2005 Journal for Juridical Science 30(1): 39-51

F du Toit

An evaluation of the limitation imposed upon freedom of testation by section 13 of the *Trust Property Control Act* 57 of 1988*

Opsomming

Section 13 of the *Trust Property Control Act* bestows on the High Court the power to vary the provisions of trust instruments. This section's applicability to testamentary trust provisions occasions its frequent classification as a statutory limitation on South African testators' freedom of testation. Section 13's common law counterpart, namely variation of testamentary trust provisions *ob causam necessariam*, is however, not likewise classified as a common law limitation on freedom of testation. It appears from case law that the latter instance of variation, although occasioning a departure from the wishes of the founder of a testamentary trust, still occurs in consonance with such wishes, rather than in contradiction thereof. The non-classification of variation *ob causam necessariam* as a limitation on freedom of testation therefore appears justified. Section 13, however, exhibits somewhat of an ambivalent character in the above regard, in that its limiting effect on freedom of testation is, it is submitted, dependent upon the content of a court's order under this section as well as the facts of the particular case. In this contribution, case law on section 13 is analysed in support of this contention.

'n Beoordeling van die beperking geplaas op testeervryheid deur artikel 13 van die *Wet op die Beheer oor Trustgoed* 57 van 1988

Artikel 13 van die *Wet op die Beheer oor Trustgoed* verleen aan die Hooggeregshof die bevoegdheid om die bepalings van trustinstrumente te wysig. Die toepaslikheid van hierdie artikel op testamentêre trusts bring mee dat dit geredelik as 'n statutêre beperking op die testeervryheid van Suid-Afrikaanse testateurs aangemerk word. Artikel 13 se gemeenregtelike ekwivalent, naamlik wysiging van testamentêre trustbepalings *ob causam necessariam*, word egter nie insgelyks as 'n gemeenregtelike beperking op testeervryheid geklassifiseer nie. Dit blyk uit regspraak dat, alhoewel laasgenoemde geval van wysiging inderdaad 'n afwyking van die wense van 'n testateur meebring, dit steeds in ooreenstemming eerder as teenstrydig met sodanige wense geskied. Die nie-klassifikasie van wysiging *ob causam necessariam* as 'n beperking op testeervryheid blyk dus geregverdig te wees. Artikel 13 vertoon egter 'n ietwat ambivalente karakter in hierdie verband, aangesien die beperkende uitwerking van dié artikel op testeervryheid, so word aangevoer, grootliks van die inhoud van die tersaaklike hofbevel en die feite van die betrokke geval afhang. In hierdie bydrae word regspraak oor artikel 13 ontleed ten einde hierdie bewering te staaf.

* Paper read at the Congress of the Society of Law Teachers of Southern Africa, University of the Free State, Bloemfontein, 17-20 January 2005.

F du Toit, Associate Professor, Faculty of Law, University of the Western Cape, Private Bag X17, Bellville 7535.

1. Introduction

Section 13 of the *Trust Property Control Act*[1] empowers any provincial or local division of the High Court having jurisdiction to vary the provisions of trust instruments.[2] This power is bestowed in the following terms:

> If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which –
>
> (a) hampers the achievement of the objects of the founder; or
>
> (b) prejudices the interests of beneficiaries; or
>
> (c) is in conflict with the public interest,
>
> the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.

It is evident from the wording of the above section that, although appearing in the Act under the heading "Power of court to vary trust provisions", it permits a court to do much more than merely order the amendment of existing trust provisions — a court is *inter alia* empowered to make any order that it deems just in respect of the trust provisions concerned, even to go as far as ordering the termination of a trust. The extensive nature of the power afforded under section 13 has prompted the comment that such power is in fact unlimited.[3] Whether the power awarded by section 13 is indeed absolute, will be addressed in the course of this contribution.

