

TECHNICAL CORRECTION OR TECTONIC SHIFT: COMPETING
DEFAULT RULE THEORIES UNDER THE NEW UNIFORM
PROBATE CODE

*Lee-ford Tritt**

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*. Associate Professor of Law, University of Florida Fredric G. Levin College of Law; Director, The Center for Estate Planning; and Associate Director, The Center on Children and Families. Research for this Article was generously supported by the University of Florida Levin College of Law summer research program. The author wishes to thank the following for helpful conversations, comments, and encouragement: George L. Dawson, Mark Fenster, Lyrissa Lidsky, Martin McMahon Jr., Kenneth B. Nunn and Michael R. Siebecker. With sincere thanks and appreciation to my assistants Heather J. Howdeshell, Paul D. Shafranski, and William G. Smith for their superb research and warm support.

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INTRODUCTION

Succession law, the law governing trusts and estates, is experiencing an identity crisis. Similar to an individual going through a midlife crisis, the laws of succession seem to be in search of a new purpose or meaning. It seems odd that a legal discipline as old as private property succession law would lack the continuity of some shared jurisprudential image. Yet, despite its historical legacy, succession law appears to have neither a complete descriptive theory (explaining what the law is) nor a complete normative theory (explaining what the law should be), hence the identity crisis.

It may seem intuitive that before lawmakers impose a consequence on property owners there should be a unifying normative basis for making the imposition or preferring the selected consequences of the law, or both. However, rule making in succession law seems to be implemented and developed in an ad hoc manner. Although scholars and legislatures tend to pay lip service to succession law’s historical core goal of effectuating a decedent’s testamentary intent, this once-central value has been cast to the

periphery of legal relevance. Accordingly, the policy goals of succession laws are largely amorphous, with no consensus built around any particular theory.¹ This patchwork nature of succession law, though, has proven to be fertile ground for scholarship. Succession law has been the subject of intensive analysis, debate, and exploration of different theories to justify and advocate the evolution of succession law.

There is no better example of this identity crisis than the simmering debate over the past few decades among scholars and state legislatures concerning how the laws of succession should change to encapsulate more fully the evolving notions of American families. Changing family structures² and emerging reproductive technologies³ influence the definition of “parentage” in law and society. These influences may undermine the traditional definition of a parent-child relationship—the presence or presumption of a genetic link between two individuals. Recognition of child status is of particular concern for succession law in determining distributions to “children” for intestacy⁴ purposes and for the law of wills.⁵

To date, scholars have proffered myriad succession law rulemaking theories to justify different and often competing social policies concerning the parent-child relationship for property succession law purposes. Goals that have been advanced are numerous, such as advancing social equity and fairness for survivors, providing stability and financial support for survivors, acknowledging reliance between individuals, facilitating reciprocity between individuals, rewarding meritorious behavior (or penalizing undesirable behavior), implementing social norms, protecting the nuclear family, serving societal interests, fostering family harmony, fulfilling expressive functions, advocating transformative functions, and so forth. Basically, succession law jurisprudence has become the theoretical amal-

1. See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1033–34 (2004) [hereinafter Hirsch, *Default Rules*] (“[S]cholars . . . have developed no general theories of inheritance defaults . . .”).

2. See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (acknowledging this social change, the United States Supreme Court stated that “[t]he demographic changes of the past century make it difficult to speak of an average American family”); Tanya K. Hernández, *The Property of Death*, 60 *U. PITT. L. REV.* 971, 1004 (1999) (“Only one in four families conforms to the idea of the traditional nuclear [family] . . .”); Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 *HOFSTRA L. REV.* 1091, 1101–02 (1996) (indicating that the nuclear family is not one which is heavily represented among families anymore and attributing the change to increases in divorce, second marriages, and a greater social acceptance of cohabitation and single people raising children); Maya Bell, *‘Gayby Boom’ Shows No Sign of Slowing; More Gays and Lesbians Than Ever Are Becoming Parents*, *ORLANDO SENTINEL*, Sept. 28, 2003, at A1 (quoting April Martin as saying that what was a “sizeable boom” in the 1990s has become a “groundswell”); Betsy Hammond, *The 2000 Census: More Say “I Do” to Cohabitation*, *OREGONIAN*, June 6, 2001, at A1 (reporting that nine percent of all couples declared themselves “unmarried partners”).

