

# Freedom of Testation in South African Succession Law: Current State and Future

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# 1. Introduction

- **Roman and Roman–Dutch law**

*Bydawell v Chapman* 1953 (3) SA 514 (A)  
531:

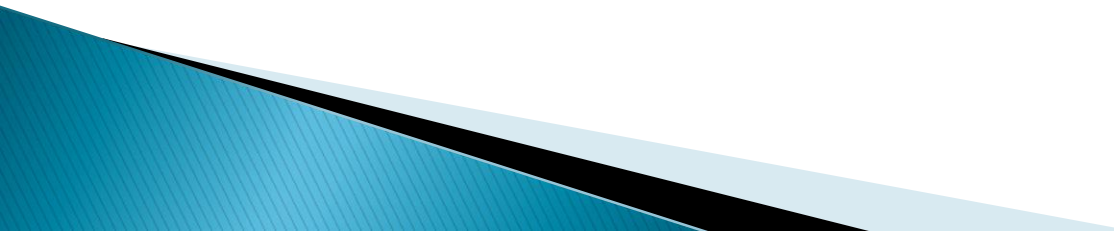
“Roman–Dutch law recognizes as a matter of public interest, transcending the private interest of beneficiaries under a will, that effect should be given to the wishes of a testator, D 29.3.5, or, as Voet states the proposition, 35.1.12, the interests of the testator and the public interest demand that effect should be given to a testator’s last wishes.”

# 1. Introduction

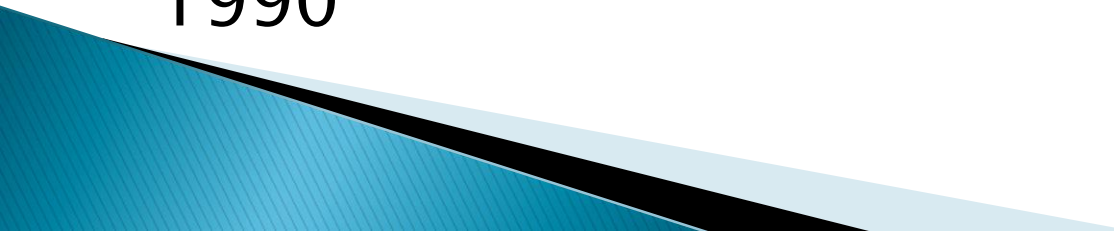
- **South African law**

Corbett, Hofmeyr & Kahn:

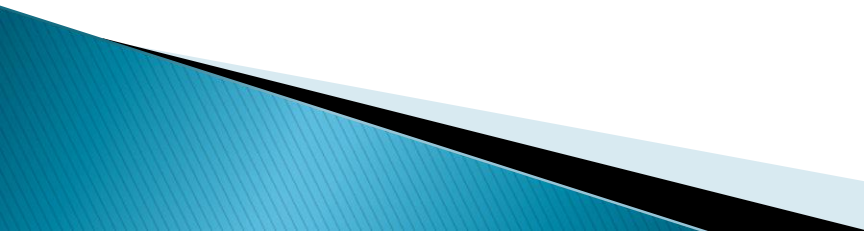
“The right of an individual to dispose of his or her property on death as he or she pleases was recognized in both Roman and Roman–Dutch law and has found full expression in South African law.”



# 1. Introduction

- **But: traditional restrictions:**
    - i. common law
    - ii. statute
      - a. Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965
      - b. Trust Property Control Act 57 of 1988 (s 13)
      - c. Maintenance of Surviving Spouses Act 27 of 1990
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# 1. Introduction

- **What about additional restrictions based on constitutional considerations?**
    - i. a bequest linked to a condition
    - ii. but: an out-and-out disinheritance (“disherison”)?
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# 2. Discriminatory Provisions in Testamentary Trusts

- Relevant judgments

- i. Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C)
- ii. Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA)
- iii. In re Heydenrych Testamentary Trust* 2012 (4) SA 103 (WCC)
- iv. Ex parte BOE Trust Ltd* 2009 (6) SA 470 (C) (confirmed on appeal: *In re BOE Trust Ltd* 2013 (3) SA 236 (SCA))

### *3. King v De Jager*

- **Issue: an out-and-out disinheritance (“disherison”)**

***King and Others NNO v De Jager and Others 2017 (6) SA 527 (WCC)***


### 3. *King v De Jager*

- **Facts (Clause 7):**

“said children’s sons and following the death of the said grandsons again and in turn to their sons, in such a way that, in the case of the death of any son or son’s son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place and in the case of the death of a grandson without any brothers, to the other Fidei Commissaire [*sic*] heirs from the lineage of the sons of the appearers by representation ... “



### *3. King v De Jager*

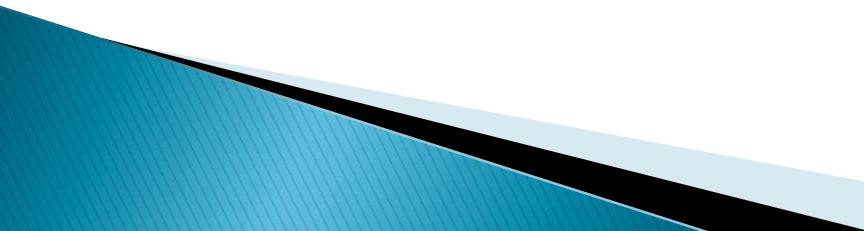
- **Contention by 2<sup>nd</sup> to 6<sup>th</sup> applicants**
  - **Contention by 1<sup>st</sup> to 3<sup>rd</sup> respondents**
  - **Contention by 4<sup>th</sup> to 8<sup>th</sup> respondents (sons of 2<sup>nd</sup> to 6<sup>th</sup> applicants)**
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### 3. *King v De Jager*

- Judgment

- i. point of departure: *Robertson v Robertson's Executors* 1914 AD 503 507
- ii. distinguish from testamentary trust cases
- iii. distinguish from *Bhe & others v Magistrate, Khayelitsha, & others* 2005 (1) SA 580 (CC)

### 3. *King v De Jager*

- iv. considerations raised in academic literature
  - v. further considerations
  - vi. can clause 7 be justified under s 36 of the Constitution (limitations clause)? – “balancing of rights”
  - vii. conclusion (paras [80]–[81])
  - viii. excursion: the interpretation issue
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## 4. In the meantime: *Harper v Crawford*

- *Harper and Others v Crawford NO and Others* 2018 (1) SA 589 (WCC)

“children” / “descendants” / “issue” /  
“legal descendants”

- *Harvey NO and Others v Crawford NO and Others* 2019 (2) SA 153 (SCA)

## 5. And what about *King v De Jager*?

- **Supreme Court of Appeal:  
judgment on 13 November 2018**

## 5. And what about *King v De Jager*?

- **Further appeal to Constitutional Court**

Directions issued by Chief Justice on 20 March 2019

## 5. And what about *King v De Jager*?

- **The road ahead and concluding remarks**