The applicability of the above provision to testamentary trust provisions occasions its frequent classification as one of the statutory limitations imposed under South African law upon testators' freedom of testation.[4] The reasoning behind such classification appears to be that, in granting an application under section 13, a court essentially orders a departure from the wishes of a testator in respect of a trust created under such testator's will and, in so doing, limits the testator's right to have the disposition of his/her property effected in accordance with his/her testamentary directions. The power conferred by

1 Act 57 of 1988.

2 Section 1 of the Act defines "trust instrument" as "a written agreement or a testamentary writing or a court order according to which a trust was created". Section 1 stipulates further that both the so-called "ownership trust" (ownership of trust property is made over or bequeathed to the trust's trustee, who administers or disposes of it for the benefit of the trust's beneficiaries or for the achievement of an impersonal object) as well as the so-called "bewind trust" (ownership of trust property is made over or bequeathed to the trust's beneficiaries, but the trust property is placed under the control of the trust's trustee, who administers or disposes of it for the benefit of the trust's beneficiaries or for the achievement of an impersonal object) fall under the operational ambit of the *Trust Property Control Act*.

3 Wessels 1993:820 and 821.

4 See, for example, De Waal 1996: par 3G7; De Waal & Schoeman-Malan 2003:4.

section 13 supplements the High Court's common law power of variation of trust provisions *ob causam necessariam*.[5] It is noteworthy that the proponents of section 13's classification as a statutory limitation upon freedom of testation do not likewise classify the High Court's power of variation *ob causam necessariam* as a corresponding common law limitation. This ostensible discrepancy raises two questions to be answered in this contribution. Firstly, why the High Court's common law power of variation is not classified as operating in limitation of freedom of testation? Secondly, in view of the common law position with regard to variation *ob causam necessariam*, whether section 13's classification as a statutory limitation upon freedom of testation is indeed appropriate?

2. The High Court's common law power of variation of testamentary trust provisions *ob causam necessariam*

The common law rule *voluntas testatoris servanda est* is founded upon the freedom of testamentary disposition afforded to testators under South African law.[6] South African courts are bound, in terms of this rule, to not only protect testators' freedom of testation as a matter of public interest but also to give effect to testators' wishes as documented in such testators' wills.[7] In consequence of this rule, South African courts enjoy no general jurisdiction at common law to authorise the variation of the provisions of a will.[8] A number of exceptions developed to this general non-variation rule, one of which is variation *ob causam necessariam* (variation in instances of dire necessity). Variation of the provisions of a will *ob causam necessariam* is permitted where a change of circumstances, unforeseen by a testator, has occurred subsequent to such testator's death, which unforeseen change renders compliance with the testator's testamentary wishes practically impossible or utterly unreasonable.[9]

Significantly, South African courts readily admit to the fact that variation of testamentary provisions on the ground under discussion, although occasioning a departure from the testamentary directions of a testator, is effected consistent with rather than in contradiction of a testator's wishes. In *Administrators, Estate Richards v Nichol*[10] the Cape High Court, relying on the decision in *Heymann v Administrators Estate Heymann*,[11] opined as follows:

5 Cameron *et al* 2002:517 and 519; Corbett *et al* 2001:426.
6 Van der Merwe & Rowland 1990:482; Du Toit 2002:40.
7 *Robertson v Robertson's Executors* 1914 AD 503 507; *Ex parte Strauss* 1949 3 SA 929 (O) 936; *Bydawell v Chapman* 1953 3 SA 514 (A) 521E-F; *Ex parte Erasmus* 1970 2 SA 176 (T) 178A.
8 *Ex parte Naudé* 1945 OPD 1 4; *Ex parte Jewish Colonial Trust: In re Estate Nathan* 1967 4 SA 397 (N) 408E-F; *Webb v Marquard* 1981 2 SA 43 (C) 46E-47H; *Ex parte Watling* 1982 1 SA 936 (C) 939A-E; *Ex parte Sidelsky* 1983 4 SA 598 (C) 601E.
9 *Ex parte Gowans: In re Estate Saunders Employees' Trust* 1977 3 SA 486 (D) 491D-G; *Ex parte Watling* 1982 1 SA 936 (C) 940H-941B; *Ex parte Sidelsky* 1983 4 SA 598 (C) 601E-G; *Administrators, Estate Richards v Nichol* 1996 4 SA 253 (C) 261D-E.
10 1996 4 SA 253 (C).
11 1932 WLD 45 47.