3. Methods of causing pregnancy other than sexual intercourse.

4. Defined as the state or condition of dying without a valid will. *BLACK’S LAW DICTIONARY* 840 (8th ed. 2004).

5. Intestacy law’s definition of parent-child status potentially affects the law of wills in construing undefined terms such as “child,” “children,” “descendants,” “heirs,” etc. See *infra* part I.A.

gamation of granting and weighing preferential status and competing interests affecting the decedent, the survivors, and society.⁶

Recently, the Uniform Probate Code (UPC)⁷ drafters—members of the National Conference of Commissioners on Uniform State Laws (the National Conference)—entered the debate concerning the definition of parent-child relationships and passed a number of amendments (the 2008 UPC Amendments) focusing primarily on defining familial relationships⁸ within the burgeoning areas of artificial reproductive technology (ART) and adoption. These revisions to the UPC may be construed in one of two ways: first, these revisions simply add technical changes to reflect evolving science and technology. Second, the changes reflect a paradigmatic shift in the UPC drafters' approach not only to defining the parent-child relationship but also to reflecting cultural and social policies in succession law default rules.⁹ If the changes are indeed merely technical (i.e., intended to qualify the most recent technological changes in reproduction to fit within the UPC), then married, heterosexual couples are the intended targets of the language changes, and the effects on gay couples or untraditional families are nothing more than collateral consequences. On the other hand, as some legal scholars have opined, the drafters of the UPC may have aspired to use property succession default rules to change our social norms—in theory, changing the rules governing property succession will influence society's perceptions of the parent-child relationship and nontraditional families.¹⁰ Regardless of any articulated rationale, in light of this

6. Hirsch, *Default Rules*, *supra* note 1, at 1036.

7. The National Conference is in its 117th year and “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Probate Code* (2008), <http://www.law.upenn.edu/bll/archives/ulc/upc/2008amends.htm>. The National Conference, which is also known as the Uniform Law Commission, consists of “practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.” *Id.*; see also Justice Michael J. Wilkins, *Report from 7500 Feet*, UTAH B.J. 40 (Sept./Oct. 2008) (describing a commissioner's experience at the July 2008 National Conference meeting in Big Sky, Montana). In general, the UPC proposes a set of laws for both testacy and intestacy; states are free to adopt the UPC's proposals as is, to adopt their own modified version of the UPC, or to reject the UPC entirely and rely on the state's current probate system.

8. Interestingly, in 2008 the UPC did not revise its notions of family across the board. For example, the drafters are conspicuously silent regarding the UPC's recognition of domestic partnerships in addition to spousal relationships (even though partnerships are increasingly recognized by states for both gay couples and unmarried heterosexual couples).

9. Even though the Comments to the 2008 changes imply that the UPC was merely updated to better reflect technological changes in reproductive technology, reflect cultural norms, increase monetary limits otherwise indexed to inflation, and clean up wording, a closer look at the amended language may lead even the most astute lawyer to infer otherwise. See Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 407 (2009) [hereinafter Tritt, *Sperms and Estates*].

10. Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 199–200 (2006) (discussing the Expressive Theory

recent change, the 2008 UPC Amendments are sure to spark intense debate regarding the appropriate use of default rules and the policy goals governing succession law.

Fortuitously, the nature of the 2008 UPC Amendments provide an ideal case study to explore the proper goals of succession law. First, the drafters of the UPC were silent on the overall scope or intent of their proposed changes.¹¹ Second, the 2008 UPC Amendments affect both intestacy laws and the law of wills. Third, the 2008 UPC Amendments affect both types of default rules: “permissive rules,” those rules that should govern property succession unless the decedent opts out of the rules, and “gap fillers,” those rules that presume the intent of the decedent and distribute his or her property when the decedent or testator is silent regarding property dispersal preferences.

Using the 2008 UPC Amendments as a springboard for analysis, this Article considers the proper role of succession law default rules. For instance, what is the appropriateness in general of adapting succession laws to advocate or advance particular societal norms?¹² Moreover, should default rules embrace a consequentialist perspective that attempts to secure a particular policy preference?

Given the wealth of literature on private property succession law theories and goals, why do we need yet another analysis? Quite frankly, existing policy analyses suffer from two fatal deficiencies.

First, in developing a regulatory framework concerning the transfer of private property upon the property owner’s death, analysts typically employ a bottom-up approach—divining policy analysis from a rule specifically tailored to govern an isolated concern. These scholars seem to be rationalizing policies to justify the end result—focusing on the consequence rather than the policy. When evaluating rules set forth within succession law, these rules and their accompanying policy goals curiously do not seem to be set in stone. Scholars and legislators seem to create rules in search of a policy goal, rather than creating default rules based on a prevailing policy goal regardless of the desired end result. For example, reciprocity between committed partners is often touted as a policy goal of succession law and is used as a rationale to justify probate law property rights

of intestacy law, where society can express its views of acceptable conduct by incentivizing or penalizing that conduct within intestacy laws—“[S]ociety merely attempts to teach individuals how their fellow citizens view particular relationships, statuses, or regimes.”).

11. This silence could be construed as a political move on the Committee’s part designed to avoid controversy inherent in changing the definitions of the parent–child relationship within the context of nontraditional families.

12. See, e.g., Andrew J. Cappel, *Bringing Cultural Practice into Law: Ritual and Social Norms of Jurisprudence*, 43 SANTA CLARA L. REV. 389, 475–76 (2003) (discussing the proper role of, and difficulties of using, cultural norms in law more generally); Kris Bulcroft & Phyllis Johnson, *A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics*, 2 J.L. & FAM. STUD. 1, 4–7 (2000).

for same-sex couples.¹³ But should reciprocity really be an overarching policy goal of succession law, or is it merely a rationale dressed up as a policy goal by advocates of same-sex property succession rights?

