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THE CONSTITUTIONAL RESHAPING OF SOUTH AFRICA'S SUCCESSION LAWS

François du Toit*

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ABSTRACT

The South African Constitution of 1996 has had a significant impact on all the branches of South African law, including its succession laws. The Constitution has transformatively reshaped important aspects of South Africa's succession laws over the past two-and-a-half decades. This Article surveys the reshaping of two such aspects critically, namely (i) the extension of spousal inheritance under the Intestate Succession Act of 1987 and the Wills Act of 1953 as well as the extension of parental inheritance under the former statute; and (ii) the limitation of testamentary freedom. The aforementioned developments occurred by and large at the hands of the South African courts under the influence of constitutional and public policy imperatives regarding equality and non-discrimination. The Article shows that many of these developments are positive and worthy of emulation, but that a handful of the judgments in which these developments occurred, are open to criticism.

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I. INTRODUCTION

South Africa's succession laws determine which assets pass by inheritance to a deceased person's successors (or beneficiaries).¹ Succession in South Africa occurs principally in accordance with the deceased's valid will or, in the absence of a valid will, through intestate succession.² The Wills Act³ regulates aspects of the former, whilst the latter is by and large governed by the Intestate Succession Act.⁴ The South African law of testate succession is a mixture of Roman-Dutch law and English law,⁵ whereas the origins of its common law of intestate succession⁶ date back to the *Schependomsrecht*, one of the intestate succession systems in operation in the Dutch province of Holland during the sixteenth century.⁷ The law of succession resorts under the broader category of South African private law.⁸

The South African Constitution⁹ and its Bill of Rights¹⁰ in particular impact all branches of South African law, including its

1. JUANITA JAMNECK & CHRISTA RAUTENBACH (eds.), *THE LAW OF SUCCESSION IN SOUTH AFRICA* 1 (3rd ed., Oxford U. Press 2017); M. DE WAAL & M. SCHOEMAN-MALAN, *LAW OF SUCCESSION* 1 (5th ed., Juta 2015).

2. JAMNECK & RAUTENBACH, *supra* note 1, at 1; DE WAAL & SCHOEMAN-MALAN, *supra* note 1, at 2–3.

3. Wills Act 7 of 1953 (S. Afr.).

4. Intestate Succession Act 81 of 1987 (S. Afr.).

5. François du Toit, *Succession Law in South Africa – a Historical Perspective*, in *EXPLORING THE LAW OF SUCCESSION – STUDIES NATIONAL, HISTORICAL AND COMPARATIVE* 67 (Kenneth G.C. Reid, Marius J. de Waal & Reinhard Zimmermann eds., Edinburgh U. Press 2007).

6. South Africa also recognizes the customary laws of intestate succession of its Black people: see JAMNECK & RAUTENBACH, *supra* note 1, at 4–5. This branch of intestate succession laws falls outside this Article's scope.

7. JAMNECK & RAUTENBACH, *supra* note 1, at 3; DE WAAL & SCHOEMAN-MALAN, *supra* note 1, at 14–15.

8. JAMNECK & RAUTENBACH, *supra* note 1, at 3.

9. S. AFR. CONST., 1996.

10. *Id.* at Ch. 2.

private law and thus also its succession laws.¹¹ It is unsurprising that South African courts, when adjudicating on constitutional challenges to South Africa's succession laws, have reshaped these laws in consonance with constitutional imperatives in general and the prescripts of the Bill of Rights in particular. This constitutional reshaping occurred regarding South Africa's testate as well as its intestate succession laws. Two aspects of the constitutional reshaping of South Africa's succession laws are surveyed in this Article: (i) the extension of inheritance in terms of the Intestate Succession Act and Wills Act to persons not traditionally recognized as a deceased's surviving spouse or parent and (ii) the limitation of testamentary freedom beyond the instances in which South African law traditionally restricted testators when disposing of their property by last will and testament. These two aspects provide ample evidence of the transformative effect of the Constitution regarding South Africa's succession laws. However, the manner in and the extent to which South African courts have undertaken the reshaping of these laws are not beyond reproach, and the Article also touches on criticism of aspects of the courts' constitutionally transformative methodologies in this regard.

II. THE EXTENSION OF SPOUSAL AND PARENTAL INHERITANCE

The Intestate Succession Act as well as the Wills Act provide for the devolution of assets to a deceased person's surviving spouse in certain instances. The Intestate Succession Act designates the surviving spouse as a deceased's sole intestate heir if the deceased is not survived by descendants,¹² and as a co-heir in the event that the deceased is survived by a spouse as well as descendants.¹³ The Wills

11. § 2 of the Constitution states that the Constitution is South Africa's supreme law and that all law or conduct inconsistent therewith is invalid; § 8(1) of the Constitution determines that the Bill of Rights applies to the entirety of South African law; § 8(2) of the Constitution renders the Bill of Rights binding on all natural and juristic persons.

12. Intestate Succession Act, *supra* note 4, at § 1(1)(a).

13. *Id.* at § 1(1)(c).