> The ratio for sanctioning a departure from the terms of a will is not to 'purport to alter the will of the deceased, but rather to give effect to his real intention by taking into consideration the special and often unexpected circumstances that have arisen'.[12]

It is submitted that the fact that variation *ob causam necessariam* occurs in consonance with the intention of a testator, justifies its non-classification as a limitation on freedom of testation. This submission is supported by case law on the High Court's exercise of its power of variation *ob causam necessariam*. For example, in *Ex parte Sidelsky*[13] the court effected an adjustment to an allowance paid from a testamentary trust to the testator's daughter by reason of the fact that changed economic conditions over a period of almost forty years subsequent to the execution of the testator's will rendered the allowance stipulated in the will inadequate. The court found that:

> A proportionate increase in the allowance paid to the applicant would in no way detract from the overall scheme of things envisaged by the testator. On the contrary, an appropriate increase in the applicant's allowance would appear to be in line with what the testator would have wished had he been able to scan the future when he executed his will.[14]

In *Administrators, Estate Richards v Nichol*[15] the court further adjusted an amount of R6 000 awarded by a court in 1970 to a testator's stepdaughter in lieu of a residence to the value of £3 000 that had to be acquired by the testator's trustees for the stepdaughter in terms of the testator's will. The court made the following finding regarding the order given in 1970:

> This Court did not express the testator's intentions in this order: it sought, in the circumstances then prevailing, to give effect to his real intention by taking into account special and unexpected circumstances that had arisen.[16]

In respect of the further adjustment of the amount of R6 000, the court said:

> In light of the circumstances now prevailing … the Court's order [of 1970] plainly does not give effect to the deceased's real intention which was and … is the provision of a residence which was worth £3 000 when the deceased died and his will came into effect. To give effect to that intention today the adjusted sum [R230 000] … will be required.[17]

It is evident from the above decisions that variation of the provisions of a will *ob causam necessariam* occurs in an attempt to preserve the intention of a testator in the face of an unforeseen change in circumstances that results in the frustration of such testator's testamentary wishes. Although such variation occasions a departure from the directions of the testator *strictu sensu*, it does

12 At 261E-F.
13 1983 4 SA 598 (C).
14 At 603E.
15 1996 4 SA 253 (C).
16 At 262A-B.
17 At 262B-C.

not alter the will in a manner that the testator him/herself would not have been amenable to, had he/she been in a position to evaluate the effect of changing conditions on the fulfilment of his/her testamentary wishes. Cameron *et al* state this proposition as follows:

> It is probable that the court has jurisdiction at common law to sanction a change when unforeseen circumstances have arisen since the trust instrument came into operation which, though not strictly rendering the execution of its provisions impossible, have so altered their practical effect as to justify the assumption that the founder would have altered its terms had the founder known that the circumstances would come about.[18]

It stands to reason that any decision on the *ob causam necessariam* exception to the general non-variation rule is necessarily determined by the facts at hand, measured against the requirements stipulated under the exception. A court can therefore only authorise variation *ob causam necessariam* if it is satisfied that the facts before it point to an unforeseen change of circumstances that renders compliance with a testator's testamentary wishes practically impossible or utterly unreasonable. In the absence of such facts meeting the requirements of the *ob causam necessariam* exception, an application for variation will be unsuccessful. For example, in *Ex parte Jewish Colonial Trust Ltd: In re Estate Nathan*[19] the court considered an application for the early termination of a testamentary trust (seven years prior to a fifty-year accumulation period directed by the testator) so as to release funds in order to realise the trust purpose stipulated by the testator, namely to create a fund to

