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IN THE HIGH COURT OF GAUTENG DIVISION,

SOUTH AFRICA

PRETORIA

CASENO: 22553-2019

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED

DATE 16/11/2020

In the matter between :

CONSTANT WILSNACH N.O.

APPLICANT

and

T[....] M[....]

FIRST RESPONDENT

N[....] M[....] D[....]

SECOND RESPONDENT

T[....] E[....] D[....]

THIRD RESPONDENT

THE MASTER OF THE HIGH COURT

FOURTH RESPONDENT

JUDGMENT

KOLLAPEN, J

Introduction

[1] This application, in the narrow sense, concerns the interpretation to be given to the term 'parent' as used in section 1(1)(d) of the Intestate Succession Act (ISA)¹. However, in interpreting the term 'parent' the matter triggers an important discussion as to the meaning and content of what is understood by the idea of parenting and parenthood. Is the definition of a parent for the purpose of the ISA simply a matter of blood and biology or is its determination a matter which in each case is to be arrived at by a consideration of the what parenting, parenthood and being a parent has come to mean in our law, regard being had to the values and objectives of the constitutional dispensation which enjoys supremacy in our legal regime.

[2] It is not uncommon for children to become entangled in disputes about succession on the passing of parents. It is less common for parents to do so on the passing of a child. This is such a matter.

[3] In this application brought by the duly appointed executor of the deceased estate of M[....] L[....] D[....] ("M[....]") the following relief is sought:

¹ Act 81 of 1987.

1.1 That the Court determine and provide direction to the question who should be regarded as beneficiaries of the intestate estate of M[....] and is/are entitled to inherit the intestate estate and/or any share thereof;

1.2 That the Court determines and provide direction on how the applicant should divide the intestate estate of M[....] in terms of the ISA;

1.3 That the Court should determine and provide directions in regard to the implications and effect of the Court order granted on 26 April 2018, by the Gauteng Division, Pretoria in relation to the right of the first respondent to receive benefits from the estate of M[....] in terms of the ISA;

1.4 The applicant is authorised to debit the estate with the costs of this application (on the attorney and own client scale).

1.5 Further and/or alternative relief.

[4] All of the respondents lay claim to the estate of the late M[....], the first respondent and second respondent on the basis that they are the parents of M[....] and the third respondent on the basis that she was awarded parental rights and responsibilities in respect of M[....]

by this Court.

The parties

[5] The applicant is Constant Wilsnach N.O. an attorney of this Court who acts herein in his capacity as the duly appointed executor in the estate of the late M[....] L[....] D[....] having being so appointed by the Master of the High Court, Pretoria on the 18 May 2018.

[6] The first respondent is T[....] M[....] an adult male person and natural father of M[....] and locates his claim to inherit on the provisions of section 1(1)(d) of the ISA.

[7] The second respondent is N[....] M[....] D[....] an adult female person and the natural mother of M[....] who also locates her entitlement to inherit on section 1(1)(d) of the ISA.

[8] The third respondent is T[....] E[....] D[....] an adult female person and the maternal grandmother of M[....]. M[....] resided with the third respondent since his discharge from hospital after birth and she was the late M[....]'s caregiver until he passed away. The third respondent bases her claim to inherit on an order of this Court dated 26 April 2018, in terms of which she was granted full parental responsibilities and rights with regard to guardianship of M[....] in

terms of sections 23 and 24 of the Children's Act².

[9] The fourth respondent is The Master of the High Court, Pretoria. No relief is sought against the fourth respondent and it is joined to these proceedings as it might have an interest in the outcome of the application.

Background

[10] M[...] was a minor male child born on 23 January 2013, and was diagnosed with cerebral palsy. His life was destined to be short one and it was sad and tragic one in many respects until he passed away on 28 April 2018 at the tender age of 5.

[11] M[...]’s cerebral palsy was caused by Hypoxic Ischemic Encephalopathy (a lack of oxygen to the brain during the birthing process).

[12] The parents of M[...] were never married to each other nor did they cohabit with each other at any time before or after his birth. The first respondent was not present at M[...]’s birth and he never factually assumed any parental responsibilities nor did he contribute in any manner to raising M[,...], to his maintenance or any other costs involved in his upbringing. The first respondent last saw M[...]

² Act 38 of 2005.

when he was six months old and in the time from the birth and the passing of M[...] never expressed any interest in the well-being of M[...] nor developed any relationship with him .

[13] The second respondent and M[...] lived with the third respondent after he was discharged from hospital following his birth. The second respondent suffered from depression following the birth of M[...] and while she lived with M[...] and the third respondent in the latter's house, she was unable to take proper care of M[...] and respond to his needs. The second respondent was also unemployed during the lifetime of M[...] and she and M[...] were reliant on the third respondent for their shelter and their other basic needs.

[14] The situation around the care and well-being of M[...] was left largely in the hands of the third respondent but it was challenging for her in many respects given her difficult economic circumstances and the fact that she was in full time employment. To this end there were times when the second respondent left M[...] effectively unattended at the third respondent's home while the third respondent was at work and absent someone to properly care for him. The second respondent often went away for days without informing the third respondent of her whereabouts or indeed for how long she intended to stay away. The situation became untenable with the passage of time and finally the third respondent gave up her employment as a hairdresser and became the fulltime sole caregiver of M[...] until he passed away.

The relevant litigation history

Action against MEC for Health, Gauteng

[15] A curator *ad litem* was appointed by this Court to represent the interests of M[....] and expert advice was sought in relation to the liability of employees of the Member of the Executive Committee for Health, Gauteng for the circumstances that led to M[....]'s medical condition.

[16] An action for damages was then instituted against the MEC for Health, Gauteng in the Gauteng Local Division, Johannesburg during 2014.

