

Article

Excluding Parents in Cases of Complete Parental Abandonment from Intestate Succession: Different Jurisprudential Approaches in South African Law

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Abstract

This article considers the exclusion of parents to inherit under section 1(1)(d) of the South African *Intestate Succession Act* 81 of 1987 (ISA) in cases of complete abandonment. It is based on a desktop study of the ISA, relevant case law (primarily *Wilsnach v TM* 2021 (3) SA 568 (GP) (hereafter *Wilsnach*) and *Jacobs v Adams* [2025] 4 All SA 655 (GJ) (hereafter *Jacobs*)), and academic commentary, with brief reference to foreign parent-bar provisions. The article shows that South African courts have recently followed two different approaches in such cases: The *Wilsnach* approach, where the meaning of “parent” was interpreted in the light of the *Constitution of the Republic of South Africa*, 1996 and the South African *Children’s Act* 38 of 2005, and the *Jacobs* approach, where the court retained the ISA’s status-based framework but excluded the abandoning father through the doctrine of unworthiness to inherit. The article argues that, although the *Wilsnach* approach may appear fair and child-centered, it risks weakening the certainty of the intestate succession system. By contrast, the *Jacobs* approach fits more comfortably within the structure and purpose of the ISA, even though some uncertainty remains about extending unworthiness on broader public policy grounds. The article ultimately concludes that statutory reform would not easily solve the problem in the South African system of estate administration, and that the judicial application of the doctrine of unworthiness to inherit currently offers a more practical response in clear cases of complete parental abandonment.

Keywords: South African intestate law of succession; unworthiness to inherit; *indignus*; parental abandonment; public policy; child law approach; statutory disqualification



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1. Introduction

In South Africa, the law of intestate succession is primarily regulated by the *Intestate Succession Act* 81 of 1987¹ which codifies the rules determining how a deceased person’s estate must devolve where *inter alia* no valid will exists. The ISA establishes a clear and structured order of succession based largely on the deceased’s marital status and blood relationship. Therefore, the ISA identifies the hierarchy in which the intestate heirs will succeed to the intestate estate.

First in line to inherit intestate is the deceased’s spouse(s) and descendant(s) in terms of section 1(1)(a)–(c) of the ISA.² However, of particular relevance for the purposes of this

¹ Hereafter the ISA.

² Read with, where applicable, the *Reform of Customary Law of Succession and the Regulation of Related Matters Act* 11 of 2009 and relevant case law dealing with the scope and nature of the term “spouse”.

contribution is the situation in which a person dies intestate³ without leaving a spouse(s) or descendant(s). Section 1(1)(d) of the ISA provides that if the deceased is: “not survived by a spouse or descendant, but is survived—(i) by both his parents, his parents shall inherit the intestate estate in equal shares; or (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate.”

It is important to note that the ISA does not define “parent” nor, from a literal reading of the ISA, require any involvement by a parent during the deceased’s lifetime. By virtue of being a biological or legal parent,⁴ a person automatically qualifies to inherit intestate if the deceased died without leaving a spouse(s) or descendant(s).

Section 1(1)(d) of the ISA, and particularly the absence of a statutory definition of “parent” tailored to the ISA’s own framework, came under scrutiny in two recent cases concerning the estates of deceased persons, one a minor and the other an adult, both of whom had been completely abandoned by their fathers. In each case, the father reappeared after the deceased’s death to claim a share of the intestate estate under section 1(1)(d)(i) of the ISA. These cases established two distinct approaches to excluding a parent who had completely abandoned a child from automatically inheriting intestate from that child:

(a) In *Wilsnach v TM* 2021 (3) SA 568 (GP),⁵ the Gauteng Division (Pretoria) of the High Court of South Africa considered it necessary to interpret the term “parent” under the ISA in light of the *Constitution of the Republic of South Africa, 1996*⁶ and the *Children’s Act 38 of 2005*.⁷ Judge Kollapen concluded that under the current set of facts, the abandoning father could not be regarded as a “parent” for purposes of section 1(1)(d) of the ISA, thereby excluding such an abandoning parent from inheriting intestate from the deceased. In addition, the court declared the maternal grandmother to be a parent for the purposes of section 1(1)(d) of the ISA, together with the deceased’s mother.

(b) In *Jacobs v Adams* [2025] 4 All SA 655 (GJ),⁸ Acting Judge Snyckers of the Gauteng Local Division (Johannesburg) of the High Court of South Africa declined to follow the *Wilsnach* judgment, warning that the statutory interpretation adopted in *Wilsnach* could undermine the established framework of intestate inheritance under the ISA. With consideration of public policy principles,⁹ Acting Judge Snyckers instead applied the common law *indignus* doctrine in order to declare a father who had completely abandoned his child for 29 years, unworthy to inherit intestate from the deceased’s estate.¹⁰

Accordingly, South African case law now provides two distinct jurisprudential approaches to the possible exclusion of parents who have completely abandoned their children from inheriting intestate from them.¹¹ The approach followed in *Wilsnach* entails a constitu-

³ Either wholly or in part.

⁴ With specific reference to the provisions of: (a) *ex lege* (by operation of law) adoption in section 1(4)(e) of the ISA; and (b) children born as a result of artificial fertilization or surrogacy agreements in respectively section 40 and chapter 19 of the *Children’s Act 38 of 2005*.

⁵ Hereafter *Wilsnach* or the *Wilsnach* case/judgment/approach.

⁶ Hereafter the Constitution.

⁷ Hereafter the Children’s Act.

⁸ Hereafter *Jacobs* or the *Jacobs* case/judgment/approach.

⁹ Public policy is explained by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para. 28 as representing “the legal convictions of the community; it represents those values that are held most dear by the society.”

¹⁰ Hofmeyr and Paleker (2023, p. 140) explain that the *indignus* doctrine, also known as the doctrine of unworthiness, may preclude a beneficiary (the *indignus*) from receiving a benefit under a will or through intestate succession where the beneficiary’s conduct renders him or her legally unworthy of benefiting from the deceased’s estate. Also see (Paleker 2023a, p. 131). The *indignus* doctrine will be further alluded to in Section 5 of this contribution.

¹¹ The exclusion of an abandoning parent from inheriting from the child may raise the converse question of whether a child may inherit from or through an abandoning parent. However, this question falls beyond the

tionalized reinterpretation of “parent” for purposes of the ISA, informed by the Children’s Act and the best interests of the child principle. By contrast, the approach adopted in *Jacobs* retains “parent” as a status category under the ISA in the interests of legal certainty, while excluding the abandoning parent by applying the common law *indignus* doctrine.

Within the broader scheme of the South African intestate law of succession, this contribution aims to: (a) outline the child law-informed and constitutionally coherent conception of “parent” and “parenthood” as utilized in the *Wilsnach* judgment, with due consideration of the scholarly criticism against this judgment;¹² (b) consider whether the development of the *indignus* doctrine through possible open-ended public policy adjudication, as applied in the *Jacobs* judgment, is more appropriate;¹³ and (c) alternatively, briefly consider whether statutory reform is practicable in order to provide for parental abandonment as a statutory disqualifying factor for intestate inheritance.¹⁴

2. Methods

This contribution is based on a desktop study of relevant primary sources, in particular the ISA and the applicable case law, as well as secondary sources such as scholarly literature. Although a number of commentaries have already appeared on the *Wilsnach* judgment, the *Jacobs* judgment is a much more recent decision. While a brief reference is made to foreign legislation, the purpose is not to undertake a comparative study, but merely to illustrate that, while some jurisdictions provide for the disqualification of abandoning parents, South African constraints and the need for legal certainty do not necessarily lend themselves to such a development.

Generative artificial intelligence was used for formulation, translation and text editing, to condense an extensive first draft of this contribution, to test and critique some of the arguments advanced in it, and to assist in summarizing the contribution for purposes of the abstract.

3. Theoretical Foundations of Intestate Succession in South Africa

The hierarchy of succession prescribed in the ISA constitutes a legislatively determined default scheme. Accordingly, where a deceased did not execute a valid will, where a valid will does not dispose of all the deceased’s distributable assets, or where a valid will (or any of its provisions) becomes inoperable, the deceased’s heir(s) are by default determined through the application of the hierarchy prescribed in the ISA.¹⁵

Media reports published during National Wills Week in 2021, citing the Office of the Master of the High Court, estimated that approximately 70% of South Africans did not have a legally executed will.¹⁶ Although comprehensive official statistics on testacy and intestacy in South Africa remain unavailable, the findings of a survey conducted by a major financial services group, Sanlam, namely the 2025 Survey on South Africans and Wills, are broadly consistent with the 2021 estimate (Sanlam 2025, p. 2). Of the 1200 participants surveyed, only 34% reported having a will, while 66% indicated they do not (Sanlam 2025, p. 2). The survey identified various reasons for not having a will, including the belief that one does not own sufficient assets, unemployment, uncertainty about how to draft a will,

scope of this contribution, which is confined to inheritance by an abandoning parent from the abandoned child, as was the subject matter in two recent judgments of *Wilsnach* and *Jacobs*. It nevertheless warrants separate and more comprehensive consideration.

