



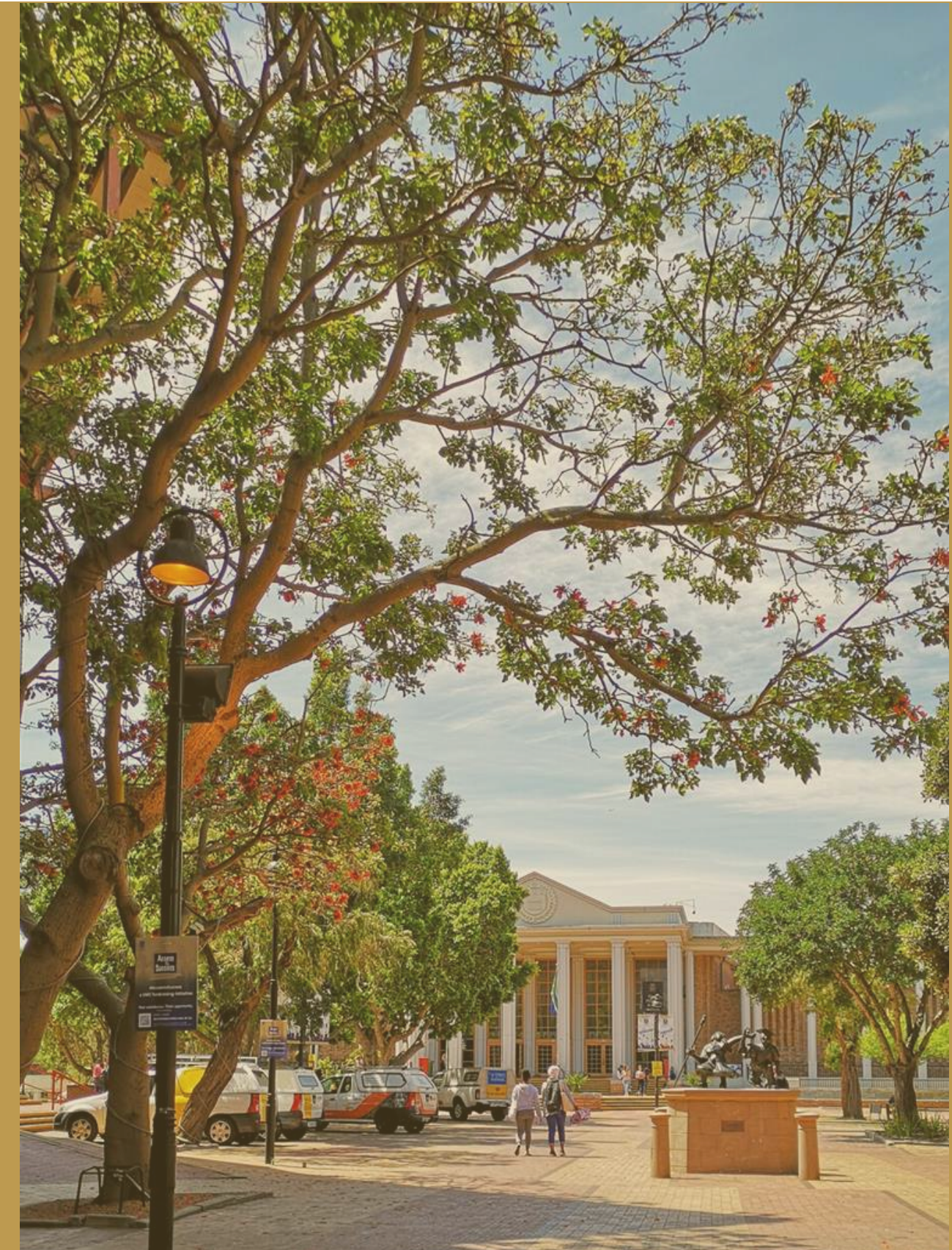
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NEW INROADS INTO FREEDOM OF TESTATION?

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A presentation in three parts

Part 1: The “traditional” approach to freedom of testation in the South African law of succession

Part 2: New inroads into freedom of testation in the constitutional era?