Second, succession law scholars have exhaustively debated the proper goals of succession law through the lens of an arbitrary, meaningless, and misguided organizational system—a system that distinguishes policy analysis between the laws of intestacy and the law of wills, as if the categories were discrete, disparate, and incongruent. These scholars suggest that because the decedent did not properly draft a will, different policy concerns should be considered in drafting intestacy rules than those considered in drafting rules that affect the construction of testamentary instruments. Because it is fallacious to assume that all individuals without wills have consciously chosen the intestate distribution scheme, and because the definitions in intestacy laws are routinely used by courts to construe will provisions, the foundational principles of succession law should reign equally supreme in both the testacy and intestacy contexts. These scholars and the UPC ignore the historical, and more appurtenant, arena in property succession law in which societal and judicial interests may eclipse decedent's intent. Rather than focusing on testacy and intestacy, this focus on the interplay between decedent's intent and other competing policy interests is more appropriately allocated to an analysis examining the differences in policies underlying succession law's mandatory rules versus its default rules.

To resolve succession law's identity crisis, this Article argues that succession law should return to its roots and refocus solely on fulfilling the decedent's intent. The intent of the decedent, rather than a particular view of society's normative policies, should prevail to control distribution of the decedent's private property.¹⁴ Because of our longstanding beliefs in the free alienation of private property,¹⁵ succession law must account for the decedent's choice in how his or her property is distributed after death; what an individual may choose to do with his property during life should not be unduly restricted after his death.¹⁶ Moreover, the default rules that

13. See *infra* note 63 and accompanying text.

14. The philosophical terrain of private property remains vast and varied, often undulating due to ancillary philosophical commitments to other normative concerns regarding economic or social justice. Defending a particular philosophical concept of private property rights that favors any of those ancillary normative commitments lies well outside the possible scope of this Article. Instead, this Article is limited to discussing the methodology in determining default and mandatory rules of private property succession as property rights are currently conceived within the estate law regime of the United States.

15. See POWELL ON REAL PROPERTY §§ 3.14–.17 et seq. (Michael Wolf ed., Lexis Nexis 2008) (1949) (discussing the evolution of English laws designed to produce freely alienable property beginning in the twelfth to fifteenth centuries).

16. See generally Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–14 (1992) [hereinafter Hirsch & Wang, *Dead Hand*] (discussing the numerous theories used to justify testamentary freedom).

govern succession law should correspond and be in line regardless of whether the decedent dies intestate or testate. The decedent's intent should control.

Therefore, in an attempt to resolve the identity crisis, this Article articulates and defends a rich positive and normative framework for analyzing and developing succession law default rules. In a departure from previous approaches, this framework attempts to analyze the issue from a process-oriented, rather than a results-oriented, perspective. Accordingly, succession law *mandatory rules* should only be imposed to protect the decedent's dispositive wishes or if particular aspects of unregulated transfer of private property at the property owner's death will have socially deleterious effects on members of society. Otherwise, this Article's normative claim is that the *only* goal of succession law *default rules* should be to effectuate decedent's intent.¹⁷

In arriving at this conclusion, Part I considers the default rules of testacy and intestacy, analyzes various policies proffered to justify these rules, and proposes that succession law should return to its original mission of effectuating decedent's intent. Part II introduces the case study of the 2008 UPC Amendments in a detailed description. Part III then analyzes whether the primary policy goal of testamentary intent and succession law's structural goals are effectuated by the 2008 UPC Amendments. Part IV provides recommendations to states considering adoption of the 2008 UPC Amendments on an *a la carte* basis and also recommends language for practitioners to avoid the new default rules, if adopted in the practitioner's state. Finally, the Article concludes that the 2008 UPC Amendments, though beneficial to a sliver of the emerging nontraditional family demographic, are, in fact, hollow technical tweaks which fall short of changes that would ultimately benefit all families, traditional and nontraditional.

I. DEFAULT RULES IN SUCCESSION LAW

It seems self-evident that before lawmakers impose a consequence on property owners, there should be a normative basis for making the imposition and preferring the consequences of the law. Therefore, a clear understanding of and consensus concerning the normative basis for making new law must be understood in order to evaluate the merits of the law. To this end, the new UPC Amendments serve as a fascinating case study because the drafters are silent concerning the normative basis for the revisions.

17. It should be noted that this Article is not arguing that there are no limitations to the concepts of private property ownership or testamentary freedom. Although restrictions to testamentary freedom should be rare, limits may be (and are) warranted at times—but these regulations should be in the arena of mandatory rules, not default rules.

Thus, a substantive analysis of the potential effectiveness of the UPC Amendments must begin with an elementary overview of the foundational purpose and underlying principle of succession laws. In addition, the examination will inevitably consist of weighing and giving preference to competing overarching jurisprudential theories used to justify the creation of rules that should foster succession law's general purpose.