[17] The litigation was settled on the 12 May 2017 and an amount of R21 000 000, 00 (Twenty One Million Rand) was awarded to M[....] being in respect of damages caused by the negligence of staff of the Gauteng Health Department. The terms of the settlement agreement which was made an order of Court provided for a trust to be established for the benefit of M[....]. A trust was indeed established and registered with the Master of this Court and the applicant was appointed as trustee on 30 June 2017 in the M[....] L[....] D[....] Trust with registration number: IT001157/2017(T).

[18] Following the appointment of the applicant as trustee of the trust,

he met with and consulted with the second and third respondents regarding M[...]'s needs and requirements as well as to facilitate payments to be made for his benefit. The applicant never met the first respondent nor did he have any dealings with him from the time of his appointment.

[19] Following M[...]'s passing the only asset in his intestate estate are cash funds currently amounting to approximately R15 000 000,00 (Fifteen Million Rand) which would be the difference between the sum awarded by the Court less costs and other payments made before the passing of M[...].

Third respondent's application against the first and second respondents

[20] In October 2017, the third respondent brought an application in terms of the Children's Act³ against the first and second respondents in which the third respondent sought the following relief⁴ (In those proceedings the applicant in the current proceedings was the third respondent, whilst the first respondent in the current proceedings was the second respondent and the second respondent in the current proceedings was the first respondent):

- 1.1 That she be awarded rights to contact and primary care of M[...] in terms of section 23(1)(a) and (b) of the Children's

³ Act 38 of 2005

Act;

- 1.2 That she be declared the sole guardian of M[...] in terms of section 24(1) of the Children's Act;
- 1.3 That the second respondent's rights to be the guardian of M[...] be terminated in terms of section 18(2)(c) and 18(3) of the Children's Act;
- 1.4 That the second respondent's rights of contact with M[...] in terms of section 18(2)(b) of the Children's Act be restricted ;
- 1.5 That the first respondent's rights to be the guardian of M[...] be terminated in terms of section 18(2)(c) and 18(3) of the Children's Act.
- 1.6 That the first respondent's rights of contact with M[...] in terms of section 18(2)(b) of the Children's Act be restricted.

[21] In her founding affidavit filed in those proceedings the third respondent described M[...]’s condition as follows:

- 21.1 He cannot hold up his head at all, and his head needs support;
- 21.2 He has never learned to sit;
- 21.3 He cannot babble any sounds, and he vocalises one sound “ehhh”;
- 21.4 He cannot chew and he therefore can eat only soft foods;

- 21.5 He cannot feed himself;
- 21.6 He cannot grab with his hands at all. His hands remain in fists and are in spasticity;
- 21.7 He has a limited ability to roll over;
- 21.8 He cannot use his hands and legs in any meaningful way;
- 21.9 He uses nappies;
- 21.10 He has no bowel control;
- 21.11 He has never crawled;
- 21.12 He cannot stand at all;
- 21.13 He cannot walk;
- 21.14 He cannot understand any verbal communication at all;
- 21.15 He has epilepsy, and he suffers from regular body spasms, which cause pain;
- 21.16 His hips may be dislocated;
- 21.17 His vision is impaired;
- 21.18 He has been diagnosed with severe spastic quadriplegia with microcephaly; and
- 21.19 He was born with severe mental and physical handicaps and he suffers from irreversible brain damage. M[...] is and will remain totally dependent on others for all his needs and activities of daily living for the rest of his life.

[22] It is evident from the above that M[...] was in constant need of care, love and attention in respect of all his needs if he was to live a life at the very least characterised by compassion and a humane response to his health situation.

[23] In advancing the relief that she sought against the biological father of M[...] the third respondent took the following stance:

“I am advised that the Second Respondent did not attain parental responsibilities and rights in terms of Section 20 of the Children's Act as he never married the First Respondent. I am further advised that the Second Respondent also did not attain parental responsibilities and rights in terms of Section 21 of the Children's Act as he did not live with the First Respondent in a permanent life partnership or applied in terms of Section 26 of the Children's Act to be identified as the child's father, or paid damages in terms of customary law or contributed or attempted to in good faith to contribute to M[...]’s upbringing or maintenance for a reasonable period. The Second Respondent was not present when M[...] was born.”

[24] The application was served personally on the first respondent and he elected not to oppose the application. The matter came before Molopa Sethosa, J on 11 January 2018 and she ordered the offices of the Family Advocate to conduct an enquiry into the welfare and best interest of M[...].

[25] The Family Advocate prepared a report as directed by the Court and in that report dated 6 April 2018, recommended that the second and third respondents be granted full parental responsibilities and rights with regard to the care of M[...] and also further that the parental responsibilities and rights to guardianship of M[...] are to be awarded to the second and third respondents and primary place of residence are with the third respondent.

[26] In dealing with the position of the first respondent the report concluded as follows:

“The Second Respondent is reportedly the biological father of the child concerned, however, in terms of the information provided he has not provided any contribution towards the needs of the child, nor has he played any role in the parenting and upbringing of the child since his birth. In light thereof, there has been no compliance with the provisions of Section 21 of the Children's Act~ and he therefore cannot be found to be the holder of any parental responsibilities in respect of the child concerned.”

[27] In so far as the position of the second and third respondents were concerned

the report recorded the following:

“The First Respondent indicated that she believes that she is capable of caring for the child on her own as she is his mother and loves him dearly, she also conceded that the Applicant loves the child and cares for him well, and as a result. she has agreed that it will serve the best interests of the child to remain primarily resident with the Applicant and that she be granted rights of guardianship of the child by the court. The First Respondent further conceded that due to her current social circumstances, which are not ideal nor can they adequately accommodate the child's special needs, she will continue to maintain contact with the child at the current residence of the child.

The Family Counsellor has informed me that she is of the opinion that the agreement between the parties which was reached at our offices will serve the best interests of the child concerned and will promote a sense of stability in his young life which is imperative due to his fragile condition.