¹² See Section 4 of this contribution.

¹³ See Section 5 of this contribution.

¹⁴ See Section 6 of this contribution.

¹⁵ See *inter alia* (Paleker 2023c, pp. 25, 28). As noted in Section 1 of this contribution, a deceased estate may therefore devolve partly testate and partly intestate.

¹⁶ See, for example, (BusinessDay 2021; MoneyMarketing 2021). The underlying report or dataset on which this estimate was based does not, however, appear to be publicly available.

the perception of being too young, and a general reluctance to confront the subject of death (Sanlam 2025, p. 4).

In the absence of reliable empirical evidence, it cannot simply be assumed that the order of succession prescribed by the ISA aligns with the presumed wishes of the average deceased person. The ISA does not provide for an individualized enquiry into what the particular deceased would probably have intended. Instead, it applies an objective, status-based framework under which inheritance is determined primarily with reference to the legally recognized family unit. Wood-Bodley (2022, p. 777) indicates that the South African rules of intestate succession originate in the Schependomsrecht as applied in South Holland and as amended. The rules of intestate succession are accordingly based on the concept of *parentelae*. The *parentela* system groups the deceased's blood relatives according to successive common ancestors and their descendants, with relatives in a nearer *parentela* generally excluding those in remote *parentela* (Wood-Bodley 2022, p. 777; Hofmeyr and Paleker 2023, pp. 833–34).¹⁷ As indicated in Section 1 above, the ISA gives preference to a surviving spouse(s) and descendant(s), followed by parents and their descendants, and thereafter more remote blood relatives. It thus proceeds from the general assumption that, in the absence of a valid will, the deceased's estate (or part thereof) should remain within the legally recognized family unit.

The legal conception of the family unit has undergone considerable development since the advent of the constitutional dispensation¹⁸ in order to accommodate contemporary and diverse family forms.¹⁹ This development is particularly evident in the extension of the categories of persons recognized as a “spouse” for purposes of the ISA.²⁰ Importantly, however, an entitlement to inherit intestate ordinarily depends on the existence of the prescribed legal relationship, as developed through legislative amendment and judicial interpretation, rather than on the nature or quality of the personal relationship between the deceased and the prospective heir (see footnote 17).

4. The Wilsnach Approach

4.1. Facts and Legal Questions

The (now) deceased child had been diagnosed with cerebral palsy as a result of hypoxic brain injury sustained during birth on 23 January 2013 (Wilsnach paras. 10–11). Following successful litigation against the Member of the Executive Council for Health, Gauteng, arising from the medical negligence of staff employed by the Gauteng Department of Health, damages in the amount of R21,000,000.00 were awarded to the child on 12 May 2017. These funds were placed in trust for his benefit, including for medical care and living expenses (Wilsnach para. 15–19).

Tragically, the child passed away on 28 April 2018 at the age of five, leaving a residual estate of approximately R15,000,000.00 behind (Wilsnach para. 10, 19). As he lacked testamentary capacity in terms of section 4 of the *Wills Act* 7 of 1953, he died intestate. Section 1(1)(d)(i) of the ISA accordingly became applicable, since he died without a spouse or descendants and was survived by both of his parents, being, respectively, his father as the first respondent and his mother as the second respondent in the current matter (Wilsnach para. 6–7).

¹⁷ Also see Section 4.3 of this contribution.

¹⁸ I.e., with reference to the enactment of the Constitution and its predecessor, the *Constitution of the Republic of South Africa* 200 of 1993.

¹⁹ See (Strydom 2026, pp. 1–210) for a comprehensive study (with inclusion of relevant case law of legislative reform) of the constitutional implications of the evolving “family unit” concept in the South African law of intestate succession.

²⁰ See *inter alia* (De Waal and Mills 2021, pp. 568–69; Strydom 2026, pp. 28–43, 83–103, 116–41, 146–95).

During the child's lifetime, his parents were never married to one another and never cohabited, either before or after his birth (*Wilsnach* para. 12). The facts further reveal that no meaningful relationship existed between the child and his father. The father was not present at the child's birth and never assumed parental responsibilities or made any contribution towards the child's upbringing or maintenance (*Wilsnach* para. 12).

Regarding the mother's involvement during the child's lifetime, the facts indicate that she suffered from depression following the child's birth and that both she and the child resided with her mother, the maternal grandmother²¹ (*Wilsnach* para. 13). It was further stated that the mother was unable to care properly for the child, was unemployed, and depended on the maternal grandmother to provide accommodation and other basic necessities for both her and the child (*Wilsnach* para. 13).

The child's care and overall well-being were, in substance, assumed by the maternal grandmother, notwithstanding the considerable economic hardship under which she laboured and despite the fact that she was at the time employed on a full-time basis (*Wilsnach* para. 14). It should furthermore be emphasized that the successful claim for damages and the creation of the trust only materialized in 2017, by which stage the child had already reached the age of four. Prior to that development, the child's maintenance and daily care had therefore largely depended on the maternal grandmother's efforts and resources. The facts further indicate that, while the maternal grandmother was at work, the mother frequently left the child unattended (*Wilsnach* para. 14). In addition, the mother reportedly would be absent for days at a time without informing the maternal grandmother of her whereabouts or the period of her absence (*Wilsnach* para. 14). In view of the child's extensive care needs, coupled with the mother's repeated absences, the maternal grandmother ultimately resigned from her employment in order to care for the child on a full-time basis (*Wilsnach* para. 14).

In October 2017, the same year in which the trust was created, the maternal grandmother instituted proceedings under the Children's Act. In those proceedings, she sought, *inter alia*: (i) an order appointing her as sole guardian of the child; (b) terminating the parental responsibilities and rights of both the mother and the father in relation to guardianship; and (c) restricting their contact with the child (*Wilsnach* para. 20). The father did not oppose the application. On 26 April 2018, two days prior to the child's death, the court granted an order conferring full parental responsibilities and rights in relation to guardianship on the maternal grandmother together with the mother, while simultaneously terminating the father's parental responsibilities and rights in respect of the child (*Wilsnach* para. 31). It is, however, important to note that the Family Advocate's report had already indicated that the father had never acquired parental responsibilities and rights under section 21 of the Children's Act, owing to his absence from the child's life and his failure to contribute towards the child's upbringing and maintenance (*Wilsnach* para. 26, 29). Notwithstanding that conclusion, the court nevertheless considered it necessary to expressly terminate the father's parental responsibilities and rights. As already noted, the child died two days after the granting of that order.

Against this factual background, the legal questions identified in the matter were the following (*Wilsnach* para. 34):

- a. First, whether the father qualified as a "parent" for purposes of inheritance under section 1(1)(d) of the ISA. This issue, in turn, required consideration of two subsidiary questions: whether, in light of the Family Advocate's report, it was sufficient that he was merely a biological parent who had never acquired parental responsibilities and

²¹ The maternal grandmother being the third respondent in the current matter.

- rights; and, alternatively, what effect the termination of his parental responsibilities and rights by court order on 26 April 2018 had on his capacity to inherit intestate.
- b. Secondly, the court had to determine whether the mother qualified as a “parent” for purposes of inheritance under section 1(1)(d) of the ISA and, if so, whether the High Court order of 26 April 2018 had any bearing on her position.
 - c. Thirdly, the court had to decide whether the maternal grandmother could qualify as a “parent” for purposes of inheritance under section 1(1)(d) of the ISA. In that regard, the issue was whether the court order of 26 April 2018, which granted her, *inter alia*, guardianship in respect of the child, had any effect on her competence to inherit under that provision.

Collectively, the issues at hand were formulated as: “... the central feature of this application is who is to be regarded as a parent for the purposes of section 1(1)(d) of the ISA. Would it suffice if one was a biological parent and nothing more, or does our law reserve parenthood (and by implication who is a parent) in the legal sense for those who conduct themselves as parents in the tenor and spirit of the relationship the law contemplates should exist between parent and child” (*Wilsnach* para. 37).