A. *Foundational Purpose and Principle of the Laws of Succession*

1. *Generally*

The purpose of the laws of succession is simple—in a private property system, there must be a procedure to facilitate the transfer of an individual's private property upon death. The very existence of private property thus perpetuates the need for the law of succession. As Professor R. Ely stated in 1914, the laws of succession advance the “continuation of the régime of private property as dominant in the social order.”¹⁸ Embedded within this notion of private property and the orderly transfer thereof is the principle that individuals have the freedom (or right) to control the disposition of their property during life and at death.¹⁹ American society has long recognized the value inherent in protecting an individual's ability to acquire and transfer private property.²⁰ Testamentary freedom is derived from this well-established property law right and is accordingly the governing principle underlying American succession law.²¹ Just as individu-

18. This purpose was first espoused in 1 RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* 425 (1914), in a list format more or less. See John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. MIAMI L. REV. 497 (1977) (further expounding on the policy goals of succession law).

19. The right of a property owner to direct the disposition of property upon her death is commonly known as “testamentary freedom.” Rationales for testamentary freedom vary, and many theories have been proffered in support for the principle of this theory—some widely accepted, others controversial. See e.g., Hirsch & Wang, *Dead Hand*, *supra* note 16, at 5–18 (discussing various arguments for testamentary freedom); Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 RUTGERS L.J. 109, 115–39 (2006) [hereinafter Tritt, *Copyright*] (providing a detailed discussion on the scope and limitations of testamentary freedom). The most fundamental rationale for testamentary freedom is that, in a society based on the theory of private property, the freedom of testation might be the least objectionable arrangement for dealing with property succession at the testator's death. See Hirsch & Wang, *Dead Hand*, *supra* note 16, at 5. Others argue that robust testamentary freedom is natural, creates happiness, promotes wealth accumulation, encourages industry, creativity and productivity, reinforces family ties, promotes responsibility, and allows the testator to adapt to the needs and circumstances of his particular family. See Tritt, *Copyright*, *supra* at 117–30. Each rationale has its proponents and skeptics, but the very breadth of jurisprudential and pragmatic justifications for testamentary freedom is, in itself, a testament to why this concept is at the core of Anglo-American succession law.

20. See Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340 (1966) (describing the history of testamentary freedom and the disposition of private property in American law).

21. It is generally held that the overarching jurisprudential foundation of American estates law is testamentary freedom. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS

als have the right to accumulate, consume, and transfer personal property during life, individuals generally are, and should be, free to control the disposition of personal property at death.²² Thus, testamentary freedom can be viewed simply as one stick in the bundle of rights referred to as property rights.²³

In addition, although the United States Constitution does not speak specifically about testamentary freedom as a property right, a robust public policy favoring testamentary freedom has been fostered in America. For example, states' probate codes have placed very limited restrictions on the testator's ability to transfer property (mainly, a surviving spouse's elective share);²⁴ Article III, Section 3 of the United States Constitution prohibits corruption of blood; the vast majority of the states have abolished the Rule in Shelley's Case;²⁵ and there is a growing trend in the United States of abolishing the Rule Against Perpetuities.²⁶ These examples tend to demonstrate a strong public policy of favoring testamentary freedom.

In the United States, there are generally three ways to implement the disposition and transfer of private property at death: wills, will-substitutes,²⁷ and intestacy statutes.²⁸ While wills, will-substitutes, and

§ 10.1 cmt. A (2003) ("The organizing principle of the American law of donative transfers is freedom of disposition."); VALERIE J. VOLLMAR ET AL., AN INTRODUCTION TO TRUSTS & ESTATES 21 (Thomson West 2003) ("Perhaps the most fundamental principle reflected in the American law of wealth transmission is freedom of testation . . ."); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 7 (3d ed. 2002) (stating the proposition that testamentary "freedom has a strong cultural tradition in Anglo-American law."); Ronald Chester, *Inheritance in American Legal Thought*, in INHERITANCE AND WEALTH IN AMERICA 23, 23-32 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1988); Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 9, 14 (Edward C. Halbach, Jr. ed., 1977) ("It is often said that the principle of freedom of testation dominates the law of the United States."); Tritt, *Copyright*, *supra* note 19, at 111 ("Testamentary freedom . . . is the hallmark principle of estates law."). *See also infra* Part I.A and accompanying notes for further discussion of testamentary freedom. However, some scholars are skeptical concerning the actual deference paid to testamentary freedom in American estates law because of potential biased results from postmortem will contests. *See, e.g.*, Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (theorizing that courts validate wills on the basis of whether the testator bequeathed his or her property to his or her biological family members rather than to nonrelatives); *see also* Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571 (1997) (arguing that the "undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms."). In addition to undue influence, some other legal doctrines potentially check testamentary freedom as well. *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 142-44 (2008).

22. Testamentary freedom extends the concept of absolute property ownership beyond the grave. *See* Tate, *supra* note 21, at 148.

23. *Hodel v. Irving*, 481 U.S. 704 (1987) (stating that the right to transmit wealth at death is a separate, identifiable stick in the bundle of rights called property).

24. *See, e.g.*, Tritt, *Copyright*, *supra* note 19, at 132.