It is, however, my humble submission that there are no sound reasons which have been presented that would justify taking away any parental responsibilities and rights that the First Respondent holds in respect of the child by the Court in conjunction with the First Respondent. It is Important that the First Respondent

continue to be actively involved in the caregiving and upbringing of the child by the Applicant, and I submit that this can only be achieved if they are both co-holders of parental responsibilities and rights in respect of the child.”

[28] The report finally concluded with the following recommendations:

“1 That Applicant and First Respondent be granted full parental responsibilities and rights with regard to the care of the minor child.

2 The specific parental right of residence of the minor child to be awarded to the Applicant.

3 That specific parental responsibilities and rights with regard to contact to the minor child be awarded to the First Respondent as per the recommendations of the Family Counsellor.

4 That the parental responsibilities and rights with regard to the guardianship of the minor child be awarded to the Applicant and First Respondent.”

[29] No recommendations were made with regard to the biological father and one can only assume that it was on account of the conclusion reached in the report of Family Advocate that he did not acquire any parental responsibilities and rights in terms of Section 21 of the Children's Act and that accordingly there was no need for any order to be made as against him.

[30] The matter came before Court on 26 April 2018, and the Court

made an order in the following terms:

- 1.1 Both the second and third respondents were granted full parental responsibilities and rights with regard to the guardianship of M[....];
- 1.2 Both the second and third respondents were granted full parental responsibilities and rights of M[....];
- 1.3 The first respondent's rights in terms of section 18(2)(a), (b) and (c) and section 18(3) were forthwith terminated until application was made for the restoration of such rights.

[31] The order made on the 26 April 2018 was made on an unopposed basis and no judgment was delivered setting out the reasons for the order made. It is however fair and reasonable to assume that the Court was satisfied that on the largely undisputed facts before It, including the report of the Family Advocate, that there was a proper basis on the facts and in law to make the order that it ultimately made.

[32] During argument in these proceedings the import of para 1.3 of the order of the Court of the 26 April 2018 was raised, given the view of the Family Advocate that the first respondent did not acquire any parental responsibilities and rights. It was suggested by Counsel for the second and third respondents (who also appeared in the matter on behalf of the maternal grandmother in the High Court) that the order was probably made as a matter of caution rather than as a matter of necessity given the conclusion reached by the office of the

Family Advocate and which accorded with the facts that the biological father did not acquire any responsibilities and rights in respect of M[...].

[33] M[...] died on the 28 April 2018, just two days after the grant of the order by this Court.

The issues for determination

[34] In considering the relief sought by the applicant, the following issues arise for determination:

In respect of the first respondent

1. Is the first respondent a parent for the purpose of inheriting as contemplated in section 1(1)(d) of the ISA and in that context whether:
 - 1.1 It would suffice if he was only a biological parent who had not acquired parental rights and responsibilities;
 - 1.2 Alternatively if he did, what the effect was of the termination of his parental responsibilities and rights, as ordered by the High Court?

In respect of the second respondent

1. Is the second respondent a parent for the purpose of inheriting as contemplated in section 1(1)(d) of the ISA.
2. If she is, does the order of the High Court of the 26 April 2018 affect her position in any manner?

In respect of the third respondent

1. Is she a parent for the purposes of inheriting as contemplated in section 1(1)(d) of the ISA.
2. What effect, if any does the order of the High Court of the 26 April 2018, have on her ability or otherwise, to inherit from the estate of M[...] in terms of section 1(1)(d) of the ISA?
3. Can it be said that the effect of the order of the High Court was equivalent to a *de facto* adoption, triggering the provisions of the Children's Act and the ISA relating to adoption and its consequences?

Analysis

The approach to the interpretative task and the general aids the Court may have regard to in this process.

[35] How is the Court to approach the task of interpreting section 1(1)(d) of the Intestate Succession Act?

[36] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵ the Supreme Court of Appeal held:

“[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastien Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the

⁵ 2012 (4) SA 593 (SCA).

provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, - read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[37] In approaching the issues requiring determination, 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.

[38] Becoming a parent is an ideal many aspire to reach as for many it represents the fulfilment of an important purpose of their lives - to procreate and introduce into the world a child with whom a relationship of love and caring can be nurtured. For many others however, It remains an elusive ideal as biology and other factors conspire to deprive many of the opportunity to become parents.

[39] At the purely biological level and without overly simplifying the issue, it may well be relatively easy and uncomplicated for most people to become a biological parent. It is achieved when the sperm cell of a man successfully enters and fuses with an egg cell of a woman leading to fertilisation of the egg and the development of the human body from a one celled egg zygote (a cell formed by a fertilisation event between two gametes).

[40] And while biological parenthood may well be the starting point of parenthood in all instances, the role and place of a parent beyond birth becomes much more than simply a matter of biology. It often happens that the biological parent ceases to play any further role in the life of the child as would be in the case of adoption or a child born through an agreement of surrogacy or a child who was abandoned and deserted.

[41] In these instances the parent/s who have the biological link with the child do not cease being biological parent/s but others may take over

the role of being parents *in situ* and this may occur either on a *de facto* basis or as a result of a formal legal process generally resulting in an issue of an order by a Court. Simply put there are many paths to becoming a parent just as there are many forms of parenthood.

[42] And so what emerges is that the term parent is a wide term that is capable of housing within it different meanings depending on the context, the particular factual circumstances that may exist and the extent to which the law may have been called into aid to regulate the relationship between a child and the person who plays the role of parent. Thus, there are the biological parents of the child (also referred to as the natural parents), there may be adoptive parents, surrogate parents, persons who acquire responsibilities and rights as a result of a Court order and possibly *de facto* parents of a child. In all of this, the role and place of biology and blood is limited, the primary focus being the relationship that exists between the child and the parent (or the person who discharges that role)⁶.