- Two specific limitations

Part 3: Conclusion

- What advice to give to your clients?



Part 1: “Traditional” freedom of testation

- Definition / description
- Implications:
 - Testator’s choice / decision regarding testamentary beneficiaries
 - Testator’s choice / decision regarding testamentary terms and conditions
 - *Voluntas testatoris servanda est*
 - Judicial non-variation rule



The limitation of freedom of testation

- Spousal maintenance claims: Maintenance of Surviving Spouses Act 27 of 1990 (MSSA)
- Public policy

Public policy applied conservatively and with judicial restraint to limit freedom of testation



Part 2:

New inroads into freedom of testation in the constitutional era?

Spousal maintenance claims



S 2(1) MSSA: “If a marriage is dissolved by death...the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs...”

- Traditional conceptualisation of a civil marriage
- Changes to the traditional conceptualisation:
 - Civil Union Act 17 of 2006, s 13
 - Case law



Daniels v Campbell 2004 (5) SA 331 (CC)

- “Survivor” in the MSSA includes the surviving partner to a monogamous Muslim marriage

Hassam v Jacobs [2008] 4 All SA 350 (C)

- “Survivor” in the MSSA includes each surviving partner to a polygynous Muslim marriage

Volks v Robinson 2005 (5) BCLR 446 (CC) [Majority]

- A surviving partner to a permanent opposite-sex life partnership cannot institute a maintenance claim pursuant to the MSSA against the estate of a deceased partner
 - “Choice argument”



Bwanya v The Master 2022 (3) SA 250 (CC) [Majority]

- “Choice argument” rejected
- Permanent life partnerships deserve legal protection
- S 1 of the MSSA (the definitions section) must be read as though it included the following:
 - “Spouse” [“survivor”] for purposes of the MSSA includes a person in a permanent life partnership in which the partners undertook reciprocal duties of support
 - “Marriage” for purposes of the MSSA includes a permanent life partnership in which the partners undertook reciprocal duties of support
- This order was suspended for 18 months to allow Parliament to legislate on the matter



New inroads into freedom of testation in the constitutional era?

Public policy



Minister of Education v Syfrets Trust Ltd 2006 (4) SA 205 (C) par 48:

“This 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...”

Curators, Emma Smith Educational Fund v University of KwaZulu-Natal 2010 (6) SA 518 (SCA) paras 38 & 41:

“In the public sphere there can be no question that racially discriminatory testamentary dispositions will not pass constitutional muster...We are not called upon to decide the case of a testator who is a member of a congregation wishing to create a trust for members of his or her faith or a club member intending to benefit the children of fellow members.”



King v De Jager 2021 (4) SA 1 (CC)

Par 148:

“However, our courts have drawn a distinction between public and private trusts. In the case of public trusts, courts have been willing to amend the trust deed to remove terms that are unfairly discriminatory.”

Par 150:

“This has resulted in drawing this difference that lacks substance. A public trust deed or will that violates the values of the Constitution or one of its provisions has the same impact as a private trust deed or will in breach of the same provisions. Both of them are inconsistent with the Constitution and the supremacy of the Constitution renders them both equally invalid.”



Par 154:

“The fact that a testator may have decided to exclude some of her children from inheriting her property does not, without more, amount to a breach of the Constitution or public policy. Nor does the fact that she may have bequeathed the property to them in unequal shares or had decided to disinherit all her children. The Constitution does not oblige testators to treat their children equally. So long as what she had done, in disposing of her property by a will, does not constitute unfair discrimination, it is permitted by freedom of testation if she had acted within the law.”



Par 161:

“In the special circumstances of the present matter, the application of the common law rule leads to a just and equitable outcome. This is because the respondents had already received the other half of the property from their own father. It would be unjust for them to be entitled to the half that was held by the applicants' father, over and above what they had already obtained.”



Part 3: Conclusion

- Change in testator conduct
- Be aware of current developments and alert to new developments
- Engage your clients on the consequences of their dispositive choices
- Explore alternative dispositions
 - Interest groups
 - *Inter vivos* dispositions

Thank you

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