4.2. Arguments and Judgment

4.2.1. The Father’s Claim to Inherit and the Court’s Response

The father’s contention that he qualified to inherit in terms of section 1(1)(d) of the ISA may be summarized as follows. First, although his parental responsibilities and rights were terminated on 26 April 2018, he argued that a statutory duty to contribute towards the child’s maintenance nevertheless continued to rest upon him in terms of section 18(2)(d) of the Children’s Act. This, in the father’s view, suggested that his legal relationship with the child remained intact to some extent and that the court order of 26 April 2018 had therefore not divested him of all parental rights and responsibilities (*Wilsnach* para. 55). Secondly, he contended that intestate succession in South Africa is fundamentally a matter of blood rather than worthiness, and thus a matter of biological connection rather than legal interpretation (*Wilsnach* para. 56). Thirdly, he argued that section 18 of the Children’s Act does not preclude a natural parent from inheriting intestate from his or her child, with the result that the ISA ought to be applied strictly according to its wording. On that basis, he maintained that he and the child’s mother should inherit the estate in equal shares (*Wilsnach* para. 57).²²

Regarding the father’s claim, the court noted that the term “parent” is not defined in the ISA and is therefore open to interpretation (*Wilsnach* para. 58). Referring to principles of statutory interpretation, and specifically to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para. 18,²³ the court emphasized that where a provision is capable of more than one meaning, a sensible and businesslike interpretation should be preferred (*Wilsnach* para. 59). Against this background, the court considered the following:

- (a) Since the father was not living with the child’s mother in a permanent life-partnership at the time of the child’s birth or, regardless of the aforementioned, never contributed to the child’s upbringing or maintenance, he never acquired parental responsibilities and rights in terms of section 21 of the Children’s Act (*Wilsnach* para. 60–61).
- (b) The court further found that the father had consciously chosen not to participate in the child’s life because of the child’s disability. This, according to the court, was inconsistent not only with the spirit and purport of the Children’s Act and section 28

²² According to *De Waal and Mills* (2021, p. 565) the father’s argument should have been with reference to section 28 of the Children’s Act and not section 18.

²³ Hereafter the *Endumeni* judgment.

of the Constitution generally, but also with the protection afforded to children with disabilities under section 11 of the Children's Act (*Wilsnach* para. 62–64). On this basis, the court held that the father did not qualify as a parent in the constitutional and statutory sense, namely as a person who cares for the child, maintains the child, acts as guardian, protects the child against neglect and abuse, and provides the love and guidance necessary for the child to flourish (*Wilsnach* para. 64).

In light of the contextual, purposive approach to statutory interpretation followed in the *Endumeni* judgment, the court accordingly held that an interpretation of “parent” in section 1(1)(d) of the ISA that recognizes only a biological or natural parent would be untenable and would lead to absurd results. In particular, it would permit a person to inherit intestate from a child with whom he had effectively severed all ties, while at the same time not recognizing him as a parent, with the accompanying responsibilities, for purposes of the Children's Act (*Wilsnach* para. 65). Stated differently, such an interpretation would grant the father the legal benefits contemplated in section 1(1)(d) of the ISA despite his complete failure, during the child's short and difficult life, to acknowledge and discharge his constitutional obligations and responsibilities towards the child (*Wilsnach* para. 65). In the court's view, such an interpretation would also be inconsistent with the best interests of the child, as protected *inter alia* in section 28(2) of the Constitution. The court held that the best interests of the child principle does not cease to apply upon the child's death, because the matter still concerned the child's property and therefore remained a matter concerning a child within the meaning of section 28(2) of the Constitution (*Wilsnach* para. 66). The court concluded that the father “does not meet the factual nor the legal requirements of parenthood” and that his biological connection to the child was merely a biological fact without legal consequence. He was consequently declared not to be a parent for purposes of intestate succession under section 1(1)(d) of the ISA (*Wilsnach* para. 68).

4.2.2. The Mother's Claim to Inherit and the Court's Response

The mother's potential entitlement to inherit in terms of section 1(1)(d) of the ISA was primarily grounded in the fact that, in accordance with section 19 of the Children's Act, she acquired full parental responsibilities and rights upon the child's birth (*Wilsnach* para. 69). This position stands in contrast to that of the father, who at birth merely incurred a duty to contribute to the child's maintenance in terms of section 21(2) of the Children's Act (*Wilsnach* para. 69).

In addressing this issue, the court considered that the mother's responsibilities under section 19 of the Children's Act included the duty to care for the child. Notwithstanding this, she failed to fulfil that role, as evidenced by the grandmother's application to have the mother divested of her parental responsibilities and rights and to be appointed as the child's guardian, given that the grandmother had effectively acted as the child's primary caregiver (*Wilsnach* para. 70).²⁴

However, likely in light of the Family Advocate's report, the court also considered that the mother's parental responsibilities and rights had not been terminated in the guardianship proceedings. Consequently, she remained not only a biological parent but also a “parent” as contemplated in the Children's Act (*Wilsnach* para. 74–75).

The court was therefore satisfied that the mother “is properly considered a parent” for purposes of section 1(1)(d) of the ISA. This conclusion, in the court's view, was consistent with the factual context of her relationship with the child, as well as with the objectives of the Children's Act and the Constitution, particularly the best interests of the child principle formulated in section 28(2) of the Constitution (*Wilsnach* para. 76).

²⁴ See Section 4.1 of this contribution.

4.2.3. The Maternal Grandmother's Claim to Inherit and the Court's Response

The maternal grandmother's potential entitlement to inherit in terms of section 1(1)(d) of the ISA was premised on the fact that, although she was not the child's biological parent, she acquired full parental responsibilities and rights, including guardianship, by virtue of the court order granted on 26 April 2018 (*Wilsnach* para. 78) (see footnote 24).

By way of analogy, the court reasoned that, if a person may cease to be regarded as a parent because their parental responsibilities and rights have been terminated, then a person such as the maternal grandmother, upon whom parental responsibilities and rights have been conferred, should likewise be regarded as a parent (*Wilsnach* para. 79). In the court's view, the grandmother's enjoyment of parental rights, parental responsibilities, and primary residence rights in respect of the child, cumulatively encompassed every feature of both factual and legal parenthood (*Wilsnach* para. 79). The court accordingly considered it *inter alia* undignified to describe such a person merely as a "holder of parental rights and responsibilities", rather than as a "parent" (*Wilsnach* para. 80). It further found that the maternal grandmother, by assuming the role of mother, father, caregiver, and nurturer, as evidenced by the significant love and care she provided to the child, qualified as a parent not only according to the *boni mores*,²⁵ but also by virtue of the parental responsibilities, rights, and guardianship conferred upon her by the court order of 26 April 2018 (*Wilsnach* para. 82). The court therefore declared the maternal grandmother to be a "parent" for purposes of section 1(1)(d) of the ISA and, on that basis, entitled to inherit intestate from the child's deceased estate together with the mother, in equal shares (*Wilsnach* para. 83).

4.3. Commentary on and Criticism of the *Wilsnach* Judgment

One could argue that the value of the *Wilsnach* approach lies in the way it links intestate succession to the child law framework created by the Children's Act. Rather than drawing on older, parent-centered notions of "parental power" or "parental authority",²⁶ the judgment reflects the modern constitutional understanding that parenthood is grounded in responsibilities and rights aimed at promoting the child's best interests and welfare.²⁷

While various scholars agree that the *Wilsnach* approach may accord with one's sense of fairness and justice, they are all, however, of the opinion that the court *inter alia* erred in the manner in which it reached its conclusion.²⁸ The main criticism being that the *Wilsnach* approach is difficult to apply in practice and does not sit comfortably with the structure of intestate succession law, which serves a different function from that of child law (*De Waal and Mills* 2021, pp. 566–67; *Wood-Bodley* 2022, pp. 776–80; *Paleker* 2023c, pp. 35–36; and *Hofmeyr and Paleker* 2023, p. 854).

The cited scholars criticize the *Wilsnach* judgment for departing from the ISA's established, status-based scheme and for importing Children's Act concepts into intestate succession in a way the legislature did not intend. *De Waal and Mills* (2021, pp. 566–67) argue that the ISA itself draws clear lines in specific contexts, such as adoption, but makes no provision for persons other than biological or adoptive parents who merely hold parental responsibilities and rights under the Children's Act. On their reading, the maternal grandmother could therefore only have inherited if she had formally adopted the child, and the court's suggestion that the order conferring parental responsibilities and rights may have

²⁵ I.e., good morals. *Van Zyl* (2024, p. 3) indicates that public policy, public interest and "the general sense of justice of the community" are regarded as synonymous concepts.