Act permits the accrual of testamentary benefits in favor of a testator's surviving spouse when a descendant of that testator renounced (rejected) those benefits.¹⁴ However, neither statute contains a definition of "spouse" or "surviving spouse" for purposes of the operation of the aforementioned provisions. The traditional meaning attributed to "spouse" or "surviving spouse" in the above contexts is of a person to whom the deceased was married (at the time of the deceased's death) in a valid civil marriage solemnized in accordance with the Marriage Act.¹⁵ Writing in 1983 (during the pre-constitutional era), Erasmus *et al* note the following distinguishing features of such a valid civil marriage:

- a civil marriage is a voluntary, life-long union of one man and one woman;
- persons of the same sex cannot enter into a civil marriage;
- a civil marriage is a monogamous union; and
- a civil marriage must be solemnized by a competent marriage officer in accordance with the provisions of the Marriage Act.¹⁶

The foregoing points to the limited meaning traditionally ascribed to "spouse" or "surviving spouse" for purposes of the directives in the Intestate Succession Act and Wills Act that appertain to these persons. South African courts have, during the post-constitutional era, extended inheritance rights under both statutes to persons who do not fall within the confines of this limited meaning. The courts did so with firm reliance on constitutional rights and norms, in particular those regarding equality and non-discrimination as well as human dignity. A similar development occurred regarding the Intestate Succession Act's engagement with parental inheritance. The Act designates a deceased's parent or parents as an intestate heir or

14. Wills Act, *supra* note 3, at § 2C (1).

15. Marriage Act 25 of 1961 (S. Afr.). *See Daniels v Campbell* 2003 (9) BCLR 969 (C) 985H, 988F.

16. H. ERASMUS, C.G. VAN DER MERWE & A.H. VAN WYK, FAMILY, THINGS AND SUCCESSION 14–17 (2d ed., Butterworths 1983).

heirs when the deceased is not survived by a spouse or descendants.¹⁷ Parentage in this regard traditionally carries the limited meaning of single-generational blood relationship in the case of a biological child (i.e., the child's biological father or mother) or, alternatively, parenthood established through a legally valid adoption in the case of an adopted child (i.e., the child's adoptive father or mother).¹⁸ These points are considered the "traditional objectively determinable criteria of who a 'parent' is."¹⁹ However, a South African court departed from this traditional meaning of "parent", for purposes of the Intestate Succession Act, by relying on constitutional rights and norms.

The specific instances in which South African courts undertook the broadening of the traditional spousal and parental concepts will now be considered in greater detail.

A. Muslim and Hindu Marriages

In *Daniels v Campbell*,²⁰ the Constitutional Court decided that "spouse" for purposes of the Intestate Succession Act includes a party to a monogamous Muslim marriage. Such a party does not qualify in terms of the spousal concept's abovementioned traditional limited meaning because a marriage concluded in accordance with Muslim rites is typically not solemnized by a marriage officer appointed in terms of the Marriage Act, and such a marriage is thus also not registered in accordance with the Marriage Act's pre-cripts.²¹ The Constitutional Court opined in *Daniels* that the limited meaning traditionally ascribed to "spouse" is unfairly discriminatory in its intent and impact, because it exalts a particular conceptualization of marriage to which Muslim marriages do not conform.²²

17. Intestate Succession Act, *supra* note 4, at § 1(1)(d).

18. MJ de Waal & L Mills, *What it Means to be a Parent: Implications for Family Law and the Law of Intestate Succession: Wilsnach NO v M 2021 1 All SA 600 (GP)*, 2021 3 SA 568 (GP), J. S. AFR. L. 562 (2021) 562–563, 568.

19. *Id.* at 568.

20. 2004 (5) SA 331 (CC).

21. *Id.* at para. 3.

22. *Id.* at para. 19.

The Court thus declared that the constitutional values of equality, tolerance and respect for diversity justify ascribing a broad and inclusive meaning to the word “spouse” for purposes of the Intestate Succession Act.²³ In the result, the Court ruled that the term “spouse” in the Intestate Succession Act must be interpreted to include a party to a monogamous Muslim marriage and, therefore, that such a spouse is capable of inheriting in terms of that Act.²⁴ The position of a party to a monogamous Hindu marriage is akin to that of a party to a monogamous Muslim marriage insofar as a Hindu marriage is typically not solemnized by a duly appointed marriage officer and is therefore not registered under the Marriage Act.²⁵ It therefore came as no surprise when the erstwhile Durban and Coast Local Division of the Supreme Court (now known as the KwaZulu-Natal High Court, Durban), bound by the precedent set by the Constitutional Court in *Daniels*, subsequently ruled in *Govender v Ragavayah* that the Intestate Succession Act must be interpreted to include a party to a monogamous Hindu marriage as a spouse who can inherit in terms of that Act.²⁶

Another reason for the exclusion of a party to a Muslim marriage from the spousal concept’s traditional limited meaning is the potentially polygynous nature of such a marriage. In *Hassam v Jacobs*,²⁷ the Constitutional Court had to determine whether or not a surviving spouse to a polygynous Muslim marriage can inherit in terms of the Intestate Succession Act. The Court decided that a failure to broaden the Intestate Succession Act’s spousal concept to include widows of polygynous Muslim marriages will occasion material disadvantage for such widows to which their counterparts in otherwise valid civil marriages or monogamous Muslim marriages are not exposed;²⁸ moreover, that the resultant discrimination against widows of

23. *Id.* at para. 21.

24. *Id.* at para. 37.

25. *Govender v Ragavayah* 2009 (3) SA 179 (D) at para. 12 (S. Afr.).

26. *Id.* at para. 42.

27. 2009 (5) SA 572 (CC).

28. *Id.* at para. 34.

polygynous Muslim marriages conflicts with the constitutional principle of gender equality.²⁹ However, the Constitutional Court in *Hassam* was unable to follow an approach similar to that adopted in *Daniels* and thus to interpret “spouse” for purposes of the Intestate Succession Act to include all the parties to a polygynous Muslim marriage. This is because the Act uses “spouse” in the singular only: reading this word to include multiple spouses in a polygynous Muslim marriage would, in the opinion of the Court in *Hassam*, unduly strain the Act’s language insofar as it would bring about a significant departure from the commonly-understood meaning of the word “spouse”, as it appears in the singular in the Intestate Succession Act.³⁰ The Court therefore utilized the so-called “reading-in remedy” to cure the Intestate Succession Act’s unconstitutionality on point: it ordered that the Act must be read as if the words “or spouses” appear after the word “spouse” wherever the latter word is used in the Act.³¹ *Hassam*’s effect is therefore that the distribution of an intestate estate must always take account of the polygynous nature of the Muslim marriage(s) to which the deceased was a party and that all the surviving spouses of such a marriage(s) are capable of inheriting from the deceased’s estate in terms of the Intestate Succession Act.