> be used in the restoration of Jews to their ancient home in Palestine either by the requisition of lands, financial assistance or otherwise in such manner as may be found most expedient.[20]

In support of the application it was contended, firstly, that circumstances in Palestine (Israel) had changed subsequent to the execution of the will, which change was beyond the testator's contemplation (this contention referred, *inter alia*, to Israel attaining independence in 1948 and the subsequent migration of Jews to Israel). It was contended, secondly, that the testator did not contemplate the depreciation in the value of money in light of prevailing inflationary trends, which depreciation had a negative effect on the realisation of the testator's trust purpose through the investment of the original capital sum.[21] The court found, however, that the facts before it did not support the above contentions and that it would be untenable to hold that the testator failed to contemplate changes in economic and political circumstances during the accumulation period.[22] Nor would it permissible to impute an intention to the testator contrary to that expressed in his will. The court expressed its opinion as follows:

18 At 527.
19 1967 4 SA 397 (N).
20 At 399E.
21 At 400B-C.
22 At 406A-407E.

> The testator must have known conditions would change, but equally he must have intended his will to operate in whatever conditions prevailed at the relevant time …[23]

The applicant, therefore, failed, in the opinion of the court, to bring the application within the ambit of the *ob causam necessariam* exception and the application is accordingly rejected.[24]

3. The High Court's statutory power in terms of section 13 of the *Trust Property Control Act*

As already indicated, the High Court's statutory power in terms of section 13 of the *Trust Property Control Act* supplements its common law power to vary trust provisions, although the statutory power is indeed more extensive than its common law counterpart.[25] Cameron *et al* contend that section 13 comprises a subjective as well as an objective criterion, both of which have to be satisfied for an application under this provision to succeed.[26] The subjective criterion concerns the trust founder's lack of contemplation or foresight in respect of consequences occasioned by a trust provision, whereas the objective criterion directs that such consequences beyond the founder's contemplation or foresight must either hamper the achievement of the founder's objects, or prejudice the interests of trust beneficiaries, or be in conflict with the public interest.

The leading decision on section 13 is that of the Cape High Court in *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust*.[27] *In casu* the testator, William Marsh, executed a will in 1899 in which he left the residue of his estate to his son in trust

> to be applied to the founding and maintaining (of) a home for destitute white children, upon the same principles as those of Dr Stephenson's Home in London, and to be called 'Marsh Memorial Home'…[28]

In consequence of these testamentary trust provisions, various Marsh Memorial Homes were established, which homes came under the administrative control of the Methodist Church of Southern Africa in the late 1970s. In the early 1990s the President of the Conference of the Methodist Church of Southern Africa applied to, *inter alia*, have the word "white" deleted from the testator's will so as to permit access to the Marsh Memorial Homes to children of all races.[29] It appeared that the number of white children housed and cared for in the homes declined dramatically over time, whereas the true need lay,

23 At 408A.
24 At 409F-H and 411B-C.
25 Corbett *et al* 2001:426. See also Cameron *et al* 2002:518.
26 At 517.
27 1993 2 SA 697 (C).
28 At 699D-E.
29 At 700F. It appears that the application was proposed on both common law grounds as well as in terms of section 13 of the Trust Property Control Act. The court, however, decides the matter on the latter basis, expressing no opinion on the possible success or failure of the application in terms of the common law. See 701C and 702A-B.

according to the applicant, in the provision of sanctuary to destitute non-white children.[30] It was further argued on behalf of the applicant that the admission of only white children to the Marsh Memorial Homes conflicted with the Methodist Church's policy of non-racialism and, moreover, that the distinction between white and non-white held no legal significance subsequent to the repeal in 1991 of the *Population Registration Act*.[31]