²⁶ See (*Skelton and Hansungule* 2021, para. 15.1).

²⁷ For more in-depth discussions of parental responsibilities and rights in terms of the Children's Act, see (*Skelton and Hansungule* 2021, chap. 15; *Heaton* 2017, chap. 3).

²⁸ See *inter alia* (*De Waal and Mills* 2021, pp. 563, 566, 570–71; *Wood-Bodley* 2022, pp. 775, 789–90).

resembled a form of *de facto* adoption²⁹ was unpersuasive, especially given the doubtful recognition of *de facto* adoption in South African law. Paleker (2023c, p. 36) argues that the court in the *Wilsnach* judgment may have gone too far in accommodating the maternal grandmother, thereby undermining the legal certainty previously afforded by the ISA. Wood-Bodley (2022, p. 776) similarly contends that the *Wilsnach* judgment introduced “novel criteria” for parenthood under the ISA by requiring more than biological parenthood and by allowing a person other than a biological parent to qualify as a “parent” for intestate purposes if that person had been granted parental responsibilities and rights in terms of the Children’s Act. In his view, this amounts to a major and unauthorized departure from the ISA’s blood-relationship-based *parentela* system³⁰ and effects a change in the order of succession that the legislature never intended (Wood-Bodley 2022, pp. 777–78).

A further common thread in the commentaries is that the *Wilsnach* approach replaces objective legal criteria with a more *ad hoc* and evaluative inquiry into the quality of parental relationships. De Waal and Mills (2021, pp. 568–69) warn that this shifts the meaning of “parent” from a clear legal status to a functional and fact-sensitive notion dependent on judicial assessments of parental conduct, thereby undermining legal certainty. Wood-Bodley (2022, pp. 777–78, 790) echoes this concern by pointing out that, prior to the *Wilsnach* judgment, eligibility to inherit under the ISA did not depend on “good behavior” towards the deceased, except through the *indignus* doctrine,³¹ nor on whether a person had fulfilled his/her constitutional obligations. Therefore, both De Waal and Mills (2021, p. 569) and Wood-Bodley (2022, pp. 777–78) object to the court’s use of a moralized conception of parenthood to reshape the statutory order of succession.

Relatedly, both commentaries emphasize the uncertainty and anomaly generated by the *Wilsnach* judgment. De Waal and Mills (2021, p. 569) note that once “parent” becomes a functional, context-dependent concept, difficult questions arise in cases where no prior order has altered parental status, or where care arrangements have developed informally, making inheritance contingent on fluctuating evaluations of parental behavior. Wood-Bodley (2022, p. 780) develops this point in detail, arguing that the *Wilsnach* judgment fails to specify what combination of care, contact, guardianship, or parental responsibilities is sufficient for intestate “parenthood” purposes. He highlights anomalies such as whether a person with only contact privileges under section 18 of the Children’s Act would qualify; whether a child could reciprocally inherit from a caregiver recognized as a “parent”; whether the judgment implicitly recognizes a form of *de facto* adoption;³² and whether the interpretation would operate differently if the child died after reaching the age of majority, when the Children’s Act no longer applies in the same way (Wood-Bodley 2022, pp. 780–82). On both accounts, the result is a disruption of the predictability that the ISA is supposed to provide (De Waal and Mills 2021, p. 569; Wood-Bodley 2022, p. 790).

The two commentaries (De Waal and Mills 2021; Wood-Bodley 2022) also converge in rejecting the use of the Children’s Act as the interpretive vehicle for determining intestate parenthood. De Waal and Mills (2021, p. 569) argue that the termination or absence of parental responsibilities and rights under the Children’s Act does not extinguish all the legal consequences of biological parenthood, pointing out, for example, that the biological father remains under a duty of support.³³ In their view, the intestate succession relationship

²⁹ A *de facto* adoption is an informal adoptive relationship in which a person assumes and performs the role of a parent towards a child, without a formal adoption order having been granted under the Children’s Act. See (Louw 2017, pp. 457–84).

³⁰ See Section 3 of this contribution.

³¹ Which was only briefly referred to in an *obiter dictum* in *Wilsnach* para. 56 fn 14–15. Also see Sections 5.1 and 5.3 of this contribution.

³² Also see (De Waal and Mills 2021, p. 567).

³³ In essence, maintenance obligations.

likewise survives such a court order (De Waal and Mills 2021, p. 569). Wood-Bodley (2022, pp. 777–79) reinforces this by arguing from legislative history: the ISA deliberately recognized blood relationship as sufficient, and neither the original enactment nor later amendments in 2009 made an unmarried biological father’s right to inherit dependent on compliance with the Children’s Act. He therefore contends that the *Wilsnach* judgment is contrary to the clear intention of the legislature and effectively uses the Children’s Act to amend the ISA indirectly (Wood-Bodley 2022, p. 790).

De Waal and Mills (2021, p. 568) go further in specifically criticizing the court’s reliance on the best interests of the child principle, arguing that, because the child was already deceased, the invocation of section 28(2) of the Constitution was “forced and artificial” since the child was no longer a bearer of legal subjectivity. While Wood-Bodley (2022, pp. 779, 781, 788–90) does not frame the objection in precisely the same terms, his analysis similarly resists allowing constitutional or child law considerations to displace the statutory structure of intestate succession.

Ultimately, both De Waal and Mills (2021, p. 570) and Wood-Bodley (2022, p. 789) regard the *Wilsnach* judgment as exceeding the legitimate bounds of interpretation and moving into the terrain of judicial lawmaking. De Waal and Mills (2021, p. 570) expressly conclude that the court engaged in judicial legislation, contrary to the interpretive caution in *Endumeni* para. 18, namely substituting what it considered reasonable, sensible, or businesslike for the words actually used. Wood-Bodley (2022, pp. 787–89) likewise sees the judgment as effecting an unauthorized alteration of the statutory order of succession under the guise of interpretation.

Significantly, both sets of commentators suggest that, if the father’s conduct was sufficiently reprehensible, the preferable route would have been to exclude him through the doctrine of unworthiness rather than by redefining the meaning of “parent” (De Waal and Mills 2021, p. 570; Wood-Bodley 2022, pp. 785–87).³⁴ De Waal and Mills (2021, p. 571) also identify statutory reform as a possible legitimate long-term solution.³⁵ According to (Paleker 2023c, p. 36), an alternative approach³⁶ would have been to permit the maternal grandmother to institute a civil claim against the deceased child’s estate in order to recover the financial expenses she incurred in caring for the child.³⁷

To summarize the commentary on the *Wilsnach* approach: Although the approach in *Wilsnach* draws much of its appeal from constitutional values and child law principles, particularly where the deceased is a child, redefining “parent” for purposes of intestate inheritance in this way raises important rule-of-law concerns. If parenthood becomes something that can be challenged in each estate on moral or relational grounds, similarly placed heirs may not be treated consistently. The Constitution certainly requires legislation to be interpreted in the light of the Bill of Rights, but that duty does not dispense with the need to remain faithful to the statute’s purpose, structure, and limits, or to respect the line between judicial interpretation and statutory reform.

Hofmeyr and Paleker (2023, p. 854) caution that *Wilsnach*’s “radical departure from the usual application” of the ISA created scope for further litigation by persons seeking to extend the operation of the ISA in order to accommodate their own circumstances. Indeed, four years after the delivery of the *Wilsnach* judgment, a matter came before the Gauteng Local Division, Johannesburg, in which the expansion of the ISA was not expressly pleaded, but where a mother nevertheless relied on the *Wilsnach* judgment in seeking the exclusion

³⁴ Also see Section 5 of this contribution.

³⁵ The suitability of statutory reform is discussed in Section 6 of this contribution.

³⁶ Apart from the possible exclusion of the father on the basis of unworthiness to inherit. See Section 5 below.

³⁷ See also (De Waal and Mills 2021, p. 571). That possibility, however, falls beyond the scope of this contribution.

of an abandoning father from inheriting from his adult child. That matter is the *Jacobs* case, discussed in Section 5 below.

5. The *Jacobs* Approach

5.1. Facts and Legal Question

The (now) deceased person (Ivan) was born of a brief relationship between his mother³⁸ when she was 18 years old, and his father³⁹ (*Jacobs* para. 4). Besides making a few payments when the mother was pregnant with the child, it is indicated that the father of the child “showed limited interest” during the course of the pregnancy, and he was also not present at Ivan’s birth (*Jacobs* para. 4). It is further noted that the mother and the father never lived together (*Jacobs* para. 4). The father’s presence after Ivan’s birth until Ivan’s death (at age 29) was confined to providing a few nappies in the first month of his life, sporadic maintenance payments during Ivan’s first year (*Jacobs* para. 5) and visiting Ivan in the hospital when Ivan got injured at age 1 (*Jacobs* para. 4). It was accordingly contended that the father: “was for all intents and purposes totally absent as far as the upbringing of Ivan was concerned” (*Jacobs* para. 8).