The Constitutional Court echoed the above approaches to the broadening of the spousal concept when it ruled on the Wills Act’s provision that permits accrual in favor of a surviving spouse. In *Moosa v Minister of Justice*,³² the Court held that confining the meaning of “surviving spouse” in the Act’s accrual provision to monogamous unions violates the equality rights of the parties to a polygynous Muslim marriage.³³ The Court again cured the resultant constitutional invalidity of the accrual provision by employing the reading-in remedy and it ordered that the accrual provision must be

29. *Id.* at para. 37.

30. *Id.* at para. 48.

31. *Id.* at para. 57.

32. 2018 (5) SA 13 (CC).

33. *Id.* at para. 12.

read as if the following words appear therein: “For the purposes of this subsection, a ‘surviving spouse’ includes every husband and wife of a monogamous and polygamous Muslim marriage solemnized under the religion of Islam.”³⁴

B. Same-Sex Life Partnerships

The spousal concept’s traditional limited meaning precludes persons of the same sex from entering into a civil marriage. In the result, the surviving partner to a permanent same-sex life partnership did not qualify as a spouse for purposes of the Intestate Succession Act. In *Gory v Kolver (Starke and Others Intervening)*,³⁵ the Constitutional Court ruled that any differentiation regarding the intestate succession rights of opposite-sex spouses (who can inherit on intestacy) and permanent same-sex life partners (who cannot inherit on intestacy) amounts to unfair discrimination against the latter; moreover, that the Intestate Succession Act’s failure to include surviving partners to permanent same-sex life partnerships within its regulatory ambit is inconsistent with the constitutional rights to equality and human dignity.³⁶ The Court consequently ordered that the Intestate Succession Act must be read as though the following words are included after the word “spouse” wherever this word appears in the Act: “[O]r partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.”³⁷ Gory therefore renders a surviving partner to a permanent same-sex life partnership a competent intestate heir in respect of the deceased partner’s estate.

34. *Id.* at para. 21. Note that the court used the generic term “polygamous” in the reading-in order, but that “polygynous” would have been preferred because a Muslim husband is permitted to marry more than one wife whereas the converse—polyandry—is not permitted under Islamic law.

35. 2007 (4) SA 97 (CC).

36. *Id.* at para. 19.

37. *Id.* at para. 66.

The Gory judgment was handed down shortly before the commencement of the Civil Union Act.³⁸ This Act enables any two competent persons to conclude a civil union, either in the form of a marriage or as a civil partnership.³⁹ Parties of the same sex as well as those of the opposite sex can enter into a civil union.⁴⁰ The Civil Union Act states pertinently that the word “spouse” in any law includes a civil union partner.⁴¹ Pursuant to the Civil Union Act, a spouse for purposes of the Intestate Succession Act thus also encompasses a civil union partner, thereby rendering a surviving civil union partner a competent intestate heir of the first-dying partner. This statutory development raised the question of whether or not the Constitutional Court’s abovementioned order in Gory endured in the aftermath of the Civil Union Act: in light of the fact that the Constitutional Court made that order in Gory at a time when the formalization of same-sex relationships was legally impermissible – which impermissibility the Civil Union Act eradicated – can same-sex life partners who have not formalized their relationship in terms of the Civil Union Act still avail themselves of the protection afforded by the Gory order? The Constitutional Court answered this question in the affirmative in *Laubscher v Duplan*.⁴²

In *Laubscher*, the Constitutional Court opined that same-sex partners who formalized their relationship in terms of the Civil Union Act constitute a new category of intestate heirs for purposes of the Intestate Succession Act; however, this new category excludes the category of intestate heirs yielded by Gory. For purposes of intestate inheritance, the parties to a civil union are, according to *Laubscher*, therefore clearly distinguishable from same-sex life partners who have not formalized their relationship in terms of the Civil Union Act. In the result, the Court held that same-sex life partners

38. Civil Union Act 17 of 2006 (S. Afr.). The Civil Union Act commenced on November 30, 2006 and the Gory judgment was handed down a week prior to this commencement date.

39. *Id.* at § 1.

40. *KOS v Minister of Home Affairs* 2017 (6) SA 588 (WCC) at para. 23 (S. Afr.).

41. Civil Union Act, *supra* note 38, at § 13(2)(b).

42. 2017 (2) SA 264 (CC).

(or cohabitants) who meet the requirement of mutual support laid down in Gory continue to enjoy intestate succession rights (as per the Gory order) until such time as the Legislature amends the Intestate Succession Act to align it with the effects of the Civil Union Act.⁴³ One may be forgiven for thinking that Laubscher produced somewhat of an anomaly insofar as the decision to keep the Gory order in effect in the Civil Union Act's aftermath created inequality between opposite-sex life partners who chose not to marry or enter into a civil union (which choice negated – at least at the time when Laubscher was decided⁴⁴ – intestate inheritance on the death of the first-dying partner) and same-sex life partners who chose not to enter into a civil union (which choice does not negate intestate inheritance on the death of the first-dying partner). Indeed, the Constitutional Court admitted as much in Laubscher⁴⁵ but because this issue was not pertinent before the Court in Laubscher, it was not called upon to engage with the inequality conundrum.⁴⁶ Instead, the Constitutional Court reasoned in Laubscher that it is best left to the Legislature to address any equality-related inconsistencies between the Gory order's continued operation on the one hand, and the effects of the Civil Union Act's operation on the other hand.⁴⁷

It is instructive to note that the Constitutional Court first acknowledged the choice principle mentioned in the previous paragraph when it handed down its judgment in *Volks v Robinson*.⁴⁸ In this decision, the majority of the Constitutional Court denied a surviving opposite-sex life partner's claim for spousal maintenance on the death of the first-dying partner. The choice principle (or argument) advanced by the majority of the Court in *Volks* prescribes in broad terms that parties who can legally enter into a civil marriage (or conclude a civil union) but chose not to do so, ought, by reason

43. *Id.* at para. 55.