⁶See also *Centre for Child Law v NN and Others (32053/2014) [2017] ZAGPPHC 682 (25 October 2017)* where Jansen van Nieuwenhuizen, J dealt with a novel issue in which two babies, a girl and a boy, were switched (due to the negligence of hospital staff) at birth and subsequently raised as their own by their non-biological parents. The discovery of the fact that came after a paternity test concluded that neither of the parents of that child was the biological parents. After an investigation was conducted it was discovered that the two babies were switched in hospital shortly after birth. In paragraph [6] of the judgment the Court explained that for purposes of the judgment, the non- biological parents will be referred to as the psychological parents of the respective children. In this regard a panel of psychologists and other experts were constituted to investigate and make recommendations to Court. In a joint minute the following points of agreement were made [39] ... 3. *A speedy legal resolution to this situation should be found. It is not in the best interest of the children as a result of the stress imposed on the parents that this matter is not resolved.* 4. *The experts were in agreement that the children should remain with their psychological parents.* 5. *The psychological parents should be provided with the full responsibilities and rights in respect of the children which they have been raising and a de facto adoption should take place with immediate effect.*"

[43] At the same time the law in South Africa has over time seen the transition in the parent-child relationship from what was traditionally called 'parental authority' or 'parental power'⁷ to the idea of parental responsibilities and rights. Visser and Potgieter⁸ defines parental authority or power as "the sum of rights, responsibilities and duties of parents with regard to their minor children on account of their parenthood, and which rights, responsibilities and obligations must be exercised in the best interest of such children and with due regard to the rights of the children".

[44] Foxcroft J, in the matter of *V v V*⁹ stated:

"There is no doubt that over the last number of years the emphasis in thinking in regard to the questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also finds expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions."

⁷See Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* (2ed, 1999) 313-316 and the authorities cited there) where it was stated the term "*parental power*" may be regarded as outmoded and unsatisfactory, if regard is had to the modern emphasis being on the rights of children rather than on the "*power*" relationship between parent and child.

⁸ Introduction to Family Law (2nd edition) 199.

⁹1998 (4) SA 169 (C) at 176D.

[45] The interpretation of section 1 (1)(d) of the ISA must also take place with due regard to section 39 of the Constitution¹⁰ which provides as follows:

"39. (1) When interpreting the Bill of Rights, a court, tribunal or forum-

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹⁰The Constitution of the Republic of South Africa. 1996.

[46] Section 28 of the Constitution in turn protects and promotes the rights of children in a compelling manner placing the best interest of the child principle at the centre of all matters concerning the child¹¹. The following extracts from section 28 have relevance here.

28. (1) *Every child has the right-*
- (a)...
 - (b) *to family care or parental care, or to appropriate alternative care when removed from the family environment;*
 - (c) *to basic nutrition, shelter, basic health care services and social services;*
 - (d) *to be protected from maltreatment, neglect, abuse or degradation;*
 - (e)- (i) ...
- (2) *A child's best interest are of paramount importance in every matter concerning the child.*
- (3) *In this section "child" means a person under the age of 18 years.*

The particular provisions of the Intestate Succession Act and the

¹¹See *S v M* (CCT 53/06) 2008 (3) SA 232 (CC) where the Constitutional Court had to consider whether to impose imprisonment on the primary caregiver of young children and whether the Courts below paid sufficient attention to the constitutional provision that *in* all matters concerning children, the children's interest shall be paramount.

Children's Act that have relevance in these proceedings

[47] All of the respondents place reliance on section 1(1)(d) of the ISA in advancing their right to inherit. The section and those following it provide as follows:

"(1) If after the commencement of this Act a person (hereinafter referred to as

the 'deceased) dies intestate, either wholly or in part, and-

(a) ...

(b)...

(c)...

(d) is not survived by a spouse or descendant, but is survived-

(i) by both his parents, his parents shall inherit the estate in equal shares.

(ii) ...

(e) - (f) ...

(2) Notwithstanding the provision of any law or the common or customary law, but subject to the provisions of this Act and sections 43 and 297(1)(f) of the Children's Act, Act 38 of 2005 having been born out of wedlock shall not affect the capacity of

one blood relation to inherit the estate of another blood relation.

(3) ...

(4) In the application of this section -

(d) the degree of relationship between the blood relations of the deceased and the deceased-

(i) in the direct line, shall be equal to the number of generations between the ancestor and the deceased or the descendant and the deceased (as the case may be);

(ii) in the collateral line shall be equal to the number of generations between the blood relations and the nearest common ancestor, plus the number of generations between such ancestor and the deceased;

(e) an adopted child shall be deemed-

(i) to be a descendant of his adoptive parent or parents;

(ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child.

...

(5) *If an adopted child in terms of subsection (4)(e) is deemed to be a descendent of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.*"

[48] The ISA does not define what a "parent" is for purposes of the Act and it was suggested that there is no single meaning of what a parent means as it may range from and include a biological parent, an adoptive parent, a legal parent and the like¹².

[49] "Parent" is however defined in the Children's Act as follows:

"parent, in relation to a child, includes the adoptive parent of a child, but excludes-

(a) *the biological father of a child conceived through rape of or incest with the child's mother;*

(b) *any person who is biologically related to a child by reason of only being*

a gamete donor for purposes of artificial fertilization; and

¹² See further in this regard the wide definition attributed to the term "parent" in the South African Schools Act 84 of 1996:

"Parent" means-

(a) the parent or guardian of the learner;

(b) the person legally entitled to custody of the learner; or

(c) the person who undertakes to fulfil the obligations of a person referred to in paragraphs (a) and (b) towards the learner's education at school.

(c) a parent whose parental responsibilities and rights in respect of a child have been terminated.”

[50] Section 18 of the Children's Act provides for the acquisition and loss of parental rights and responsibilities and provides as follows:

“(1) A person may have either full or specific parental responsibilities and rights in respect of a child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right -

(a) to care for the child;

(b) to maintain contact with the child;

(c) to act as guardian of the child; and

(d) to contribute to the maintenance of the child.”