The mother gained employment when Ivan was one year old and maintained Ivan herself, and raised Ivan together with the support of her mother, brothers, and other family members, where they could (*Jacobs* para. 5–6). The mother entered into a relationship with Phillip McCarthy when Ivan was 7, and McCarthy became, for all practical purposes, Ivan’s *de facto* father (*Jacobs* para. 6). It should, however, be noted that with reference to *Flynn v Farr* 2009 (1) SA 584 (and with the exclusion of customary law), *de facto* adoptions seem not to be accepted in South African law.⁴⁰

After contracting the COVID-19 virus, Ivan died on 7 July 2021, as mentioned, at the age of 29 (*Jacobs* para. 9). Seeing that he died without leaving a spouse or descendants behind, section 1(1)(d)(i) of the ISA prescribes that his distributable estate (being R716 070.24) should devolve in equal shares between his parents, being the applicant and the first respondent (*Jacobs* para. 9–10, 38). The mother accordingly applied for a court order declaring herself the sole parent of the late Ivan, and that the father is not to be regarded as a parent for the purposes of the ISA, in order to prevent the father from benefiting from Ivan’s deceased estate (*Jacobs* para. 11). The mother’s application was founded on the *Wilsnach* judgment (*Jacobs* para. 2). In the alternative, the mother relied on the court’s common law powers to declare an heir, including an intestate heir, unworthy to inherit (*Jacobs* para. 3), as was briefly referred to in an *obiter dictum*⁴¹ in the *Wilsnach* judgment (*Wilsnach* para. 56 fn 14–15).⁴²

The legal issues before the court in *Jacobs* were twofold. The first was whether the reasoning in the *Wilsnach* judgment was correct insofar as it could be applied to the present matter to hold that a parent is not a “parent” for purposes of the ISA, and, more specifically, whether that reasoning could be extended from a case concerning a minor child to one involving an adult child (*Jacobs* para. 48–49).⁴³ The second was whether the matter should

³⁸ Being the applicant in her capacity as executrix of his deceased estate and in her personal capacity as his mother.

³⁹ Being the first respondent.

⁴⁰ Also see *Wilsnach* para. 54; (De Waal and Mills 2021, p. 567; Wood-Bodley 2022, p. 781) and Section 4.3 of this contribution.

⁴¹ *Obiter dictum* (plural *obiter dicta*) refers to a remark made by a judge that is not essential to the decision of the case (i.e., a remark made in passing). In other words, it does not form part of the reason for the court’s decision. The last-mentioned referred to as the *ratio decidendi*. See (Klein et al. 2019, para. 3.3.1(e)).

⁴² Also referred to in Section 4.3 of this contribution.

⁴³ Also see Section 5.2.1 of this contribution.

rather be resolved through the development and application of the common law *indignus* doctrine by declaring the father unworthy to inherit (*Jacobs* para. 52–63).⁴⁴

5.2. Judgment

5.2.1. Dismissal of the *Wilsnach* Approach

According to Acting Judge Snyckers (*Jacobs* para. 34–35), a fundamental distinction must be drawn between “parenthood” within the framework of the Children’s Act and the meaning of “parent” for purposes of intestate succession under section 1(1)(d) of the ISA. Within the context of the Children’s Act, parenthood is focused on the best interests of the child, with parental responsibilities and rights directed at the child’s care, maintenance, contact, custody, and guardianship (*Jacobs* para. 35). By contrast, the ISA is concerned with the devolution of a deceased person’s estate where that person dies wholly or partly intestate (*Jacobs* para. 36). Stated differently: “. . . the rights and obligations governed by the Children’s Act by definition attract a greater degree of fluidity than the rules applicable to intestate succession do or should. The concept of parent in the Children’s Act is shorthand for those who should act as parents, necessarily incorporating a default starting point with much room for normative adjustment. The concept of parent in the ISA is aimed at identifying the existence of a blood relative to determine the direction of the flow of estate assets” (*Jacobs* para. 36). With reference to the last-mentioned, the ISA is not, according to Acting Judge Snyckers, about the best interests of the child, and it “does not call for an assessment of which persons associated with the deceased are more, and which less, deserving of inheritance” (*Jacobs* para. 37). Although a normative interpretation is required in the context of the Children’s Act, such an approach is not warranted for purposes of the ISA, particularly when regard is had to the distinct purpose of the ISA (*Jacobs* para. 37).

After considering the relevant provisions of the ISA that expressly refer to the Children’s Act (*Jacobs* para. 39–41), namely those dealing with children born out of wedlock,⁴⁵ *ex lege* adoption,⁴⁶ and children born through artificial insemination⁴⁷ or surrogacy,⁴⁸ Acting Judge Snyckers concluded that the ISA “deals comprehensively with the interplay with parental status under the Children’s Act” (*Jacobs* para. 43). References to the Children’s Act in the ISA are, according to Acting Judge Snyckers, “comprehensive, and exhaustive, and intended to be so” (*Jacobs* para. 41). On that basis, the court held that the ISA deliberately does not make an unmarried father’s acquisition of parental responsibilities and rights under section 21 of the Children’s Act a prerequisite for inheriting under the ISA (*Jacobs* para. 42). Likewise, the ISA does not expressly exclude a parent whose parental responsibilities and rights have been terminated in terms of the Children’s Act from inheriting under the ISA (*Jacobs* para. 43).

The approach adopted in *Wilsnach*, namely a normative assessment of whether a person merits the designation “parent” with due reference to the Children’s Act, was accordingly rejected in the *Jacobs* judgment. The court held that the father, as one of the deceased’s two surviving parents, qualified to inherit in terms of section 1(1)(d)(i) of the ISA (*Jacobs* para. 51).⁴⁹

However, as noted in Section 5.1 above, the mother pleaded in the alternative that the common law doctrine of unworthiness to inherit should be developed so as to disqualify the abandoning parent from inheriting, an issue outlined in Section 5.2.2 below.

⁴⁴ Also see Section 5.2.2 of this contribution.

⁴⁵ See section 21 of the Children’s Act.

⁴⁶ See section 242 of the Children’s Act.

⁴⁷ See section 40 of the Children’s Act.

⁴⁸ See chapter 19 of the Children’s Act.

⁴⁹ Also see (Campbell 2025; Nkoana 2025; Squier et al. 2025).

5.2.2. Extension of the *Indignus* Doctrine

As noted in Section 5.2.1 above, the *Wilsnach* approach, namely a normative assessment of whether a person deserves to be regarded as a “parent” with reference to the Children’s Act, was rejected in the *Jacobs* judgment. Acting Judge Snyckers held that a “more solid jurisprudential basis” for addressing the facts in both the *Wilsnach* and *Jacobs* cases lies in considering an extension of the *indignus* doctrine in accordance with contemporary public policy considerations (*Jacobs* para. 62).

After considering a range of authorities on declarations of unworthiness to inherit (*indignitas*), including a brief reference in the *Wilsnach* judgment to *Pillay v Nagan* 2001 (1) SA 410 (D), Acting Judge Snyckers held that the common law permits the application of the *indignus* doctrine in light of contemporary public policy considerations and that, on the facts of the case, the father’s complete abandonment of his child justified such a finding (*Jacobs* para. 59). Acting Judge Snyckers cautioned, however, that the judgment was confined to the exceptional facts before the court, namely the father’s “complete and utter abandonment” of the child from virtually the beginning of the child’s life and continuing for the next 29 years (*Jacobs* para. 61). The court emphasized that it is important to distinguish between different degrees or forms of abandonment, ranging from complete abandonment, such as in the *Jacobs* and *Wilsnach* cases, to less serious instances, but indicated that “[f]urther refinement and drawing of lines will await another day and another case” (*Jacobs* para. 61).

In the *Jacobs* judgment, the father was declared unworthy to inherit from his deceased son’s estate, with the result that the mother inherited the estate (*Jacobs* para. 65).

5.3. Commentary on the *Jacobs* Judgment

The *Jacobs* judgment’s rejection of the *Wilsnach* approach effectively avoids rewriting the meaning of “parent” in the ISA. In doing so, it respects the separation of powers by recognising that any broad redefinition of inheritance categories is a matter for the Legislature, not the courts.