44. *See* II. C. below.

45. Laubscher, *supra* note 42, at para. 31.

46. *Id.* at para. 52.

47. *Id.* at para. 32.

48. 2005 (5) BCLR 446 (CC).

of their choice, not to receive any of the benefits (such as spousal maintenance claims or intestate succession rights) yielded by a civil marriage (or a civil union).⁴⁹ This principle therefore precludes, at least *prima facie*, intestate succession on the death of a same-sex or opposite-sex life partner where the cohabitating partners could have legally formalized their relationship but chose, for whatever reason, not to do so. The choice principle is not uncontroversial in South African jurisprudence and has elicited criticism from some academic commentators.⁵⁰ It is therefore regrettable that Laubscher's circumstances did not require the Constitutional Court to engage substantively with this principle. The Constitutional Court's subsequent judgment on intestate succession between opposite-sex life partners called for a fundamental engagement with the choice principle but as is shown next, the controversy regarding this principle persisted even in this judgment.

C. Opposite-Sex Life Partnerships

Predictably, it was simply a matter of time before a surviving opposite-sex life partner would challenge the Intestate Succession Act's constitutionality on the basis that the extension of intestate succession rights to permanent same-sex life partners who have not formalized their relationship (as per Gory and Laubscher), whilst withholding those rights from similarly situated opposite-sex life partners, occasions unfair discrimination against the latter category of persons. Such a challenge came before the Western Cape High Court, Cape Town in *Bwanya v The Master*.⁵¹ The Court held that no constitutionally-justifiable reason exists why surviving partners to permanent opposite-sex life partnerships are excluded from the spousal concept for purposes of intestate inheritance under the

49. *Id.* at para. 92.

50. *See, e.g.*, Anita Cooke, *Choice, Heterosexual Life Partnerships, Death and Poverty*, 122 SALJ 542 (2005); Michael Cameron Wood-Bodley, *Intestate Succession and the Survivor of an Unformalised Same-Sex Conjugal Relationship: Laubscher NO v Duplan 2017 (2) SA 264 (CC), 39 OBITER 276 (2018)*.

51. 2021 (1) SA 138 (WCC).

Intestate Succession Act.⁵² It therefore ordered that, whenever the Intestate Succession Act's spousal concept applied, the Act must be read to include a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support.⁵³ Some academic commentators welcomed the High Court's decision in *Bwanya*.⁵⁴ The Constitutional Court⁵⁵ handed down the confirmation judgment in *Bwanya* little over a year later.⁵⁶

The Constitutional Court delivered three separate judgments in its decision in *Bwanya*. Two of these judgments are pertinent to the present discussion. The majority of the Court expressly rejected the abovementioned choice principle enunciated in *Volks*. The majority opined that *Volks* was wrongly decided; however, not to the extent that it could summarily break with the precedent set by *Volks*. The majority therefore identified two considerations that distinguished *Bwanya* from *Volks* and thus permitted the majority not to follow *Volks*.⁵⁷ The first consideration rested on the evidence presented to the Court in *Bwanya* (evidence that was not considered in *Volks*) that showed that many women in opposite-sex relationships have no real or realistic choice regarding whether or not to marry. The reasons in this regard include women's lack of "bargaining power" in relationships; the dependence of women and children, if there are any, on the financial strength of the men in the relationships; and the mistaken belief by one or both partners in a permanent life

52. *Id.* at para. 190.

53. *Id.* at para. 233.

54. See, e.g., Koshesayi Madzika, *Dawn of a New Era for Permanent Life Partners: from Volks v Robinson to Bwanya v Master of the High Court*, 53 DE JURE 393 (2020) (S. Afr.); Fatima Osman, *Splitting Hairs? Bwanya v The Master of the High Court*, 138 SALJ 521 (2021).

55. *Bwanya v The Master of the High Court* 2022 (3) SA 250 (CC) (S. Afr.).

56. The Constitution, § 167(5) states that the Constitutional Court makes the final decision regarding whether an Act of Parliament, among others, is unconstitutional or not: once a High Court, the Supreme Court of Appeal, or a court of similar status has issued an order of constitutional invalidity of any such Act, the Constitutional Court must, in a subsequent hearing, confirm such an order before it has any force.

57. *Bwanya*, *supra* note 55, at para. 47.

partnership that they are in a legally binding “common law marriage.”⁵⁸ In light of these reasons, the majority dismissed the choice principle insofar as it prohibits extending intestate succession rights to surviving permanent opposite-sex life partners.⁵⁹ The majority emphasized, secondly, that the “choice question” posed in *Volks* is in fact the wrong question for purposes of the matter before the Court in *Bwanya*: the more fundamental question is whether or not permanent life partnerships deserve constitutional and legal protection in and of themselves.⁶⁰ The majority answered this question in the affirmative, whilst acknowledging that proving the existence of a life partnership may at times be difficult. The majority nevertheless argued that probative challenges are no bar for identifying and extending legal recognition and protection to such a partnership.⁶¹ In light of the foregoing, the majority held that excluding surviving permanent opposite-sex life partners from enjoying benefits under the Intestate Succession Act amounts to constitutionally prohibited discrimination. In the result, the majority ordered that the omission from the Intestate Succession Act of the words “or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support” after the word “spouse” wherever this word appears in the Act, is unconstitutional and invalid. In order to remedy this invalidity, the majority ordered that the Intestate Succession Act must be read as though the words “or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support” appear after the word “spouse” wherever this word appears in the Act. However, the majority suspended this order for a period of eighteen months from the date of the judgment to enable the South African Parliament to take legislative steps to cure the constitutional defects identified in *Bwanya*.⁶²

58. *Id.* at para. 62.

