provision for the situation in which his primary wishes cannot be given effect, due to impossibility, illegality or changes in the public policy. In light of the above, such a safety net is not only advisable, but essential as we have no indication of how the fluid concept of public policy may change in the future.[435] In this manner, by means of thorough estate planning, a testator would be able to prevent the situation where a court may override his freedom of testation.[436]

In the words of Judge Dewar in the *Castanera* case*:* "...treat the testator or testatrix with the respect and gratitude to which he or she is entitled."[437]

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[432] See para 5.3.5 above.
[433] See paras 3.1.1-3.2.3 above.
[434] See paras 3.1.1-3.2.3 above.
[435] See para 2.2 above.
[436] As a short side note (in response to footnote 270): with regards to all 'discriminatory' bequests to charitable trusts, it can be argued that, depending on who the trustees of the charitable trust are, resistance and the limitation of freedom of testation can either be expected or avoided. If a university forms part of the trustees, the university policies apply in the public sphere. If only private trustees are responsible for the administration of a trust, resistance to freedom of testation will probably not be offered.
[437] *Castanera* case para 166.

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LIST OF ABBREVIATIONS

ABAJ	American Bar Association Journal
CJCCL	Canadian Journal of Comparative and Contemporary Law
PER	Potchefstroomse Elektroniese Regsblad
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TECLF	Tulane European and Civil Law Forum
HJMNF	Het Jan Marias Nationale Fonds
SAJHR	South African Journal on Human Rights
SA Merc LJ	South African Mercantile Law Journal
SU	Stellenbosch University
UWN	University World News