As indicated in Section 5.2.1 of this contribution, once the mother’s primary reliance on the *Wilsnach* approach had been rejected, Acting Judge Snyckers was required to determine, in relation to her alternative claim, whether the common law doctrine of unworthiness to inherit should be developed and applied so as to render the father an *indignus*. Referring, *inter alia*, to the Roman-Dutch authorities and the considerable body of case law on unworthiness to inherit, Hofmeyr and Paleker (2023, pp. 149–50) conclude that South African law recognises three possible grounds upon which a beneficiary may be disqualified from taking a benefit from a deceased estate. These are:

Ground 1: The overarching principle that no person should be allowed to benefit from his/her wrongful conduct, or otherwise be advantaged by conduct that is punishable.⁵⁰

Ground 2: The specific grounds of unworthiness identified in the Roman-Dutch sources. In this respect, Johannes Voet, in his *Commentarius ad Pandectas*, identified twenty-two grounds on which an inheritance or legacy could be forfeited due to unworthiness (Voet 1956 translation).⁵¹ Over time, however, changing social values and legal developments have rendered some of these grounds obsolete (see *inter alia* Hofmeyr and Paleker 2023, p. 140). Included in Voet’s reference to specific grounds of unworthiness is the maxim *de bloodige hand neemt geen erffenis* (the “bloody-hand” maxim), which relates to the intentional or negligent killing of the deceased or the deceased’s *conjunctissimus*.⁵² The latter concept

⁵⁰ See *inter alia* (Van Leeuwen 1881) translation; *Taylor v Pim* (1903) 24 NLR 484; and *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T).

⁵¹ Also see (Van Leeuwen 1881) translation.

⁵² See in general (De Waal and Zimmermann 2011, pp. 188–90; Sonnekus and Van der Walt 1992, pp. 147–53; Van der Walt and Sonnekus 1981, pp. 30–45; Schoeman-Malan 2013, pp. 113–75).

refers to the deceased's closest relatives and, in the South African context, is limited to the deceased's spouse, child, or parent (see *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) at 750).⁵³

Ground 3: In light of decisions such as *Pillay v Nagan* 2001 (1) SA 410 (D),⁵⁴ and *Danielz v De Wet* 2009 (6) SA 42 (C),⁵⁵ the proposition that the recognised grounds of unworthiness are not closed, but may be extended to encompass analogous or even novel grounds on the basis of public policy considerations. In this regard, [Barns and Thompson \(2014, p. 123\)](#) identify *Taylor v Pim* (1903) 24 NLR 484⁵⁶ as the point of departure for the later judicial reasoning in these cases.

Against this background, the declaration in *Jacobs* that an abandoning parent is unworthy to inherit intestate from his or her child constitutes a novel development in South African succession law. The father's abandonment of the child did not cause the latter's death, and the other recognised common law grounds of unworthiness, as reflected in the Roman-Dutch authorities, do not expressly provide for such a situation.

As noted in Section 5.2.2 above, Acting Judge Snyckers held that the father's complete abandonment of his child justified a finding of unworthiness on the basis of contemporary public policy considerations (*Jacobs* para. 59), i.e., placing the facts in the *Jacobs* case under the third ground for disqualification, namely public policy considerations. However, even prior to the *Jacobs* judgment, debate existed as to the proper scope of such development. The question is whether the doctrine should be extended only to accommodate facts sufficiently analogous to the recognised grounds, or whether it may also be developed more broadly to cover situations that cannot readily be incorporated under those grounds, but which nonetheless, in light of the prevailing *boni mores* of society, justify or require disqualification.⁵⁷ The point of controversy being *inter alia*, the recognition of public policy as an independent basis for disqualification in situations (such as *Danielz*) where the overarching principle that no person may benefit from his/her own wrongdoing,⁵⁸ would have sufficed ([Hofmeyr and Paleker 2023, pp. 149–50](#); [Barns and Thompson 2014, p. 129](#)). On this view, the facts in *inter alia* *Pillay* and *Danielz* could have been resolved by applying the overarching principle, without the need to invoke an additional, potentially open-ended category of disqualification grounded in public policy considerations. See below for the potential risks associated with recognising such a potentially open-ended category on public policy grounds.

[Barns and Thompson \(2014, p. 124\)](#) argue that the inclusion of public policy as a separate basis for unworthiness in *Pillay* and *Danielz* can be traced to a misunderstanding of the court's reliance on the French jurist Jean Domat in the *Taylor* judgment. In *Taylor* 493, the court quoted the following passage from [Domat \(1777\)](#): "The causes which may render the heir unworthy of the succession are indefinite, and the discerning of what may or may not be sufficient to produce this effect depends on the quality of the facts and the circumstances. Thus we are not to limit these causes . . . where we have only mention of those in our laws. But if there should happen any other case where good manners and equity should require that an heir should be declared unworthy, it would be just to deprive him of the inheritance. . . ." [Barns and Thompson \(2014, pp. 124–26\)](#) contend that the *Taylor* judgment did not endorse Domat's open-ended public policy inquiry. Rather, the outcome in *Taylor* can be fully explained by established Roman-Dutch principles, namely adultery

⁵³ Hereafter *Ex parte Steenkamp*.

⁵⁴ Hereafter *Pillay*. The *Pillay* case dealt with the forgery of a will.

⁵⁵ Hereafter *Danielz*. The *Danielz* case dealt with conspiracy to assault with the intent to do grievous bodily harm.

⁵⁶ Hereafter *Taylor*.

⁵⁷ See *inter alia* ([Wood-Bodley 2022, pp. 786–87](#); [Wood-Bodley 2010, pp. 32–34](#); [De Waal and Zimmermann 2011, pp. 188–90](#); [Hofmeyr and Paleker 2023, pp. 149–50](#)).

⁵⁸ See ground 1 mentioned above.

with the testatrix and, more importantly, the wrongful conduct that contributed to the testatrix's death⁵⁹ and the subsequent enrichment (Barns and Thompson 2014, pp. 124–26). On this reading, *Taylor* supports the traditional notion that a person may not profit from his/her own wrongdoing, and not a general doctrine of disqualification based on moral unworthiness (Barns and Thompson 2014, p. 126). In *Ex parte Steenkamp* 750–51, the court treated Domat's remarks as having been quoted merely in passing and not as decisive of the outcome in *Taylor* (Barns and Thompson 2014, pp. 126–27). In *Yassen v Yassen* 1965 (1) 438 (N) 441,⁶⁰ the court also cautioned that Domat's broad notions of "equity" and "good manners" as a general test for unworthiness are too vague to be a test of general application (see Barns and Thompson 2014, p. 127).

However, the courts in the subsequent *Pillay* and *Danielz* cases did not refer to *Ex parte Steenkamp* or *Yassen* and instead appeared to have cited Domat with apparent approval—even though in *obiter dicta* (see *Pillay* 423–24 and *Danielz* para. 38. Also see (Hofmeyr and Paleker 2023, p. 150)).

Returning to the disqualification of abandoning parents from inheriting intestate from their children, the *Wilsnach* judgment contains only a brief reference to unworthiness. Apart from recording the father's submissions in paragraph 56 and citing, in two subsequent footnotes (fn 14–15), authority including the view in the *Pillay* judgment that unworthiness may be extended on public policy grounds, the court ultimately based its order on a redefinition of the term "parent" for purposes of the ISA with reference to the Children's Act, thereby excluding the abandoning father. This creates the impression that the court's brief reference to the possible declaration of the father as an *indignus*, together with its citation of *Pillay*, formed part of an *obiter dictum* rather than the *ratio decidendi*. As provided in Section 4.3 of this contribution, the academic commentary on the *Wilsnach* judgment generally suggests that, although the outcome is emotionally compelling, the same result could have been reached through alternative legal avenues, including a declaration that the father was unworthy to inherit. This further supports the impression that the court's reference to unworthiness in *Wilsnach* did not form part of the *ratio decidendi*. Yet, in the *Jacobs* judgment, Acting Judge Snyckers nevertheless considered it necessary to engage with those *obiter* remarks on unworthiness, despite rejecting the *Wilsnach* approach of redefining "parent" for purposes of the ISA. This is evident, for example, from paragraphs 58–59 of the *Jacobs* judgment: "I must confess to a great degree of hesitancy on my part to apply the concept of *indignus* here. Had it not been for *Wilsnach*, the extension, upon a sobering consideration of the cases to date that have applied the doctrine, and the debate between cases such as *Steenkamp* and *Danielz*, would have struck me as a bridge too far. Nevertheless, there is the authority of *Wilsnach*. *Wilsnach* specifically had recourse to *Pillay* and the unworthiness doctrine to support its ultimate conclusion concerning the definition of 'parent' in the ISA. . . My application of the *indignus* doctrine here to these facts would not be novel—it would be following that portion of the *ratio* of *Wilsnach* that does not entail the difficulties considered above that attend upon interpreting the term 'parent' in the ISA. In this regard, I am still bound by *Wilsnach* save to the extent I regard it as clearly wrong, and, with respect, I do not regard its assessment that the unworthiness doctrine would find apposite application to facts like these to be clearly wrong. The common law allows application of the *indignus* concept based on contemporary public policy. Contemporary public policy in this very sphere is addressed in detail in *Wilsnach*." However, and as mentioned, unworthiness was mentioned very briefly in the *Wilsnach* judgment, and except

⁵⁹ Bringing about the deceased's death by giving her alcohol against medical advice and failing to obtain medical assistance when needed.