59. *Id.* at para. 66.

60. *Id.* at para. 68.

61. *Id.* at paras. 75–78.

62. *Id.* at para. 95.

The first dissenting judgment in Bwanya is also instructive for purposes of this Article.⁶³ This judgment focused, among others, on the marked differences between a marriage (or a civil union) and a life partnership, in particular regarding the legal certainty yielded by the former as opposed to the uncertainty regarding the existence (or not) of the latter.⁶⁴ It is submitted that Bwanya's facts underscore the first dissenting judgment's stance in this regard. The Western Cape High Court found quite readily that the applicant (the surviving partner) and the deceased were indeed permanent life partners who had undertaken reciprocal duties of support.⁶⁵ The facts on which the Court based this finding were the following: the relationship between the applicant and the deceased existed from early 2014 until the deceased's death in early 2016 – little more than two years;⁶⁶ the applicant and the deceased moved in together, but the applicant retained a separate abode for work purposes;⁶⁷ the applicant averred that she and the deceased intended to start a domestic cleaning business together (no evidence was advanced that this anticipated venture came to fruition) as well as that the deceased assisted her in obtaining a driver's license and that he was going to pay for her driving lessons and also buy her a car for use in the cleaning business.⁶⁸ The applicant alleged furthermore that she and the deceased contemplated having a child together;⁶⁹ the applicant admitted that the deceased paid all the household and other expenses and that her contribution to the relationship occurred by way of "love, care, emotional support and companionship";⁷⁰ and the applicant averred that the deceased asked her to marry him⁷¹ but that the

63. The second dissenting judgment in Bwanya held that Volks was not clearly wrongly decided and thus constitutes binding legal precedent: *id.* at para. 197.

64. *Id.* at paras. 98 and 111–118.

65. Bwanya, *supra* note 51, at paras. 141–142.

66. *Id.* at paras. 5 and 25.9.

67. *Id.* at paras. 7–8.

68. *Id.* at paras. 13–14.

69. *Id.* at para. 16.

70. *Id.* at para. 19.

71. *Id.* at para. 23.

preparations for the marriage were yet to be finalized pending arrangements to be made with the applicant's family in Zimbabwe.⁷² The first dissenting judgment in the Constitutional Court's decision in Bwanya remarked that many of these actions are found, to varying degrees, in many relationships, ranging from high school sweet-hearts to adult lovers, but that this does not establish the existence of a permanent life partnership that yields rights and obligations similar to those that attach to a marriage (or a civil union).⁷³ Secondly, the first dissenting judgment was not convinced by the majority's stance on the incorrectness of the choice principle: the first dissenting judgment opined that the choice whether or not to enter into marriage may at times be a difficult one, but it remains a real choice and not merely an illusory one (as the majority suggested). The first dissenting judgment was consequently unpersuaded that women are "helplessly trapped in some of these relationships" due to the reasons advanced in the majority judgment to support its stance that many women in opposite-sex relationships have no real or realistic choice regarding whether or not to marry.⁷⁴

The Constitutional Court's judgments in Bwanya highlight the challenges, difficulties and tensions associated with extending intestate succession rights beyond legally formalized relationships. Given that legal certainty is a particularly potent arrow in any private lawyer's quiver, the reasoning advanced in the first dissenting judgment in this case is, it is submitted, indeed persuasive. This is not to say, of course, that intestate succession rights should not be granted to permanent opposite-sex life partners who have undertaken reciprocal duties of support. How this must occur and the extent to which it must happen are matters best left to the Legislature rather than the courts—a fact on which both dissenting judgments in Bwanya concurred.⁷⁵ In this light, the majority of the Constitutional Court's temporary suspension of its orders in Bwanya to allow the

72. *Id.* at para. 25.8.

73. Bwanya, *supra* note 55, at para. 117.

74. *Id.* at para. 126.

75. *Id.* at paras. 149, 195.

South African Parliament to enact appropriate legislation regarding, among others, the intestate succession rights of permanent opposite-sex life partners appears extremely prudent and sensible.

D. Parentage in Extended-Family Households

In *Wilsnach v TM*,⁷⁶ a decision of the Gauteng High Court, Pretoria, the Court had to adjudicate on intestate succession rights in an extended-family household where one of the deceased's biological parents assumed no parental role whatsoever and was effectively replaced in this role by the deceased's grandmother. The deceased whose estate was at issue in this case was a severely disabled person by reason of complications at birth. A claim for the medical negligence that caused the deceased's disabilities was settled out of court and, when the deceased died aged five, his estate comprised the sizeable remainder of the settlement amount. The deceased's biological parents (the first and second respondents in the matter) survived him⁷⁷ and would have been the deceased's sole intestate heirs in terms of the Intestate Succession Act.⁷⁸ However, these parents provided little by way of parental care during the deceased's short life. In fact, the deceased's father did not care for the deceased at all and played no role in the deceased's life.⁷⁹ The deceased and his mother resided with the deceased's maternal grandmother (the third respondent in the matter) and they thus formed a so-called "extended-family household."⁸⁰ The deceased's grandmother was his primary caregiver and was granted full parental rights and responsibilities regarding his guardianship.⁸¹ This factual matrix prompted the

76. 2021 (3) SA568 (GP).

77. *Id.* at paras. 6–7.

78. *See* II. above.

79. *Wilsnach*, *supra* note 76, at para. 12.

80. *Id.* at par. 13. *See LF and Another v TV* 2020 (2) SA 546 (GJ) at para. 41 (S. Afr.) where the Court expressly included grandparents as members of a child's extended family.

81. *Wilsnach*, *supra* note 76, at para. 8.

executor of the deceased's estate to request a declaratory order on exactly who the deceased's intestate heirs were.