[51] The acquisition of parental responsibilities and rights by an unmarried father is regulated in section 21 of the Children's Act and determines as follows:

“21 Parental responsibilities and rights of unmarried fathers

(1) The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-

(a) *if at the time of the child's birth he is living with the mother in a permanent life-partnership; or*

(b) *if he, regardless of whether he has lived or is living with the mother-*

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

(2) *This section does not affect the duty of a father to contribute towards the maintenance of the child.*

(3) (a) *If there is a dispute between the biological father referred to in subsection (1) and the biological mother of a child with regard to the fulfilment by that father of the conditions set out in subsection (1) (a) or (b), the matter must be referred for mediation to a family advocate, social worker, social service professional or other suitably qualified person.*

(b) Any party to the mediation may have the outcome of the mediation reviewed by a court.

(4) *This section, applies regardless of whether the child was born before or after the commencement of this Act."*

Analysis

[52] It is against that constitutional and legislative backdrop that the matters that arise for determination must then be considered.

The Applicant

[53] The applicant, as executor is charged with the administration of the estate of the late M[...] and as such holds no financial or other interest in the estate. Faced with what may be termed competing claims on the right to inherit, he has approached this Court to seek directions with regard to the devolution of the estate in terms of the ISA.

[54] While there was some suggestion on the part of the applicant that the Court order granted on 26 April 2018 may well have had the same effect as an adoption order and could constitute a *de facto* adoption, the matter was not seriously pursued in argument. It is in any event not an issue I will deal with further as it is highly doubtful that South African law recognises the concept of a *de facto* adoption¹³ and the third respondents has also indicated that she did not consider

applying for the adoption of the late M[...].

The entitlement of the first respondent to inherit

[55] The first respondent confirms that his parental responsibilities and rights were terminated in regard to sections 18(2)(a), 18(2)(c) and 18(3) but says that the obligation to maintain the child as contemplated by section 18(2)(d) of the Children's Act remained intact suggesting that his legal relationship with the child somehow remained intact and that the Court order of the 26 April 2018 did not divest him of all his rights and responsibilities as parent.

[56] The first respondent contends that our scheme of intestate inheritance is blind to the worthiness of individual heirs¹⁴ to inherit and that the right to inherit is located in and derived from a particular biological or marital relationship between heir and deceased¹⁵ It is, says the first respondent, a matter of blood rather than of worthiness, a matter of biology rather than a matter of legal interpretation.

¹³ Flynn v Farr No and Others 2009 (1) SA 584 (C).

¹⁴ See Corbett, Hofmeyr & Khan The South African Law of Succession 2nd ed (2001) 81 - Corbett argues that the Court should not be limited to the known and accepted grounds of unworthiness, but should be allowed to disqualify a persons based on the specific circumstances taking into account public policy; See further in this regard *Pillay v Nagan 2001 (1) SA 410 (DJ where it was confirmed that Courts are not limited to the know and recognized principles of unworthiness and that they could be expanded on the basis of public policy.*

¹⁵ See Cronje and Roos Casebook on the Law of Succession (2002) 181 which suggest that the Court should look at the conduct or the beneficiary towards the deceased in order to determine whether the beneficiary is unworthy to inherit or not.

[57] The first respondent submits that the section 18 of the Children's Act does not preclude the natural parent of a child from the right to inherit for the child's intestate estate. Under the circumstances, the provisions of the ISA should be followed to the letter and that the first and second respondent, as the parents of M[...], should inherit the intestate estate in equal shares.

[58] While it may be so that section 1(1)(d) of the ISA refers to parents in the wide sense and that it may be possible to interpret parents as including a biological parent, it must also in the same vein be possible to interpret parent as a parent other than a biological parent for the purpose of the section given the lack of specificity in the language used in the section. Accordingly it must in my view follow that the section is capable of the interpretation that the first respondent contends for but that is not the only interpretation that is possible.

[59] In this regard *Natal Joint Municipal Pension Fund* makes the point that where than more than one meaning is possible a business and sensible like approach must be taken and if I follow that injunction then the following become relevant in this regard.

[60] The first respondent as the biological father of M[...] never acquired any parental responsibilities and rights in respect of M[...] as contemplated in section 21 of the Children's Act.

[61] It was certainly possible for him to have done so as section 21 sets a relatively low bar for a biological father to acquire parental responsibilities and rights and they include contributing in good faith to the child's upbringing or contributing in good faith to the expenses in connection with the maintenance of the child.¹⁶

[62] The first respondent elected not to have anything to do with his child largely on account of the disability that the child was born with. That the child was born with a disability was the result of human error but whatever its cause a child with a disability is no less in need of and no less deserving of the right to parental care. On the contrary it may well be argued that a children with disabilities require special care and responsiveness from parents if they are to live with dignity and achieve their potential.

[63] Without wishing to make a moral judgment on the conduct of the first respondent in permanently severing the link between himself and his child, it is so that his conduct in doing so stands in stark contrast with all the Constitution and the Children's Act seek to advance in how children in general and children with disabilities in particular are to be treated in

¹⁶ ***“21 Parental responsibilities and rights of unmarried fathers***

(1) *The biological father of a child who does not have parental responsibilities and rights in respect of the child in terms of section 20, acquires full parental responsibilities and rights in respect of the child-*

(a)...

(b) *if he, regardless of whether he has lived or is living with the mother•*

(i) ...

(ii) *contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.*

our society.

[64] Section 28 of the Constitution affirms the right of a child to family or parental care while section 11 of the Children's Act, in dealing with children with disabilities or chronic illness, confirms in large measure the constitutional injunction of section 28. Despite this there was simply no parental care or love forthcoming from the first respondent and while he remained the biological or natural parent of M[...], he certainly did not become a parent in any other sense to M[...] and in particular in the sense described in the Constitution and the Children's Act as the person who cares for, maintains, acts as guardian, protects against neglect and abuse and provides the love and guidance for the child to thrive and achieve its full potential.