25. *See, e.g.*, DUKEMINIER, *infra* note 28, at 876.

26. *See id.* at 905-09.

27. Basically, a will-substitute is the functional equivalent of a will executed during life. For example, revocable inter vivos trusts, contracts, life insurance, pension plans, and joint accounts are all will-

intestacy statutes differ in a variety of ways, each provides a possible means of implementing the principle of effectuating the decedent's intent.

2. *Under the UPC*

The National Conference drafted the first UPC in 1969²⁹ to create a more uniform probate law among the states.³⁰ The UPC affects both intestacy and the law of wills.³¹ The principle of testamentary freedom has been incorporated into the UPC as the fundamental purpose behind its succession laws; this purpose is articulated in UPC section 1-102(b)(2): "to discover and make effective the intent of a decedent in distribution of his property."³² The UPC has historically, and logically, attempted to further testamentary freedom in both the law of wills and intestacy contexts.³³

Given the interplay between the law of intestacy and the law of wills, it would seem evident that the purpose, the principle, and the policy behind the creation of statutory rules for testacy and intestacy would be similar. The policy goals of the law of intestacy should theoretically coincide with the policy goals of the law of wills; each represents a different side of the same coin—the law of succession.

substitutes.

28. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 62 (7th ed. 2005).

29. *See supra* note 7.

30. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 896 (1992).

31. *See* UNIF. PROBATE CODE (2008), 8 U.L.A. 9 (1998) (stating the UPC "consolidat[es] and revis[es] aspects of the law relating to wills and intestacy.").

32. Other stated purposes include simplifying and clarifying the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons; promoting a speedy and efficient liquidation and distribution system; facilitating use and enforcement of certain trusts; and creating consistency and uniformity in the field of probate law among the several states. UNIF. PROBATE CODE § 1-102(b) (2008), 8 U.L.A. 26 (1998); *see also* National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Probate Code* (2008), <http://www.law.upenn.edu/bll/archives/ulc/upc/2008amends.htm>. Scholars argue that additional policy goals promoted by the UPC include ensuring family members receive fair distributions of decedent's property to prevent disputes, promoting the interests of society (especially protecting family members who were financially dependent of decedent) and promoting the nuclear family. Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1499–1500 (2000) (arguing that intestate laws have yet to fulfill their goals because domestic partners' rights have yet to be recognized); *see also* Stephanie J. Willbanks, *Parting is Such Sweet Sorrow, but Does it Have to Be so Complicated? Transmission of Property at Death in Vermont*, 29 VT. L. REV. 895, 901 (2005) (stating that the UPC's "intestacy provisions are designed to establish a suitable estate plan for the typical person of modest means, to reflect the probate intent of the average decedent, and to accommodate modern family structures").

33. The National Conference looks at "prevailing patterns in valid wills as a guide" to fulfill this goal of disposing of the decedent's property in a manner that the decedent would have done had the decedent written a will. Holob, *supra* note 27, at 1499–1500; *see also* Linda Kelly Hill, *Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance*, 13 WM. & MARY J. WOMEN & L. 129, 129 (2006) (explaining that intestate laws aspire "to reflect the 'presumed desires' of the decedent" by disposing of the decedent's property to family members "based on a priority scheme designed to approximate the significance of familial relations").

Some scholars, however, seem to suggest, *ipse dixit*, that other policies besides decedent's intent may prevail in the realm of intestacy (but, nevertheless, extol the status of testamentary freedom in the realm of testacy).³⁴ These scholars artificially and illogically bifurcate succession jurisprudence between testate and intestate estates and opine that other policies can trump testamentary freedom for intestacy laws merely because the decedent forfeited his or her rights by not executing a will. For instance, Professor Gary notes that the "tension between testamentary freedom and succession within the family does not exist when a decedent dies intestate because the decedent has not exercised the available testamentary freedom."³⁵ Without a will, has the decedent forfeited, at least in part, his or her rights to have the laws of succession reflect testamentary desires as closely as possible? If a property owner dies without a will or drafted a will that is invalid, can the state impose whatever distribution scheme it deems appropriate?³⁶

Interestingly, the drafters of the UPC originally included a policy statement explaining that the driving force behind the intestacy portions of the UPC was effectuating decedent's probable intent.³⁷ This policy statement is consistent with the underlying purpose of the UPC.³⁸ However, the 1990 and 2008 versions of the UPC have conspicuously omitted this portion of the general comment that indicates this goal of effectuating likely testator intent. Instead, the intestacy portions of the pre-1990 UPC are recast as having been designed "to provide suitable rules for the person of modest means who relies on the estate plan provided by law."³⁹ The 1990 and 2008 changes to the UPC are then said to be "intended to further that purpose, by . . . bringing [the various sections] into line with developing public policy and family relationships."⁴⁰ It seems that the UPC is shifting focus to the negative externalities that might impact third parties rather than focusing on the property owner. Thus, the UPC now reflects the influence of legal scholarship suggesting that, particularly in the intestacy context, these other policy considerations can usurp decedent's intent.