The Court opined that the declaratory order called for a determination of the meaning of the word "parent" for purposes of the Intestate Succession Act. The Court noted that the Act contains no definition in this regard and therefore proffered that the matter turned on the word's proper interpretation.⁸² It then looked at the broad meaning ascribed to "parent" for purposes of the Children's Act⁸³ and concluded that the word should be interpreted widely, also for purposes of the Intestate Succession Act, to include someone who, although not a biological parent, fulfilled parental duties and functions, and thus essentially played the role of a parent, in a child's life.⁸⁴ In light of this interpretation, the Court held that it would "offend the entire constitutional scheme and the values it is founded upon" if the deceased's absent father was to be regarded as a parent (and thus an heir) for purposes of the Intestate Succession Act merely on the strength of his biological connectedness to the deceased.⁸⁵ The Court ruled that the deceased's mother, despite not providing continuous care to the deceased, could still properly be considered the deceased's parent for purposes of the Intestate Succession Act.⁸⁶ Significantly, the Court ruled furthermore that the deceased's grandmother, who primarily and substantially carried the burden of caring for the deceased,⁸⁷ was "entitled to be called a parent in truth, in reality and in law."⁸⁸ In the opinion of the Court, such a conclusion is consistent with the grandmother's relationship with the deceased and, moreover, aligned to the objectives of both the Children's Act and the Constitution insofar as advancing the best interests of the child is concerned.⁸⁹ The Court thus found that the deceased's grandmother was his parent for purposes of the Intestate

82. *Id.* at paras. 35, 37, 48.

83. Children's Act 38 of 2005 (S. Afr.).

84. Wilsnach, *supra* note 76, at paras. 42, 58.

85. *Id.* at paras. 65–66, 68.

86. *Id.* at paras. 70, 76.

87. *Id.* at para. 77.

88. *Id.* at para. 81.

89. *Id.* at para. 76.

Succession Act and that she and the deceased's mother were the deceased's sole intestate heirs.⁹⁰

Wilsnachs outcome can certainly be regarded as just and equitable; however, the manner in which the Court achieved this outcome, in particular its interpretative reliance on the Children's Act, is criticizable. This is so because the legislative histories and contexts of the Intestate Succession Act and the Children's Act are quite different: the former lays down succession rules based on a strictly generational approach to blood relationship—an approach that can be traced back to the old *Schependomsrecht*—whereas the latter sets out contemporary principles regarding the care and protection of children and, moreover, defines parental responsibilities and rights *vis-à-vis* those children. The Court's reliance in Wilsnach on the meaning of "parent" in a statute that has little, if anything, in common with the Intestate Succession Act is thus historically and contextually highly suspect.⁹¹ It is therefore submitted that the parental concept in the Intestate Succession Act must retain its limited meaning of single-generational biological connectedness or parenthood through a valid adoption. Doing so, even in respect of the abhorrent conduct of the deceased's father and the laudable actions of the deceased's grandmother in Wilsnach, need not contravene the Constitution and its underlying values as the Court in this case would have one believe: Wilsnach's outcome could have been achieved without any judicial tampering with the meaning of "parent" for purposes of the Intestate Succession Act. De Waal and Mills⁹² as well as Van Vuren⁹³ correctly point out that the same result could probably have been achieved if the deceased's grandmother had instituted a claim against the deceased estate for the expenses she incurred in caring

90. *Id.* at paras. 83, 93.

91. *See, e.g.*, De Waal & Mills, *supra* note 18, at 569: the co-authors regard the Court in Wilsnach's incorporation of the Children's Act's definition of "parent" into the Intestate Succession Act as "problematic."

92. De Waal & Mills, *supra* note 18, at 570–571.

93. Louis van Vuren, *From What Constitutes a Parent, to Soundness of Mind: Three Fiduciary-Related Court Case Summaries by FISA*, WITHOUT PREJUDICE (Quarter 1, 2021), <https://perma.cc/5PZK-2A7P>.

for the deceased, coupled with an application to have the deceased's father declared unworthy to inherit based on his total neglect of his son. Such a course of action would have secured ample compensation for the deceased's grandmother and would have bestowed an intestate inheritance on the deceased's mother to the exclusion of his father. Unfortunately, the Court in *Wilsnach* was ostensibly persuaded by the particularly disconcerting facts of the case to follow a different and rather dubious interpretative approach to resolving the matter: *Wilsnach* is therefore a hard case that made bad law or, as De Waal and Mills contend, a case that "raises more questions than it provides answers."⁹⁴ In light of the private lawyer's need for legal certainty referred to earlier, this can never be a satisfactory outcome.

III. THE LIMITATION OF FREEDOM OF TESTATION

Freedom of testation is a cornerstone of South Africa's testate succession laws.⁹⁵ Many of Civil Law's typical limitations on testamentary freedom, such as forced heirship and mandatory asset claims, cannot be obtained in South Africa. One limitation on testamentary freedom that South Africa shares with its civilian counterparts, is that effect is not given to testamentary provisions that are *contra bonos mores* or, in contemporary phraseology, that violate public policy. South African courts have traditionally applied the public policy limitation on freedom of testation with circumspection and restraint. Some patently untenable testamentary provisions, for example, those aimed at the destruction of existing marriages, have consistently been adjudged as offending public policy.⁹⁶ These provisions that are clearly in contravention of public policy aside, South African courts have traditionally refrained from invoking public policy to intrude on testators' dispositive choices, in particular their choices in respect of instituting and excluding beneficiaries under

94. De Waal & Mills, *supra* note 18, at 571.

95. *In re BOE Trust Ltd* 2013 (3) SA 236 (SCA) at paras. 26–27 (S. Afr.).