[65] To this extent and on the facts of this matter interpreting section 1(1)(d) of the ISA to mean that reference to parent is limited to the biological or natural parent is simply untenable, will not make sense, will not accord with the understanding of what a parent is and will lead to absurd results. It will mean that the first respondent will be regarded as a parent for the purposes of the ISA but will not have been a parent for the purposes of the Children's Act. It will have the result that someone who has severed all links with the child and who has made a conscious election not to be a parent, will nevertheless retain parenthood for the sole purpose of succession. It will mean conferring on the first respondent the legal benefits that section 1 (1)(d) of the ISA contemplates and

recognising him as a parent notwithstanding that his conduct during the short and troubled life of his child was characterised by his total failure to appreciate and discharge his constitutional obligations and responsibilities towards his child.

[66] Such an interpretation would in my view offend the entire constitutional scheme and the values it is founded upon and would ultimately not be in the best interest of the child. Mindful that M[...] is deceased, I do not believe that the best interest principle ceases to operate upon the death of the child. The Court is called upon to deal with a dispute relating to the property of the child and section 28 is clear that 'a child's best interest are paramount in every matter concerning a child'. The estate of a child is a matter concerning the child as it relates to the property of the child and it must follow that the best interest principle continues to have relevance and this Court is obliged to take it into account. It simply cannot be said that the recognition of the first respondent who failed to act in the best interests of M[...], accords with the best interests of M[...]. It is simply irreconcilable.

[67] In the matter of *Haskins v Wildgoose*¹⁷, Hefer, J in reference to the The Child Care Act¹⁸ interpreted the term "parent" as including the father of a child born out of wedlock¹⁹. The Court admitted, however, that the

¹⁷ 1996 (3) All SA 446 (T).

¹⁸ Act 74 of 1983.

¹⁹At 450j-451a. The Court included, *inter alia*, the following reasons for the extended interpretation: (a) The ordinary meaning of the word "parent" embraced biological parents (at 451a); (b) the change in legislative language - whereas the Children's Act 33 of 1960 excluded the father of a

father was "...from a legal point of view. no different from that of any outsider who seeks to have contact with the child against the wishes of his parents"²⁰ and could be considered a parent "in name only"²¹ "[H]e is not, and indeed never was, the guardian of the child nor did he exercise any authority over him".²²

[68] It is for these reasons and in the context of the particular facts of this matter that I conclude that the first respondent is not a parent as contemplated in section 1 (1)(d) of the ISA. He does not meet the factual nor the legal requirements of parenthood and his biological link (which was his only link to M[...]) was simply a biological fact that carried no legal consequence. It is for these reasons that I conclude that he is not a parent for the purposes of section 1 (1)(d) of the ISA and as such is not entitled to inherit intestate from the estate of M[...].

The entitlement of the second respondent to inherit

[69] The second respondent, as the biological mother of the child, acquired full parental responsibilities and rights upon the birth of M[...]. Regard being had to the provisions of section 19 of the Children's Act, she had the responsibility in law to amongst other

child born out of wedlock from its definition of "parent", the Child Care Act 74 of 1983 is silent on the issue, thus, according to the court (at 451b) . apparently choosing to leave the decision to the context (the same conclusion was reached in Fraser v Children's Court, Pretoria North 1997 (2) SA 218 (T) at 228E); and (c) policy considerations, relating principally to the best interest of the child concerned (at 451()). See Acquisition of Parental Responsibilities and Rights, AS Louw, May.2009, https://repository.up.ac.za/bitstream/handle/2263/27861/thesis.pdf?sequence_ visited 2 November 2020.

²⁰ At 452f.

²¹ At 453f.

²² *Ibid.*

things care for M[...], maintain contact with him, to act as his guardian and to contribute towards his maintenance. This is in contrast to the position of the first respondent, who apart from the duty to contribute towards the maintenance of M[....] carried no other responsibility.

[70] So while in law the second respondent's position was considerably different from that of the first respondent, in reality she faltered in significant ways in discharging that responsibility so much so that it triggered an application to the High Court by the third respondent to divest the second respondent of her parental rights and responsibilities. There is little doubt that her relationship with M[....] was an one erratic and a difficult one and that even though she lived in the same house as her child, most of his needs were taken care of by the third respondent.

[71] In the High Court application brought by the third respondent against the first and second respondents, she says the following about the second respondents contact with and care for M[....]:

“The First Respondent continued to physically care for M[....] for approximately two years after his birth. I assisted her during the aforesaid period whenever I could. My intervention became more frequent consequent upon the difficulties that the First Respondent showed relating to depression, moodiness, sadness and her withdrawal. Her moods progressively became more erratic and she

often conducted herself in such a manner that arguments ensued between her and me, as well as between her and other family members. At the same time, she stopped showing M[...] the love and affection he deserved and my intervention necessarily became more frequent and intense. The First Respondent eventually indicated to me that she was overwhelmed by the additional attention and care M[...] required as a result of his disabilities. Eventually the First Respondent often left M[...] without any care to attend social activities while I was at work."

[72] In the report of the Family Advocate it appears however that the second respondent intimated her love for her son and her commitment to play a greater role in his life while conceding the dominant role played up to then by the third respondent in the upbringing and care for M[...]. Arising out of this there appears to have been some form of arrangement arrived at between the second and third respondents with regard to the future care of M[...] with the third respondent being his primary caregiver while the second respondent would retain contact with him and continue to be a part of his life.

[73] It appears that this may have motivated the Family Advocate in not recommending the termination of the second respondents parental responsibilities and rights and in concluding that there were no sound reasons to have done so. The Court ultimately would have been satisfied that the order it made then was in the best interests of M[...] and that those interests were best served by ensuring that the second respondents

responsibilities and rights in respect of M[...] remained intact.