34. Indeed, even the UPC drafters themselves seem to have explicitly endorsed eliminating decedent's intent as a policy goal of its intestacy statutes to make room for the extremely subjective policy of making laws that reflect "developing public policy." See *infra* note 40 and accompanying text.

35. See Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 10 (2000) [hereinafter *Adapting Intestacy Laws*].

36. Hirsch, *Default Rules*, *supra* note 1, at 1043-44.

37. UNIF. PROBATE CODE art. II, pt. 1, cmt. (amended 2008), 8 U.L.A. 271 (1998) (pre-1990 version of article II) ("The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death . . .").

38. See *infra* note 40 and accompanying text.

39. UNIF. PROBATE CODE art. II, pt. 1, cmt. (amended 2008), 8 U.L.A. 79 (1998).

40. UNIF. PROBATE CODE art. II, pt. 1, cmt. (Supp. 2009). Bringing the UPC's intestate rules into line with "developing public policy" was added to the 1990 version of the UPC, while "and family relationships" was added to the most recent 2008 UPC Amendments.

This artificial and illogical bifurcation of policy by scholars and the UPC is problematic. First, it ignores the notion that intestacy furthers testamentary intent by giving an individual the right not to execute a will but still have his or her property pass to intended takers. Otherwise, the default rules of intestacy would have a harsh effect on many individuals.⁴¹ Many individuals may not have either adequate knowledge concerning the laws of succession or the mental acumen to create a valid will. In states that do not allow holographic wills, this becomes even more problematic. In addition, allowing other policy considerations to usurp decedent's intent in the intestacy context forces individuals to hire lawyers to draft wills, which many individuals may not be able to afford. Denying the right to testamentary freedom to those without proper knowledge or resources seems draconian. Before adopting a system for intestacy laws that punishes certain property owners merely for being uninformed, ill-advised, or economically disadvantaged,⁴² more convincing justifications must be given.

Second, diminishing testamentary freedom for intestacy purposes adversely affects testamentary freedom for testacy purposes because the two structures are inextricably interconnected. Intestacy statutes are used for a variety of purposes.⁴³ For example, in the realm of class gifts⁴⁴ the UPC states that the rules of construction for interpreting a class gift (and therefore a gift based upon a written instrument and not intestacy) are those rules found in the intestacy section of the UPC.⁴⁵ The elective share provision of the UPC⁴⁶ allows the surviving spouse of a decedent who has been disinherited to override the will and take a certain portion of the estate.

41. Mary L. Fellows et al., *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 AM. B. FOUND. RES. J. 321, 323–24 [hereinafter *Public Attitudes About Property Distribution at Death*] (“[U]nless the statutory scheme invoked in the absence of a will conforms to the likely wishes of a person who dies without having executed a valid will, it creates a trap for the ignorant or misinformed.”).

42. Hirsch, *Default Rules*, *supra* note 1, at 1046–52.

43. For example, the statute determines who will have standing to contest a decedent's will because intestate heirs are interested parties if the will is invalid. In addition, courts have used the statutes as ways to identify the “‘natural objects of the legislator's bounty’ in determining will contests alleging undue influence.” See Tritt, *Sperms and Estates*, *supra* note 9, at 380 (quoting Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 644 (2002)). Additionally, intestacy laws are not necessarily sectioned off to the general realm of succession laws either. In *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257 (Mass. 2002), the issue was whether posthumously conceived children qualified for social security survivor benefits. *Id.* at 259–60. Because of a state statute, the children had to be classified as children of the decedent according to the intestacy laws of that state in order to be eligible for the benefits. *Id.* at 261.

44. It is relevant to note that class gifts are inherently creatures of dispositive documents such as wills. For a detailed description of class gifts under the Uniform Probate Code, see *infra* Part II.B.2. Dispositive documents are also affected by intestacy statutes in determining antilapse rules and other construction instruments. See, e.g., UNIF. PROBATE CODE § 2-703 (2008), 8 U.L.A. 186 (1998).

45. See UNIF. PROBATE CODE § 2-705, cmt. (amended 2008), 8 U.L.A. 188 (1998) (Purpose and Scope of Revisions) (“[This section] invokes the rules pertaining to intestate succession as rules of construction for interpreting terms of relationship in private instruments.”).

46. UNIF. PROBATE CODE § 2-202 (2008), 8 U.L.A. 102 (1998).

The same term, “surviving spouse,” is used in both the elective share provision of the testacy portion of the UPC as well as the spousal share provision of the intestacy portion of the UPC. Therefore, those not included in the definition of “surviving spouse”⁴⁷ are potentially affected by this restrictive term even if the property owner opts out of intestacy by drafting a will. It seems counterintuitive that the underlying principle of estates law would be diminished in intestacy if intestacy statutes influence the construction and interpretation of wills. Therefore, a property owner could opt out of the intestacy statutes of the UPC by drafting a will yet her will would, nonetheless, be subject to the definitions under the intestacy statutes. There exists the very real possibility that a definition found in intestacy statutes will affect the testator’s intended bequests. Thus, it is clear that intestacy laws are not merely confined to the intestacy portions of the UPC and do indeed affect parts of the testacy laws.