96. *See, e.g.*, *Ex parte Swanevelder* 1949 (1) SA 733 (O) (S. Afr.); *Ex parte Isaacs* 1964 (4) SA 606 (GW) (S. Afr.); *Oosthuizen v Bank Windhoek Ltd* 1991 (1) SA 849 (Nm) (S. Afr.).

testamentary gifts. In *Campbell v Daly*,⁹⁷ the erstwhile Transvaal Local Division of the Supreme Court stated its position as follows:

The mere fact that the dispositions in a will may appear to be unreasonable, unfair, capricious, or otherwise unacceptable does not empower a Court to depart therefrom. The testator is at liberty to be as generous or restrictive in his bequests as he pleases.⁹⁸

South African courts have, during the post-constitutional era, used public policy to an ever-greater extent to limit testamentary freedom, even in instances that were earlier regarded as beyond reproach pursuant to the legal position stated in *Campbell*. This has principally occurred in respect of testators' choices to include some and to exclude others from benefitting under testamentary gifts. The courts did so with firm reliance on constitutional rights and norms, in particular those regarding equality and non-discrimination. In *Minister of Education v Syfrets Trust Ltd*,⁹⁹ it was said in this regard that contemporary South African public policy is rooted in the Constitution and the fundamental values it enshrines. When, therefore, a court must adjudicate on a policy-based challenge to a restricted testamentary gift, it must be guided by "the founding constitutional values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism."¹⁰⁰ Proceeding from this point of departure, South African courts have used public policy progressively to undo what they deemed the constitutionally- untenable consequences of restricted testamentary gifts. A dual distinction can broadly be drawn in this regard, namely between courts' engagement with testamentary charitable trusts on the one hand, and their engagement with non-charitable (or private) testamentary bequests on the other hand.

97. 1988 (4) SA 714 (T).

98. *Id.* at 720H.

99. 2006 (4) SA 205 (C).

100. *Id.* at para. 24.

A. Charitable Trusts

In *Syfreys Trust*, the erstwhile Cape Provincial Division of the High Court ruled that a testator's exclusion of non-White, female, and Jewish students at a public university from benefitting under a testamentary bursary trust fell afoul of constitutionally founded public policy. The Court held that limiting bursary eligibility to White students only occasioned indirect discrimination on the grounds of race and/or color; moreover, that the exclusion of female and Jewish students from bursary eligibility constituted direct discrimination on the grounds of gender and religion.¹⁰¹ The Court therefore ordered that the restrictions in respect of bursary eligibility must be struck from the testator's will.¹⁰² The Supreme Court of Appeal followed suit in *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal*¹⁰³ when it dismissed an appeal against the KwaZulu-Natal High Court, Durban's order to strike a racial restriction on eligibility under a testamentary bursary trust from the testator's will.¹⁰⁴ In arriving at this conclusion, the Supreme Court of Appeal remarked that "racially discriminatory testamentary dispositions will not pass constitutional muster"¹⁰⁵ and that "[t]he constitutional imperative to remove racially restrictive clauses that conflict with public policy from the conditions of an educational trust...must surely take precedence over freedom of testation, particularly given the fundamental values of our Constitution."¹⁰⁶ The Western Cape High Court, Cape Town subsequently produced a similar outcome in *In re Heydenrych Testamentary Trust*¹⁰⁷ when it ordered the excision of racial and gender eligibility restrictions from three separate testamentary bursary trusts. The Court also ordered the variation of these trusts' provisions to make the bursaries available to students

101. *Id.* at para. 33.

102. *Id.* at paras. 47, 49.

103. 2010 (6) SA 518 (SCA).

104. *Id.* at para. 50.

105. *Id.* at para. 38.

106. *Id.* at para. 42.

107. 2012 (4) SA 103 (WCC).

of all races and genders.¹⁰⁸ In arriving at this conclusion, the Court observed that “the impugned conditions . . . constitute unfair discrimination on grounds of gender and race and are in conflict with s 9(4) of the Constitution¹⁰⁹ and the public interest.”¹¹⁰

The decisions above can be supported insofar as they dealt with testamentary charitable trusts. These trusts possess a distinct public dimension by reason of their defining characteristic, namely that they operate for the public benefit. In this light, a charitable trust can rightly be regarded as a “public trust” that must comply with the demands of public law norms.¹¹¹ In *Ex parte Henderson*¹¹² it was said that “public benefit” in the context of a charitable trust does not necessarily denote benefitting the public at large, but that it also encompasses the bestowal of benefits on sections of society. However, in such a case, the particular section or group must be sufficiently large and representative; moreover, the bequest to that section or group must advance the public interest.¹¹³ The public benefit characteristic of a charitable trust thus generally engages the size of the beneficiary class, the extent to which that class represents society at large, and the advancement of the public interest. In the case of a testamentary charitable bursary trust bequest to students, or a designated group of students, at a public school or university, the public benefit characteristic usually demands that the beneficiary class must constitute a sufficiently large and representative cross-section of society; additionally, that the bequest to this class must serve some public interest (for example, the educational advancement of

108. *Id.* at para. 23.

109. § 9 is the Constitution’s equality clause.

110. Heydenrych, *supra* note 107, at para. 20.

111. *See, e.g.*, J Phillips, Case Comment: *Anti-Discrimination, Freedom of Property Disposition, and the Public Policy of Charitable Educational Trusts: A Comment on Re Canada Trust Company and Ontario Human Rights Commission*, 9 THE PHILANTHROPIST J., July 1 1990, at 25, <https://perma.cc/Z3AV-FKNN> (Last accessed: 27 May 2022) ; JW Colliton, *Race and Sex Discrimination in Charitable Trusts*, 12 CORNELL J.L. & PUB. POL’Y. 275, 293 (2003) <https://perma.cc/8JBR-K2LJ> (Last accessed: 27 May 2022).

112. 1971 (4) SA 549 (D).