⁶⁰ Hereafter *Yassen*. The *Yassen* case dealt with the concealment or destruction of a will.

for the reference to *Pillay* in footnote 14 of the judgment, public policy as such is not addressed “in detail” in the *Wilsnach* judgment.

It would seem that history is repeating itself. From the reference to Domat’s views in the *Taylor* judgment and the subsequent misunderstanding as to the inclusion thereof, to the *obiter* approval of Domat in *Pillay* and *Danielz*, to the *obiter* reference to *Pillay* in footnote 14 of *Wilsnach* as authority for the proposition that courts are not confined to the known and recognised grounds of unworthiness and may expand them on the basis of public policy (based on Domat’s views), to the inclusion of *Wilsnach*’s reference to *Pillay* in the *Jacobs* judgment.

The above-mentioned cross-referencing, although its jurisprudential soundness still remains to be authoritatively determined by the Supreme Court of Appeal, should the occasion arise, appears to have created the impression that the inclusion of unworthiness on grounds of public policy considerations in *Pillay* and *Danielz* now forms part of trite South African law. For example, in their criticism of the *Wilsnach* judgment, [De Waal and Mills \(2021, pp. 570–71\)](#) argue that the court should have instead declared the father unworthy to inherit, citing *Pillay* and *Danielz*. In this regard, they state: “It is now accepted in South African law that we are no longer restricted to the traditional categories of unworthiness inherited from Roman and Roman-Dutch law. Instead, it is acknowledged that unworthiness to inherit should be determined on the basis of broad public policy considerations, now also including constitutional considerations, with the *boni mores* of society being decisive” ([De Waal and Mills 2021, p. 570](#)). Also, with reference to the *Pillay* and *Danielz* cases, [Du Toit \(2012, p. 138\)](#) states that there is no *numerus clausus* of grounds of unworthiness, and that a South African court may, on public policy grounds, find a person unworthy even outside the recognized grounds of unworthiness that have, over time, become established.

Getting to the risks associated with subjecting a legatee or heir’s benefit to a free-standing, open-ended basis grounded in notions of public policy, equity, or good manners:

- a. In *Yassen*⁶¹ the court was reluctant to use Domat’s broad notions such as “equity” and “good manners” as a general test for unworthiness, warning that such a standard is too vague for general application, seeing that “many actions may be described as contrary to good manners, which could never be erected into a sufficient cause for stigmatising an heir as unworthy” (*Yassen* 441). [Barns and Thompson \(2014, p. 127\)](#) similarly endorse the caution expressed in *Yassen*, noting that there is a “risk of opening the legal floodgates to spurious claims”.
- b. In a matter unrelated to unworthiness to inherit but relating to the hierarchy of sources, Judge of Appeal Corbett held in *Du Plessis v Strauss* 188 (2) SA 105 (A) 149, that preference should be given to Roman-Dutch sources over other continental writers such as Domat.⁶²
- c. [Barns and Thompson \(2014, p. 127\)](#) also refer to the caution expressed by the Supreme Court of Appeal in *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) par 34,⁶³ namely cautioning against judges deciding cases on the basis of their own views of fairness rather than legal principle: “. . . the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put

⁶¹ As mentioned concerning the concealment or destruction of a will.

⁶² Also see ([Barns and Thompson 2014, p. 128](#)).

⁶³ Hereafter *Potgieter*.

it in *Preller v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.”⁶⁴

- d. While Wood-Bodley (2022, p. 786) concludes as to the possibility of the *indignus* doctrine in the *Wilsnach* judgment that, although the modern trend appears to favour judicial extension of the grounds in appropriate circumstances, such development should preferably remain confined to the recognised grounds. In his view, a direct reliance on public policy considerations carries the risk that the outcome may become dependent on the subjective views of the presiding judge (Wood-Bodley 2022, p. 786).

Nevertheless, and until legal certainty is provided by the Supreme Court of Appeal on this matter, Hofmeyr and Paleker (2023, p. 150)⁶⁵ conclude that: “[o]n the other hand, these decisions introduce flexibility that is consistent with the fact that the underlying basis of unworthiness is itself the flexible notion of public policy.” Du Toit (2012, p. 138) likewise holds that the basis for unworthiness in the context of inheritance is that the benefit to an unworthy successor is contrary to public policy norms. While advocating for a more conservative development of unworthiness to inherit,⁶⁶ Wood-Bodley (2022, p. 787), with reference to the *Wilsnach* case, does concede that the father’s “extreme neglect of his helplessly disabled child was so shocking that he ought to be identified as unworthy to inherit in the legal sense, particularly in view of the source of the child’s estate.” Although the facts in the *Jacobs* case did not concern the abandonment of a disabled child, it likewise involved complete abandonment, as in the *Wilsnach* case. In light of legal certainty, Wood-Bodley’s concession could therefore equally apply to the facts of *Jacobs*.

It is also necessary to indicate that South African courts have adopted a flexible, evolutionary approach to the *indignus* doctrine, progressively extending its application beyond the strict confines of succession law. As a result, the doctrine has increasingly been invoked to disqualify a person from benefiting from his or her wrongdoing not only in matters of inheritance, but also in relation to claims for pension fund benefits, matrimonial property and maintenance claims, executor’s remuneration and life policy proceeds.⁶⁷

The question arises whether the *Jacobs* approach, namely declaring the abandoning father an *indignus* in light of public policy considerations, can now be regarded as a clear and decisive solution to the problem of abandoning parents and intestate inheritance. As noted in Section 5.2.2 of this contribution, the court itself stressed the need to distinguish between different degrees or forms of abandonment, ranging from complete abandonment, as in *Jacobs* and *Wilsnach*, to “less serious” forms of parental absence. Having recognized the complexity in this regard, the court in *Jacobs* para. 61 stated that “[f]urther refinement and drawing of lines will await another day and another case”—effectively passing the buck. Therefore, the *Jacobs* judgment leaves unresolved those cases that are not so clear-cut, particularly where some degree of parental involvement was present. Moreover, the *Jacobs* judgment does not accommodate facts such as those in *Wilsnach*. Although both matters concerned extreme abandonment, *Wilsnach* additionally recognized the grandmother as a “parent” for purposes of the ISA. In light of the criticism levelled against the *Wilsnach* judgment,⁶⁸ such recognition was incorrect, since the acquisition of parental rights and responsibilities is not equivalent to adoption. The grandmother accordingly did not be-

⁶⁴ Also see the application of *Potgieter* para. 34 in the subsequent cases of *Trustees, Oregon Trust v Beadica* 231 2019 (4) SA 517 (SCA) para. 24; and *Beadica 231 v Trustees, Oregon Trust* 2020 (5) SA 247 (CC) para. 42.

⁶⁵ Before the *Jacobs* judgment, but with specific reference to *Pillay* and *Danielz*.

⁶⁶ In other words, confined to the development of existing grounds.

⁶⁷ See *inter alia* *Makhanya v Minister of Finance* 2001 (2) SA 1251 (D); *Leeb v Leeb* [1999] 2 All SA 588 (N); *Smit v Master of the High Court, Western Cape* [2022] 4 All SA 146 (WCC); and *Marais v Botha* 2009 JDR 0020 (C).

⁶⁸ See Section 4.3 of this contribution.

come a “parent” for purposes of the ISA, and her claim should have been framed more appropriately as a claim for expenses against the deceased estate.