Despite all of the various theories and policy statements, the heart of this matter is quite simple: there is no justifiable reason why decedent’s intent matters any less because the decedent died without a will or with an invalid will. To state it differently, if the proposed purposes of intestacy laws—promotion of the family, advancing society’s interests, expressing society’s attitudes, etc.⁴⁸—are important enough to override decedent’s intent in intestacy, there is no reason why these same interests should not override decedent’s intent in a testate setting. Therefore, for purposes of this Article, the artificial bifurcation of policy reasons based upon whether property will be distributed through a will or intestacy will be ignored in order to advocate a unifying principle of succession law.

For the foregoing reasons, the differentiation these scholars and the UPC draw alleging divergent policies behind testacy law and intestacy law is grossly misguided. Because it is fallacious to assume that all individuals without wills have consciously chosen the intestate distribution scheme and because the definitions in intestacy laws are routinely used by courts to construe will provisions, the principle of decedent’s intent should reign equally supreme in both the testacy and intestacy contexts. These scholars and the UPC ignore the historical, and more appurtenant, arena in property succession law where societal and judicial interests may trump the decedent’s intent. Rather than focusing on testacy and intestacy, this focus on the interplay between decedent’s intent and other competing policy interests is more appropriately allocated to an analysis examining the differences in policies underlying succession law’s mandatory rules versus its default rules.⁴⁹

47. This would seem to include both same-sex couples and unmarried opposite-sex couples.

48. See *supra* Part I.A.1.

49. See *infra* Part I.B.

B. *Creating Statutory Rules*

Having dispensed with the artificial policy bifurcation between testacy and intestacy as inapposite, this Article now turns its focus to the pertinent policy distinction—the distinction between mandatory rules and default rules. Similar to other legal disciplines, succession laws can be divided into these two distinct classes. The smaller group, the mandatory rules, consists of those rules that individuals must obey, irrespective of his or her wishes.⁵⁰ The Rule Against Perpetuities and will formality statutes serve as examples. The larger group, default rules, encompasses rules that are changeable and are only applicable to individuals who forbear to take whatever steps the law requires to override them.⁵¹ The intestacy statutes, with their comprehensive implications on distribution and potential to affect every decedent, are the most prevalent and recognizable of the default rules.⁵²

In succession law, *mandatory* rules should only be imposed if society finds an overwhelming need to protect (i) a decedent in effectuating his or her testamentary intent or (ii) an individual who would be excluded from taking if the state were to directly implement the decedent's testamentary intent. In either case, mandatory rules are paternalistic in nature. In the former case, mandatory rules foster and protect testator's intent and therefore should only be used if unregulated death-time transfers of property would undermine a decedent's wishes.⁵³ In the latter case, however, mandatory rules impinge upon and displace the principle of testamentary freedom. Therefore, these types of mandatory rules should be implemented only if particular aspects of unregulated transfers of death have a socially deleterious effect on members of society excluded from the decedent's wishes.⁵⁴ Thus, in creating these mandatory rules, the issue is whether the particular paternalistic concern is sufficiently great to justify the use of mandatory rules to impede the property rights associated with testamentary freedom.

50. Hirsch, *Default Rules*, *supra* note 1, at 1032; Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 87 (1989); see Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 *S. CAL. INTERDISC. L.J.* 389, 390–92 (1994).

51. Hirsch, *Default Rules*, *supra* note 1, at 1032. In fact, the vast amount of succession law consists of default rules.

52. It could be argued that the intestacy statutes are not default rules for some individuals; if these individuals cannot afford the luxury of creating, or do not have the means to create, a will the intestacy statutes transform into mandatory rules.

53. For example, the formalities associated with execution of a valid will are mandatory rules intended to protect the testator. Requiring that two witnesses must watch the testator sign the will helps to safeguard the testator from executing a will under undue influence or duress.

54. Statutes that provide an elective share for spouses or mandatory support for minor children are examples of mandatory rules. These rules are applied when the state has a compelling interest in the outcome of the estate that outweighs the presumed status quo of testamentary freedom.

Because the vast majority of succession statutes are default rules, this Article concentrates its focus away from mandatory rules and toward defining and evaluating the competing default rule theories. When the preconditions of mandatory rules are not present, the normative legal analysis devolves to the choice of default rules. There is considerable conflict, however, among scholars concerning how to choose between possible default rules. Some theories advocated are testamentary intent, majoritarian, normative, transformative, and penalty defaults.⁵⁵

Succession law default rules can be further divided into the subcategories of gap-fillers and permissive rules.⁵⁶ Succession law gap-fillers provide courts with instructions on how to interpret or construe a testamentary instrument when the instrument is silent, unclear, or ambiguous. For instance, if a will is silent in defining the term “heirs,” default rules will fill in the gap and define the term.⁵⁷ In contrast, succession law permissive rules are binding on an individual unless the individual expressly opts out from terms provided by the rule.⁵⁸ For instance, the distribution scheme provided by the intestacy statute may be binding upon a decedent’s probate assets unless the decedent creates a will; mere drafting and execution of a will allows the individual to avoid the permissive rules altogether.