The Master of the High Court submitted two reports to the court in response to the above-mentioned application. In these reports the Master contended that the variation of the testator's will through the deletion of the word "white" should not be allowed. The Master based his argument in this regard on adherence to the testator's testamentary wishes as determined through the exercise of the testator's freedom of testation. The court expressed the Master's view as follows:

> The Master's approach, based as it is on the application of the so-called 'golden rule'[32] is essentially a pragmatic one — notwithstanding legislation and the relaxation (or even the disappearance) of social mores where skin-colour is concerned, white is white and it is not and cannot be brown or yellow or black, this being as true today as it was a century ago, that this must have been known to the late William Marsh, and that accordingly, altruistic, laudable and commendable as the motives of the applicant may be, he cannot be granted the relief he seeks…[33]

The court, however, decided that, despite the cautionary view of the Master, the application had to succeed, as both the subjective and objective criteria of section 13 had been satisfied. As to the subjective criterion the court said:

> [T]his particular provision of the trust instrument has brought about consequences which the late William Marsh neither contemplated nor foresaw, viz that the home which he wished to establish upon his death in his name would, in a changing world, the nature of which he could not envisage, become emptier and emptier as the white-skinned section of the population became increasingly affluent and the number of children in destitute circumstances to whom he limited the enjoyment of his beneficence would continually decrease.[34]

The court found that the objective criterion of section 13 had been met in that the racial limitation imposed in terms of the testator's will is contrary to the public interest:

> It cannot seriously be contended that by continuing to restrict the intake of destitute children to the homes to those whose skins are white will

30 At 700B-E and 701A-B.
31 At 701A-B.
32 Ostensibly a reference to *Robertson v Robertson's Executors* 1914 AD 503 507: "[T]he golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so."
33 At 701G-H.
34 At 703B-C.

> better serve the interests of the public than to open their half-empty premises to children who are destitute but are excluded therefrom solely be reason of the fact that their skin is coloured brown or black or indeed any other colour but white. The contrary is unarguably the case — the interest of the public in this country, the inhabitants of which are mainly non-white, cries out for the need to house and care for destitute children, whatever their ethnological characteristics may be.[35]

The court therefore granted the application that the word "white" be deleted from the testator's will.

It is noteworthy that the court in the *William Marsh* case admitted to some difficulty in defining the concept "public interest" as it is used by the legislature in section 13.[36] However, the manner in which the court dealt with the public interest criterion in allowing the application permits the interpretation that the court attributed a public policy value judgement to what would or would not be in the public interest. It has therefore been suggested that the phrase "in conflict with the public interest" as it appears in section 13 can, when appropriate, be likened to "against public policy" or "*contra bonos mores*".[37]

4. Evaluation

Cameron *et al* state the following in respect of the operation of the criteria stipulated by section 13:

> [T]he legislature chose to respect the founder's intentions to the extent that the public interest or that of the beneficiaries prevails over the terms of the trust instrument only when the court decides that the founder did not contemplate or foresee the untoward consequences that have arisen from its terms.[38]

Taking the above statement as a point of departure, the critical question arises whether the prevalence afforded to the public interest or the interests of a trust's beneficiaries in consequence of an order in terms of section 13, negates the trust founder's intention to such an extent that it occasions, in the case of a testamentary trust, a limitation of the founder's (testator's) freedom of testation? In order to answer this question, a distinction is drawn, for reasons of efficacy, between, on the one hand, the first two elements of section 13's objective criterion, namely, hampering the achievement of the trust founder's objects and prejudicing the interests of a trust's beneficiaries and, on the other hand, the third element, namely, conflict with the public interest.

---

35 At 703I-J.

36 At 703C-H.

37 Du Toit 2001:231. See generally Nadasen & Pather 1995:256. The relationship between public policy and public interest in limiting freedom of testation is expressed thus by Atherton & Vines 1996:603: "[P]ublic policy suggests some overriding qualification of legal rules in the pubic interest: that at some point the individual's freedom of action is checked in the interest of some higher good. Public policy … is … an explanation of a group of rules and principles which overrides the freedom of testamentary disposition and the freedom of inheritance."