[74] Given the passing of M[...] just two days after the order of the 26 April 2018 was made, I imagine it will always remain a matter of conjecture and speculation whether in fact the second respondent would have made the transformation required of her in becoming a more meaningful and relevant parent in the life of M[...] had he continued to live. In any event that is not relevant for the purpose of the determination I am required to make and I must proceed on the basis that the second respondent retained her parental responsibilities and rights and that in fairness to her, I must have regard to her depression and anxiety following the birth of M[...] as possible mitigatory factors in the unacceptable and erratic manner in which she related to M[...] and responded to his needs.

[75] She was thus not only a biological parent, but also a parent as understood by the Children's Act and, if regard is had to the evidence of the third respondent in the High Court proceedings, she cared for M[...] in the first two years of his life but was erratic thereafter in her relationship with him.

[76] I am satisfied that she is properly considered a parent for the purpose of section 1(1)(d) of the ISA. Such a conclusion is not inconsistent with the facts relating to her relationship with M[...] and also does not run counter to the objectives the Children's Act and the Constitution seek, in advancing the best interest principle. She would accordingly be entitled to inherit from the intestate estate of M[...] as a parent.

The entitlement of the third respondent to inherit

[77] The third respondent was the primary and substantial caregiver and the dominant parental figure in the life of M[...] from his birth until his passing. She was not his biological parent and the only biological link to M[...] was through her daughter the second respondent.

[78] Whatever the factual position may have been, in law she acquired parental responsibilities and rights, as well as guardianship in respect of M[...] and if one has regard to the definition of parent in terms of the Children's Act which is largely exclusionary in nature then it must be arguable that she should be regarded as a parent for the purposes of the Children's Act.

[79] In this regard it seems logical and sequential that if a parent is excluded from being regarded as parent upon the termination of their parental rights and responsibilities then conversely a person who is granted parental rights and responsibilities should be regarded as a parent. Such a person as in the case of the third respondent enjoyed parental rights, guardianship as well as primary residence rights in respect of M[...]. All of these rights and responsibilities cumulatively covered every feature of both factual and legal parenthood. It begs to question as to what terminology is to be used in respect of a person who

enjoys such rights and accepts the responsibilities that go with it. Is it a 'person who has parental rights and responsibilities'?

[80] Apart from sounding sterile and being reminiscent of some contractual arrangement rather than reflective of a deep and caring bond that parenthood has come to characterise, it is also undignified. Whatever its shortfalls there will always remain something special and profound about being a parent. Generally, it is a term that instinctively becomes descriptive of those in respect of whom it is used. It must surely follow that when a person has done all and more that is implicit in and required of a being a parent, their right to dignity must demand that we refer to them as such. Calling them holders of parental rights and responsibilities is legally deficient and inept but more than that it is at odds with what they best do - being parents.

[81] It may also be useful at this juncture to recall and record that from time immemorial grandparents and grandmothers in particular have played a dominant and a defining role in the lives of millions of our people. While what they did was triggered by an instinctive sense of responsibility and a deep and abiding love for their grandchildren it was also for a long time located in the political, economical and social destruction that apartheid brought to bear on the lives of Black families. These brave women would not allow the might of the apartheid State to intimidate them as their sense of duty to their families emboldened them to do what was necessary. They were extraordinary parents in every

sense of the word just as the third respondent is entitled to be called a parent in truth, in reality and in law.

[82] In *Van der Linde v Van der Linde*²³ Hattingh, J held that the concept of mothering is determined by the quality and function thereof and is no longer determined by the gender of the parent and the proposed role that they are classified as in society. A father can be as good a "mother" as the biological mother of the child, whilst a mother can be as good a "father" of as the biological father of the child. The relevance to this conclusion by the Court to the position of the third respondent, is that the third respondent, based on the role she undertook, as mother, father, caregiver and nurturer which is clear from the immense amount of love and care she provided to M[...] undoubtedly makes her a parent not only according to the *bonis mores* but even beyond that the parental responsibilities and rights and guardianship she obtained in the 26 April 2018 Court order in regard to M[...]

[83] It is for these reasons that I conclude that the third respondent is a parent for the purposes of section 1(1)(d) of the ISA and that she is entitled to inherit intestate from the estate of the late M[...].

Comparable position in other jurisdictions

[84] In United State of America (US) judgment *People v Wambar*

²³ [1996] 1 All SA 43 (0) - quoting from Editor's Summary.

²⁴the defendant appealed against a conviction of attempted unlawful taking of a child. The Trial Court convicted and sentenced the defendant. The defendant argued on appeal that his conviction must be overturned as he could not be convicted of attempted taking of his biological child, even though his parental rights to the child had earlier been terminated. In some states in the US parental responsibilities and rights may be terminated permanently which is not possible in South Africa except where legal adoption takes place. The Trial Court disagreed with the submission of the defendant stating *inter alia*:

"[I]t's just inconceivable the [L]egislature would have wanted to allow for an exemption, if you will, of a person, of a parent being charged with kidnapping once the parental rights have been terminated. Don't [sic] seem conceivable that the [L]egislature would have wanted to protect a parent who no longer, really in the eyes of the law, is a parent. For all intents and purposes, they have no right to be a parent."

"In the context of intestate succession, MCL 700.2114(3) states that [t]he permanent termination of parental rights of a minor child by an order of [300 Mich.App. 127] a court of competent jurisdiction ... ends kinship between the parents whose rights are so terminated and the child for purposes of intestate succession by that parent from or through that child."

²⁴ 831 N.W.2d 891.

[85] As mentioned in paragraph [61] above the first respondent never attempted to have his parental responsibilities and rights restored nor did he oppose the application for the termination of his parental rights and responsibilities.