113. *Id.* at 554A.

financially disadvantaged students).¹¹⁴ The judicial striking-out of the ineligibility criteria in *Syfrets Trust*, *Emma Smith* and *Heydenrych* therefore broadened the relevant beneficiary classes to include students at the respective universities or schools, regardless of these students' race or color, gender, or religion. In the result, the excision of the ineligibility criteria in these cases ensured that the bursary gifts complied fully with the public benefit characteristic of charitable trusts. As such, the striking-out of the ineligibility criteria in these cases conformed to contemporary South African public policy as informed by public law norms on equality and non-discrimination, thereby rendering the judicial variation of the wills at issue a justifiable limitation on the respective testators' freedom of testation.¹¹⁵

B. Private Bequests

In *King v De Jager*,¹¹⁶ the Constitutional Court ruled that the exclusion of two co-testators' female descendants as fideicommissary heirs under a testamentary *fideicommissum* over certain immovable property occasioned unfair gender-based discrimination. The Court reasoned that, in the majority judgment in particular, that unfairly discriminatory disinheritances in private bequests are *ipso jure* in violation of public policy and thus unenforceable in terms of the common law *boni mores* (or public policy) rule.¹¹⁷ The Court also found that the gender-based discrimination wrought by the disinheritance in this case conflicts with the Constitution's equality directive¹¹⁸ which, in conjunction with its violation of public policy, rendered the impugned clause governing the *fideicommissum* unenforceable.¹¹⁹ The Court finally ruled that the offending clause also fell afoul of the Promotion of Equality and Prevention of Unfair

114. *Harvey v Crawford* 2019 (2) SA 153 (SCA) at para. 60 (S. Afr.).

115. *Wilkinson v Crawford* 2021 (4) SA 323 (CC) at para. 127 (S. Afr.).

116. 2021 (4) SA 1 (CC).

117. *Id.* at para. 96.

118. *Id.* at para. 130.

119. *Id.* at para. 158.

Discrimination Act¹²⁰ and that it was unenforceable on this ground as well.¹²¹

The King judgment is contentious, because it concerned a private bequest and not a charitable (and thus public) gift such as those at issue in the cases discussed in the preceding part. One is reminded of Lord Wilberforce's famous statement in *Blathwayt v Baron Cawley*,¹²² namely that the choice of beneficiaries, if it is made in a testator's limited and private sphere, is not tantamount to discrimination because it does not operate over a larger and more impersonal (read: public) field.¹²³ It is therefore difficult to conceive how the co-testators' female descendants in King, who had no legal entitlement to the specific testamentary gifts bestowed under the private *fideicommissum*, nor indeed any right at all to inherit from the co-testators, could successfully claim that the testators' private choice to institute others and not them as fideicommissary heirs occasioned unfair discrimination, even if the testators' choice involved one or more of the non-discrimination grounds listed in the Constitution's equality clause.¹²⁴ This is not to say that public policy has no role whatsoever to play in regard to private testamentary bequests. It is submitted, however, that public policy's role in this regard is to prohibit a testator from visiting substantially incontestable harm (to borrow from Robins JA in *Canada Trust Co v Ontario Human Rights Commission*¹²⁵) on a beneficiary when making such a bequest. In King, the Constitutional Court advanced neither any cogent reason why the female descendants' disinheritance was substantially and incontestably harmful to them specifically, nor any explanation of exactly what manner of actual harm befell each of these descendants by reason of their disinheritance.

120. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.).

121. King, *supra* note 116, at para. 163.

122. [1975] 3 All ER 625 (HL).

123. *Id.* at 636.

124. See Harvey, *supra* note 114, at para. 64; Wilkinson, *supra* note 115, at para. 131.

125. 69 DLR (4th) 321 at para. 36.

It is therefore submitted that a private testamentary gift and the institution and disinheritance of beneficiaries under such a gift in particular must be adjudged primarily in regard to its private consequences which, if not substantially and incontestably harmful to those excluded as heirs, should not be disturbed by a Court. The Constitutional Court's judgment in *King* is thus open to criticism insofar as the Court bridged the public/private divide in the law of gifts far too readily and, in doing so, intruded unduly on the testators' freedom of testation.

IV. CONCLUDING REMARKS

South African courts have, since the advent of the country's current constitutional dispensation, reshaped its succession laws to conform to the founding constitutional values of human dignity, equality, the advancement of human rights and freedoms, non-racialism, and non-sexism. In the vast majority of cases, this reshaping is to be welcomed, in particular when it occasioned an expansion of succession rights to parties to whom the law theretofore afforded no rights to inherit either on intestacy or in terms of a will. South African courts' methodologies in this regard can serve as a guide to courts and/or legislatures in other jurisdictions grappling with similar challenges. In a few cases, however, the courts handed down dubious judgments based on questionable reasoning – ostensibly to achieve outcomes they perceived as equitable and just but, nevertheless, outcomes that do not accord with the basic tenets of South Africa's succession laws. These judgments created considerable legal uncertainty and will hopefully be revisited by the appropriate courts in the future.

The constitutional reshaping of South Africa's succession laws brings the intersection of private law and public law generally, and in the law of gifts and trusts specifically, to the fore. The manner in and the extent to which courts ought to engage with this intersection is a contentious and challenging issue on which individual judges and academic commentators often disagree. As long as this

intersection and the attendant constitutional reshaping of succession laws rest on objective (or objectively determinable) criteria (such as the existence of a religious union when broadening intestate succession rights or compliance with the requirements set for a particular testamentary institution when altering the provisions of a will), courts can generally venture sure-footedly into the constitutional reshaping of succession laws. However, when courts discard such criteria and, moreover, derogate from the existing succession rights of others in attempts to arrive at just and equitable outcomes in succession cases, they find themselves on thin ice where they should proceed with the utmost caution and restraint in order not to open the cracks (or chasms) of legal uncertainty. The Legislature is certainly better placed to undertake law reform in these contentious cases.