It should also be borne in mind that a person cannot be declared unworthy by, for example, the Master of the High Court; only a High Court of South Africa may make such an order, and only if satisfied on a balance of probabilities that a declaration of unworthiness is justified. This raises the further question whether the *Jacobs* judgment may encourage a flood of litigation based on abandonment and contested public policy considerations, or whether the matter would be more appropriately addressed through statutory intervention (see [De Waal and Mills 2021](#), p. 571).

6. Suitability of Statutory Reform

The *Wilsnach* and *Jacobs* approaches leave the courts to choose, depending on the facts of the matter and the applicability of the *stare decisis* doctrine,⁶⁹ between a potentially destabilizing functional reinterpretation of “parent” for purposes of the ISA or relying on the development and application of the *indignus* doctrine based on public policy considerations. Statutory reform can therefore be desirable to externalize these value judgments from *ad hoc* judicial discretion into legislatively enacted and predictable criteria.

The court in the *Wilsnach* judgment referred to foreign legislation that includes so-called “parent-bar provisions” (see *Wilsnach* para. 84–89), which statutorily exclude parents from inheriting intestate from their children under certain circumstances. The parent-bar provisions in Kentucky 391.033 *Limitation on right to estate if parent has abandoned care and maintenance of child*⁷⁰ reads: “A parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to intestate succession in any part of the estate and shall not have a right to administer the estate of the child, unless: (a) The abandoning parent had resumed the care and maintenance at least one (1) year prior to the death of the child and had continued the care and maintenance until the child’s death; or (b) The parent had been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent had substantially complied with all orders of the court requiring contribution to the support of the child. (2) Any part of a decedent child’s estate prevented from passing to a parent, under the provisions of subsection (1) of this section, shall pass through intestate succession as if that parent has failed to survive the decedent child.” The parent-bar provisions in Michigan Compiled Laws §700.2114(4) in *Estates and Protected Individuals Code (EPIC)*,⁷¹ essentially prevent a parent from inheriting from his/her child where the parent did not acknowledge or support the child.

While the legislation mentioned above may provide for the exclusion of an abandoning parent from intestate inheritance, the question of whether abandonment has in fact occurred⁷² or whether a parent did not acknowledge or support their child⁷³ remains one of fact to be determined by a court. Statutory intervention, therefore, does not dispense with the need for judicial involvement. See below for a brief outline of the distinction between the probate system in the United States of America and the role of the Master of the High Court in the South African administration of deceased estates. In addition, although such legislation may exclude an abandoning parent from inheriting intestate, it does not provide for the inclusion (as in *Wilsnach*) of the person who, in fact, cared for the child, nor does it cater for instances where the deceased died as an adult (as in *Jacobs*).

⁶⁹ The *stare decisis* doctrine refers to the system of judicial precedent. ([Klein et al. 2019](#), para. 3.3.1(b)) indicates that the “underlying principle of the doctrine is that the law which was applied to a specific factual situation should be applied to all similar situations.”

⁷⁰ Hereafter the Kentucky parent-bar provisions.

⁷¹ Hereafter the Michigan parent-bar provisions.

⁷² With reference to the Kentucky parent-bar provisions.

⁷³ With reference to the Michigan parent-bar provisions.

Last-mentioned was recently addressed in Minnesota Statutes 2025 in §524.2-114 *Parent Barred from Inheriting in Certain Circumstances* by providing for both abandonment where the deceased died either as a minor or an adult: “(a) A parent is barred from inheriting from or through a child of the parent if: (1) the parent’s parental rights were terminated and the parent-child relationship was not judicially reestablished; (2) the child died before reaching 18 years of age and there is clear and convincing evidence that immediately before the child’s death the parental rights of the parent could have been terminated under law of this state other than this chapter on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child; or (3) the child died after reaching 18 years of age and there is clear and convincing evidence that: (i) during the years of the child’s minority, the parental rights of the parent could have been terminated under laws of this state other than this chapter on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child; and (ii) in the year preceding the child’s death, the parent and child were estranged. For purposes of this subdivision, ‘estranged’ means having a relationship characterized by enmity, hostility, or indifference.”

While a termination order constitutes *prima facie* evidence,⁷⁴ the other grounds provided for in the Minnesota statute will still require judicial determination, including whether parental rights could have been terminated on grounds such as abandonment and whether estrangement existed in the form of enmity, hostility or indifference. Moreover, the Minnesota statute does not recognize *de facto* caregivers, such as in *Wilsnach*, as intestate heirs.

Consequently, South African statutory reform would likely require two linked interventions: a codified parental disqualification rule and a carefully delimited recognition of a caregiver. However, any statutory intervention must account for institutional capacity and the ISA’s purpose.

In contrast to the probate system in the United States of America (being a court-supervised system), the South African system of deceased estate administration is organized around the administrative supervision by the Master of the High Court and not the court itself. A central purpose of the ISA is accordingly to lay down relatively clear-cut rules of intestate succession, founded principally on the deceased’s marital status and *parentela* blood relationship system. The Master’s Office is not institutionally designed to adjudicate contested family histories or factual disputes concerning the quality of parental relationships, but rather to supervise the orderly administration of estates. Legislation aimed at disqualifying abandoning parents from inheriting intestate from their children would therefore not necessarily remove the difficulty. Unless framed in very narrow and specific terms, such legislation would still require judicial determination of whether abandonment had in fact occurred. The Master cannot decide disputed questions, such as whether abandonment occurred, its degree, or whether the facts justify disqualification. Even in cases where parental rights and responsibilities were formally terminated in terms of section 28 of the Children’s Act, that fact would not always be conclusive, since such termination may in some circumstances be reversed, except in the case of adoption.⁷⁵ In practice, the matter would therefore still have to be referred to court. This, in turn, risks undermining both the purpose of the ISA as a clear and administrable statute and the limited role and capacity of the Master in the South African law of deceased estate administration.

⁷⁴ I.e., presumptive evidence or, more literally, evidence sufficient at first sight.

⁷⁵ Section 28(1)(b) read with sections 22–24 and section 242 of the Children’s Act.

7. Conclusions

The *Wilsnach* approach reflects an understanding of “parenthood” that aligns with child law and resonates strongly with constitutional principles. Its difficulty, however, is that it may disrupt the structure of the ISA by introducing a functional, best interests-based framework into legislation intended to operate through fixed, administratively workable rules of intestate succession.

The *Jacobs* approach preserves the ISA’s commitment to legal certainty by rejecting a moralized, case-by-case definition of “parent” yet still allows for moral accountability through the doctrine of unworthiness. While attractive in principle, this approach remains legally uncertain, since the Supreme Court of Appeal has not yet definitively recognized unworthiness on public policy grounds beyond the traditional common law grounds. It is also risky because it may allow public policy to depend too heavily on the individual judge’s value judgment. Even so, it may be argued that unworthiness based on broader public policy considerations has, by now, largely become trite in South African law. In addition, if the *Jacobs* approach is confined to clear-cut, complete abandonment cases, the facts will usually be so extreme that judges are likely to reach the same conclusion.

Statutory parent-bar provisions could shift the difficult value judgment away from open-ended, case-by-case appeals on “public policy” to clear statutory rules. Foreign examples show that this can be done in different ways: some jurisdictions link disqualification to the termination of parental rights, while others use specified forms of misconduct that would have justified such termination. In Minnesota, the disqualification is also extended to cases where the deceased died as an adult by including an estrangement requirement. The last-mentioned approach would have been relevant to the *Jacobs* case. However, existing foreign examples do not provide for the inclusion of *de facto* caregivers, such as a grandparent in the *Wilsnach* case, to inherit intestate in the place of a parent. On this point, it is argued that, if statutory reform is to be pursued, the ISA is not the most suitable statutory vehicle. The ISA is aimed at legal certainty and the straightforward application of a clear order of succession. It should also be borne in mind that the Master of the High Court is responsible for overseeing deceased estates in South Africa, alongside a range of other functions. While a court order terminating parental responsibilities and rights provides a clear, objectively verifiable basis for disqualification, more fact-sensitive issues, such as whether a *de facto* caregiver should inherit, cannot be determined by the Master. Although the Master performs certain quasi-adjudicative functions, the office is not designed to hear oral evidence and make findings on complex factual disputes of this nature (Paleker 2023b, p. 260). Such matters would necessarily have to be referred to the court. This, in turn, undermines the ISA’s objective of legal certainty. Unless legislation were to regulate every possible scenario in detail, these cases would in any event still require judicial determination.

For these reasons, judicial application of the *indignus* doctrine remains the more practical and workable mechanism for addressing cases of parental abandonment on a case-by-case basis.

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Abbreviations

The following abbreviation is used in this manuscript:

ISA Intestate Succession Act 81 of 1987

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