[86] In *Robert Simms v Estate of Brandon Michael Blake; Melanie Gosser Blake, individually; Melanie Gosser Blake, Co-Administrator of the Estate of Brandon Michael Blake; Derek Blake, individually; and Derek Blake, Co-Administrator of the Estate of Brandon Michael Blake*²⁵ discussing the limitation on the right to inherit from a child of which a parent has found to have abandoned care and maintenance the Court of Appeals held that:

“Mandy Jo's Law²⁶ provides that a parent who had 'wilfully abandoned the care and maintenance of his of her child' shall not have a right to intestate succession from the child's estate or the right to recover any proceeds from the child's wrongful death. There is scant published authority applying Mandy Jo's Law in Kentucky. In 2003, three years following the enactment of Mandy Jo's Law, this Court confronted it for the first time. See Kimbler v. Arms, 102 S.W.3d 517, 525 (KY. App. 2003). After considering the statutory terms and examining authority for other jurisdictions, we determined that a factually intensive, case-by- case inquiry was necessary to determine whether a

²⁵ No. 2017-CA-000306-MR Commonwealth of Kentucky Court of Appeals.

parent abandoned his or her child.

In doing so, we implicitly recognised that care and maintenance are interrelated components of a parent's overall responsibilities for his or her minor children. The ultimate question is whether the parent abandoned his or her child, and no one factor is determinative of that issue.

We explained:

[F]or the purpose of applying Mandy Jo's Law, abandon means 'neglect and refusal to perform natural and legal obligations to care and support, withholding of parental care, presence, opportunity to display voluntary affection and neglect to lend support and maintenance ...It means also the failure to display responsibility of care, training and guidance during the child's formative years.'

Further, as correctly observed by the circuit court, the differing factual situations that are likely to appear in this context make a bright line rule impossible, and, as such, analysis under Mandy Jo's Law must be done on a case-by-case basis."

[87] The Court went even further saying that the appellant in the matter "more likely" elected to pay child support and not pursue court-ordered

visitation with his child, Brandon because he "was trying to maintain a relationship with his wife after Brandon was born" and simply "found it more convenient to stay absent". The Court concluded that by "*forsaking his full statutory parental duty to provide Brandon both 'care and maintenance', the appellant shirked essential obligations, thereby forfeiting inheritance or recovery right as Brandon's father pursuant to Mandy Jo's Law.*"

[88] In *the matter of the Estate of Thomas A. Flemming and Others v Judith Kovacs, as personal representative of the Estate of Thomas A. Flemming and Another*²⁷ the Court held the following in respect of a submission that biology is the only factor to be considered in a similar instance where a child died intestate after the biological mother's parental responsibilities and rights were terminated:

"While the order could not change Flemming's status as the biological parent of Thomas, it did end her legal status as his parent. Since Flemming never reestablished the parent-child relationship, in the eyes of the law she was not Thomas' legal parent at the time of his death in 1996."

"The critical question here is what is the meaning to give to the term "parent" as used in RCW 11.04.015(2)(b). Does it refer to one's legal status as a parent, or does it refer to the

²⁷ 21 P.3d 281 142 Wash2.d 412.

biological parent? The probate statute does not define the term "parent". See RCW 11.02.005. Black's Law Dictionary defines "parent" as: "[t]he lawful father or mother of someone. In ordinary usage, the term denotes more than responsibility of conception and birth." Black Law Dictionary 1173 (7th ed. 1999). The Court of Appeals interpreted the term to refer to a person's legal status, thus disqualifying Flemming from an intestate distribution under RCW 11.04.015(2)(b)."

[89] Further in *In re Koehler Estate*²⁸ in interpreting the intestate succession act (MCL 700.2114(4)) the Court found the following:

"The Legislature intended a dual showing of parental malfeasance before an intestate inheritance may be precluded: both economic and emotional malevolence. Turpening supports this view: 'The statute's meaning is clear that a natural parent is barred from inheriting except if the natural parent 'openly treated the child as his' and 'has not refused to support the child'.

....

...a 'refusal' reflects 'an act of the will'".

[90] As I have concluded above, the first respondent did not in any way indicate that he was interested and willing to be a parent to M[....]. He was not even present at M[....]'s birth, he never openly treated M[....] as his and has not in any way contributed to the upbringing of M[....] in stark contrast to the third respondent, who from his discharge from hospital after birth up to the day of his passing, lovingly provided, supported, cared for and sacrificed so much, she acted in the most unselfish way, to take care of every need of M[....] and fighting for his dignity and rights.

Costs

[91] With regard to costs all counsel were unanimous that given the significance of the legal issue involved as well as the impecunious position of the first to the third respondents, the costs of the application should be borne by the estate of the late M[....]. This approach appears to be reasonable and while no order is necessary in respect of the costs of the applicant, as those costs would ordinarily and irrespective of the outcome of the application be borne by the estate.

[92] In so far as the costs of the first and second respondents are concerned, my view is that the estate should bear those costs on the scale as between party and party. I do not wish to unduly burden the

estate with costs on an attorney and own client scale and where there is likely to be a shortfall, that shortfall which I hope will not be and should not be substantial will be met by the litigants. The first respondent is in gainful employment, while the second and third respondents will be able to meet any shortfall from the proceeds of what they will inherit from the estate of the late M[....].

Order

[93] In the circumstances I make the following order:-

1. The second and the third respondents are declared to be parents of the late M[....] L[....] D[....] for the purposes of section 1 (1)(d) of the ISA.
2. It is ordered that the second and third respondents shall inherit in equal shares the full estate of the late M[....] L[....] D[....] after the payment of all expenses and charges.
3. The applicant shall be entitled to recover the costs incurred by it in this application on an attorney and client scale from the estate of the late M[....] L[....] D[....] while the party and party costs of the first, second and third respondents should also be paid by the estate.

N KOLLAPEN

JUDGE OF THE HIGH COURT

GAUTENG, PRETORIA

APPEARANCES

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Second and Third Respondent's Attorneys: Fried Attorneys

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