38 2002:517.

4.1 The trust founder's objects and the interests of a trust's beneficiaries

The dearth of case law on South African courts' interpretation and application of the first two elements of section 13's objective criterion unfortunately renders evaluation of its limiting effect on freedom of testation open to much conjecture. It is nevertheless submitted that such limitation will not necessarily result in all instances when a court grants an application on either of these elements. It is suggested that a court order under section 13, as indeed in terms of the common law *ob causam necessariam* exception to the non-variation rule, to salvage the achievement of the objects of a trust founder or to safeguard the interests of trust beneficiaries in the face of unforeseen consequences emanating from trust provisions, will frequently be effected in consonance with rather than in contradiction, of the intention of the trust founder. It follows from the aforementioned submission that many of the decisions under the common law *ob causam necessariam* exception would have yielded corresponding results, had they been decided under any one of the first two elements of section 13's objective criterion. It is suggested in particular that the applications for variation *ob causam necessariam* granted in the *Sidelsky* and *Nichol* cases discussed earlier, would meet with equal success in terms of section 13, particularly on the ground that the trust provisions in these cases brought about financial consequences not foreseen or contemplated by the various trust founders, which consequences either hampered the achievement of such founders' objects or were prejudicial to the beneficiaries' interests. It has similarly been suggested that the unsuccessful application for early termination of the trust in the Jewish Colonial Trust case discussed earlier, would likewise be unsuccessful in terms of section 13 as the facts of that case revealed no consequences emanating from the trust provisions, be it financial or political in nature, that, in the opinion of the court, the testator *in casu* failed to foresee or contemplate.[39]

It is important to note in the above regard that much will obviously depend on the facts of each case and a court's application of section 13's criteria to such facts. It is of course quite possible that, in an apposite factual scenario, a court may, in the application of either of the first two elements of section 13's objective criterion, issue an order in respect of testamentary trust provisions that is inconsistent with the intention of the testator and, in so doing, limit such testator's freedom of testation. This is ostensibly what happened in *First National Asset Management and Trust Company (Proprietary) Limited: In re Estate late Andrew Mauritz Mostert Trust*.[40] *In casu* the court ordered the termination of a testamentary trust in terms of section 13, ostensibly because the founder's trust objects were deemed unachievable to such an extent that it could not be cured through a variation of the trust deed. The court further ordered that the trust property should devolve on intestacy upon the trust's termination. It is insightful that the criticism levelled against this decision relates partly to the disregard it exhibits for the testator's freedom of testation. Wessels comments as follows:

39 Cronjé & Roos 2002:449.

40 Unreported case 22459/90, discussed by Wessels 1993:820-821.

> Wat die uitspraak heeltemal onaanvaarbaar maak, is die resultaat van die ontbinding van die trust. Hierdie wye bevoegdheid wat die wetgewer aan die hof verleen het, veronderstel immers dat aan die einde van die dag die gevolge vir die belanghebbendes in die trustgoed billik moet wees … Op geen wyse kan dit geargumenteer word dat om meer as die helfte van die trustgoed na partye te laat gaan wat andersins geen aanspraak daarop het nie [*in casu inter alia* some of the intestate heirs], billik is nie … Die uitspraak soos hy staan, kom, met respek, op 'n totale verkragting van die erflater se wense neer en daarby 'n uiters onbillike resultaat vir die trustbegunstigdes.[41]

It is moreover possible that some decisions under the common law *ob causam necessariam* exception may have yielded different results, had they been decided under any one of the first two elements of section 13's objective criterion, especially taking into account section 13's less stringent requirements. For example, Cameron *et al* surmise that the decision in *Ex parte Hugo*[42] might well have yielded a different result, had it been decided in terms of section 13. *In casu* the court refused an application authorising the trustees of a testamentary trust to utilise trust capital to buy a plot of land and build a house more suited to the needs of the testator's elderly and frail widow, who was the trust's income beneficiary for purposes of her support and maintenance. Whereas the court found that, *in casu*, there is "no emergency or state of necessity" justifying a departure from the provisions of the testator's will *ob causam necessariam*,[43] section 13 may well permit a successful application on such facts.

