Freedom of testation versus the right to equality

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Can a court amend the wording of a will that establishes a *fideicommissum* containing a condition that discriminates against female descendants?

A *fideicommissum* is a legal instrument that allows the owner of a property to transfer it to another person, subject to the property's' being transferred from that person to yet another person at a later stage.

In the case of *King NO and others v De Jager and others (21972/2015)*, the High Court (Western Cape division) found that the general public would regard the testator's decision to impose the *fideicommissary* condition, which discriminates against female descendants, as unreasonable to the extent of offending public policy.

However the court ruled that the applicants had failed to make the case for the granting of a declaratory order.

(A declaratory order is a statement by a judge that the judge is satisfied that the use of a device, technique, or procedure, or the carrying out of an activity specified in the order, is reasonable and lawful in the circumstances described in the order.)

FACTS OF THE CASE

The matter involved a dispute arising from a joint will ('the will') executed on 28 November 1902 in Oudtshoorn, by Carel de Jager and Catherina de Jager, who were married in community of property. The testators had six children, of which four were sons and two were daughters. The testators bequeathed various fixed properties to their sons and daughters, subject to the *fideicommissum* governed by clause 7 of the will.

According to clause 7 of the will, all of the fixed properties, including those that were specifically listed and those properties that were not mentioned in the will (save for a certain piece of property bequeathed to one daughter under clause 5), were subject to the *fideicommissum*.

Furthermore, until the death of the testator, the terms of the *fideicommissum* were interpreted and applied to appoint only the sons of the testators and thereafter, their sons as *fideicommissary* beneficiaries. In other words, both the first and the second substitutions limited the *fideicommissary* beneficiaries to male descendants.

The first applicant in the matter was an attorney and one of six co-executors of the deceased estate of the late Kalvyn de Jager, who died on 5 May 2015. The deceased, who died testate, had no sons but left five daughters.

The first applicant was not certain to whom he and his fellow executors should transfer the *fideicommissary* property, owing to the content of the *fideicommissum*. He was therefore advised to approach the court for a declaratory order.

In court, the first applicant expressed the view that the terms of the *fideicommissum*, which discriminates against the female descendants of the testators, is against public policy and

cannot stand. He sought to amend the terms of the will to include the female descendants.

The effect of these amendments, had they been allowed, would have been that the *fideicommissary* property would have devolved upon the deceased's daughters. The applicants sought to declare invalid what they regarded as the offending portions of the will and the amendments thereof – both in terms of common law and section 9 of the Constitution.

The case for the second group of claimants to the property, namely the three sons of the late John de Jager, was to give effect to the intention of the testators. According to them, this was that the *fideicommissary* property would remain in the De Jager family up to and for the duration of the lives of the third generation.

Where the condition relating to the *fideicommissary* property could not be met because the fiduciary or substitute fiduciary left no sons, the property would devolve upon any brothers or their sons.

TWO COMPETING RIGHTS

The case highlights two competing rights – the right to freedom of testation and the right to equality, or more specifically, the right to not be unfairly discriminated against. The contention is that, even before the new constitutional dispensation, a testator's freedom of testation was limited where provisions in a will were found to be contrary to public policy.

It is further argued that the common law has developed extensively since 1902, particularly as a result of the values that have been adopted in the Constitution. As a result, a testator's freedom of testation is limited if a provision in a will amounts to unfair discrimination.

However, in the matter under discussion, the inference can be drawn that the original testator's desire was for the property in question to stay under the ownership of the male descendants of the De Jager family and to remain in their lineage.

Freedom of testation, according to which testators are free to dispose of their assets in a will in any manner they see fit, is a basic principle of our law of succession. No beneficiary has a fundamental right to inherit, hence we have freedom to testate.

Section 25 of the Constitution further protects a person's right to dispose of their assets as they wish upon their death. Freedom of testation is underpinned by the founding constitutional principle of human dignity. Although not relied upon by the courts in this action, freedom of testation arguably also has a bearing upon aspects of the right to privacy, freedom of expression and freedom of association.

Finally, it must be noted that section 8 (c) of The Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, expressly addresses gender discrimination in the context of succession, but only in respect of discrimination by means of a system and not in terms of private wills.

An example of such a discriminating system is that of *primogeniture* (a rule of inheritance of common law, which stipulates that the oldest male child has the right to succeed to the estate of an ancestor, to the exclusion of the female child). The rule was tempered by the Constitutional Court in *Bhe v Magistrate, Khayelitsha and others 2005 (1) BCLR (CC).*

In this matter, the Constitutional Court declared that the customary law rule of male primogeniture, and the legislative provision relating thereto, were unconstitutional and invalid. The reason for this was that they amount to the violation of a woman's right to not be unfairly discriminated against on the grounds of gender, as well as her right to dignity. It ordered that the Intestate Succession Act 81 of 1987 be applied to all customary law estates. However, the discrimination in that case was as a result of the operation of law. The case did not deal with the issue of freedom of testation.

The present matter, however, does not involve a testamentary system or practice that prevents women from inheriting family property or which impairs their dignity. Notwithstanding the fact that the *fideicommissary* structure in the pending matter has endured for more than 100 years, it would be inaccurate to describe it as a system or practice as contemplated by section 8 (c) of The Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000. It is clearly a single, private testamentary disposition by the testator.

THE MATTER AT HAND

In light of the two competing rights that the case brings to the fore, it is important to first determine what the case is about. In my view, this case deals with the freedom of testation, and not discrimination.

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The fact of the matter is that a testator has great freedom to dispose of his or her property upon his or her death and nobody has a fundamental right to inherit. If the court had upheld the amendment of this will, it could have infringed on the very freedom that is given to the testator in terms of the Constitution.

It is important to determine at which point the court can and should step into the shoes of the testator, assuming the power to amend or change the testator's will. I accept that the testator's freedom is limited, but this limitation should not eliminate or change the testator's wishes.

The equality clause in the Constitution should ultimately not provide a basis for disputing the validity of a will on the grounds that only male descendants have been appointed as heirs.