It is submitted, in the light of the above, that the limiting effect of a court order (be it for variation of trust provisions, termination of a trust or any other order a court deems just) in respect of testamentary trust provisions under any one of the first two elements of section 13's objective criterion, is to be evaluated against the content of the order as well as the facts at hand in the particular case. If such order occurs in consonance with the founder's original intention, it will (as is the case under the common law *ob causam necessariam* exception to the non-variation rule) not occasion a limitation of such founder's freedom of testation. If the order, however, is inconsistent with the founder's testamentary wishes, it will have the effect of limiting the founder's freedom of testation.

4.2 The public interest

The above exposition in respect of the first two elements of section 13's objective criterion also holds true in respect of its third element, namely, the avoidance of conflict with the public interest in the face of unforeseen consequences emanating from trust provisions. It is submitted that an order granted in terms of this element can, depending on the content of such order and the facts at hand, also be effected either in consonance with the intention of the trust

41 1993:821. See also Cronjé & Roos 2002:453.
42 1960 1 SA 773 (T).
43 At 776D.

founder or in contradiction of such intention. Depending on the particular circumstances, it can, therefore, either preserve or, alternatively, limit a testator's freedom of testation. However, the decision in the *William Marsh* case illustrates the pitfalls of an artificial adherence to a testator's wishes, whereas, in fact, such wishes are negated by a section 13 order to such an extent that a testator's freedom of testation is indeed limited. Wessels[44] opines that the court in the *William Marsh* case ostensibly varied the provisions of the testator's will in consonance with his wishes when it concludes its decision with the observation that the order *in casu* "will serve to facilitate the achievement in practical form of the intention of the late William Marsh as expressed by him in his will…".[45] However, Van der Spuy argues that the testator's principal objective *in casu* was to create a home for destitute white children exclusively and that the race-based provision was therefore an integral part of the testator's charitable objective. This fact was, according to Van der Spuy, erroneously overlooked by the *William Marsh* court.[46] Van der Spuy contends further that the *William Marsh* court's application of section 13's subjective criterion is questionable in light of the fact that the testator's will provided for the utilisation of excess trust income and capital to assist hospitals and other charitable institutions and hence contained ample indication of foresight and contemplation on the part of the testator that socio-economic circumstances may well change subsequent to his death.[47]

Van der Spuy moreover emphasises the interpretative error committed by the court in its application of the public interest element of section 13's objective criterion, namely that the court inquired into whether the trust provision in question was in conflict with the public interest,[48] whereas section 13 requires the consequences of the provision to conflict with the public interest.[49] Van der Spuy also notes that the court's application of section 13's public interest test is highly suspect. The court namely inquired into whether the suggested amendment would better serve the public interest (or, as Van der Spuy interprets the court's decision, the interest of the majority of the population) than the existing trust provision,[50] whereas section 13 requires, as already indicated, the consequences of the provision to conflict with the public interest.[51] Van der Spuy's criticism is generally regarded as convincing.[52] Whereas the *William Marsh* court professed to preserve the trust founder's testamentary wishes in its order in terms of section 13, the above criticism necessitates the conclusion that the court's order was in fact contradictory to testator's intention and hence operated in limitation of his freedom of testation.[53]

---

44 1993: 822.
45 At 704C.
46 1993:452-453. Wessels (1993:822) observes in similar fashion that the late William Marsh "wou … slegs aan behoeftige wit kinders 'n heenkome bied. Mens kan nie anders voel as dat dit die substratum van sy trust was nie."
47 1993:453.
48 At 703C.
49 1993:454.
50 At 703I.
51 1993:454 and 455.
52 Cronjé & Roos 2002:452-453.
53 Van der Spuy 1993:455 and 457; Cronjé & Roos 2002:452.

5. Conclusion

Section 13 of the *Trust Property Control Act* exhibits, at least as far as its limiting effect on freedom of testation is concerned, a somewhat ambivalent character. An order in terms of this section can indeed limit a testator's freedom of testation if it occasions a departure from the terms of a testamentary trust not consistent with its founder's wishes. On the other hand, an order that is consistent with such wishes will not have a similar limiting effect. Section 13's classification as a statutory limitation on South African testators' freedom of testation is therefore justified, but subject to the qualification that the content of a particular order and the facts of the case in respect of which it is issued, will determine whether such limitation is at hand or not.

Of some significance are the cautionary observations from various sources that the power bestowed by section 13 ought not to be seen as absolute or unfettered. The South African Law Commission in its recommendations on section 13 was the first to express this sentiment.[54] Although section 13 contains no legislative imperative that a court, when making an order under this section, must preserve a trust founder's wishes in such order, it has nevertheless been suggested, with regard to the decision in the *William Marsh* case, that the wishes of trust founders should indeed set the broad parameters for South African courts' application of section 13. Van der Spuy states the proposition as follows:

> By die toepassing van artikel 13 moet die howe dus waak teen judisiële aktivisme waardeur trustdokumente ingrypend verander word in die naam van die openbare belang, maar die beginsels van testeer- en kontrakteervryheid en die belang van bestaande bevoordeeldes verontagsaam word.[55]

Such an approach may be well advised in the light of what could be described as the somewhat dubious decisions on section 13 delivered by South African courts to date.

54 1987:48: "The Commission does not recommend that wide powers to vary trust provisions be given to the court."

55 1993:456-457.

Bibliography

ATHERTON RF AND VINES P
1996. *Australian succession law*. Adelaide: Butterworths.

CAMERON E, DE WAAL M, WUNSH B, SOLOMON P AND KAHN E
2002. *Honoré's South African law of trusts*. 5th edition. Cape Town: Juta.

CORBETT MM, HOFMEYR G AND KAHN E
2001. *The Law of succession in South Africa*. 2nd edition. Cape Town: Juta.

CRONJÉ DSP AND ROOS A
2002. *Casebook on the law of succession*. 4th edition. Pretoria: Unisa Press.

DE WAAL MJ
1996. "The law of succession and the Bill of Rights: private succession and freedom of testation in the light of the Constitution". *Bill of Rights Compendium* 3G-1-3G-34. Durban: Butterworths.

DE WAAL MJ AND SCHOEMAN-MALAN MC
2003. Introduction to the law of succession. 3rd edition. Cape Town: Juta.

DU TOIT F
2001. The constitutionally bound dead hand? The impact of constitutional rights and principles on freedom of testation in South African law. *Stellenbosch Law Review* 12(2):222-257.

2002. South African trust law: principles and practice. Durban: Butterworths.

NADASEN S AND PATHER S
1995. The South African reality and the creation of a human rights culture. *Stellenbosch Law Review* 6(2):256-263.

SOUTH AFRICAN LAW COMMISSION
1987. Project 9: Review of the law of trusts.

VAN DER MERWE NJ AND ROWLAND CJ
1990. Die Suid-Afrikaanse erfreg. 6th edition. Pretoria: JP van der Walt en Seun.

VAN DER SPUY P DE W
1993. *Ex Parte President of the Conference of the Methodist Church of Southern Africa NO: In re William Marsh Will Trust*. *De Jure* 26(2):447-457.

WESSELS L
1993. Wysiging van testamentêre trusts en die *Wet op die Beheer oor Trustgoed* 57 van 1988: twee nuwe uitsprake. *De Rebus* 309:819-822.