Because the new UPC statutes concerning a parent–child relationship are default rules, this Article will focus on evaluating the various policies that have been advanced to justify the development of succession law default rules. Note that another reason why the UPC statute makes a great case study is that the parent–child relationship statutes serve both as gap-fillers *and* permissive rules. Because, in succession law, gap fillers and permissive rules are interconnected, the theory behind them should be consistent.

C. *Theories of Succession Law Default Rules*

Succession law has neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be. The policy goals of succession laws are largely amorphous, with no consensus built around any particular theory.⁵⁹ Despite the simple purpose behind the creation of succession laws in general—the orderly transfer of property at death—an encompassing, descriptive theory for the

55. See *infra* Part I.C.

56. Tamar Frankel, *What Default Rules Teach Us About Corporations; What Understanding Corporations Teaches Us About Default Rules*, 33 FLA. ST. U. L. REV. 697, 702 (2006).

57. For example, if the testator does not define the parent–child relationship in his will, the UPC relies upon its intestacy definition of “child” within the parent–child relationship to define children for class gifts purposes.

58. Frankel, *supra* note 56, at 702.

59. See Hirsch, *Default Rules*, *supra* note 1, at 1033–34 (“[S]cholars . . . have developed no general theories of inheritance defaults . . .”).

creation of succession law as a whole is lacking. To date, scholarship has focused on analyzing specific laws within succession law, either advocating or criticizing the specific law based on various, and oftentimes, competing policy grounds. Before an examination and determination of which potential overarching theory should be used to guide the creation of succession law, a brief discussion of the applicable types of succession law default rule theories is in order.

1. *Intent Effectuating Defaults*

It is generally agreed upon that the primary reason for succession laws is fulfilling the decedent's intent.⁶⁰ Because of the historic, rich, and robust public policy of effectuating testator's intent in the United States,⁶¹ this seems like a strong cornerstone to base the default rules of succession law. This is a natural and logical extension of the uncontroversial notion that one has the right to acquire and freely transfer his private property.⁶² As one author has noted, “[c]onnected to the idea that individuals can own and control property, separate and apart from ownership by the family unit or other social unit, is the idea that an individual property owner should be able to control the disposition of the property at his or her death.”⁶³ Therefore, in order to effectuate the articulated rationale, the generally accepted principle is that succession law should reflect the desires of the property owner “both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented.”⁶⁴

Of course, an intent effectuating default regime might not be desired. Protecting the intent of a deceased testator over the interest of living individuals rarely fares well when viewed from an *ex post* perspective. What sense does it make for society to allow the wishes of the deceased to trump the happiness of the living?

60. See, e.g., Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC J. 171, 171 (2008) [hereinafter *We Are Family*] (“Drafters of intestacy statutes have considered decedent’s intent an important, perhaps *the most important*, factor in creating patterns of intestate distribution.”) (emphasis added); Hirsch, *Default Rules*, *supra* note 1, at 1042 (“[T]he intent of the testator is ‘the pole-star by which the courts must steer.’”) (quoting 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 537 (photo. reprint 1971) (1826–1830)); Tritt, *Copyright*, *supra* note 19, at 111 (“Testamentary freedom . . . is the hallmark principle of estates law.”); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1068 (1999) [hereinafter *Expressive Function*] (“Succession law generally places donative freedom at the apex of its hierarchy of values.”).

61. See *supra* Part I.A.1 and corresponding footnotes.

62. See Tritt, *Sperms and Estates*, *supra* note 9, at 375 (“Just as individuals have the right to accumulate, consume, and transfer personal property during life, individuals generally are, and should be, free to control the disposition of personal property at death.”); see also text accompanying *supra* note 15.

63. See Gary, *Adapting Intestacy Laws*, *supra* note 35, at 9.

64. Averill, *supra* note 30, at 912.

Even if desired, implementing a scheme in which the decedent's intent is always effectuated could prove to be complicated and, at times, difficult. The goal is relatively simple in testacy because there is a written instrument to decipher the decedent's intent.⁶⁵ However, this goal is complicated significantly by the lack of the decedent's express testamentary wishes in the realm of intestacy. Decedent's intent is much more difficult to fulfill in the realm of intestacy than testacy because in the former, there is either no expressed testamentary scheme or one that the law deems inadequate for whatever reason.⁶⁶ Therefore, it has been generally accepted that the law should reflect the testamentary wishes of the average or typical decedent.⁶⁷ However, the UPC has not created a single monolithic average testator. Quite the contrary, the UPC has created various contingencies based upon what decedents from multiple types of backgrounds would desire.⁶⁸ Therefore, the "average" or "typical" decedent should be viewed as a general and expansive term rather than a specific and restrictive term.⁶⁹

Regardless, creating a more expansive view of an average decedent would almost certainly increase administrative costs and, therefore, lower efficiency to create a default rule scheme which is flexible enough and inclusive enough to prioritize effectuating decedent's intent.⁷⁰ Additionally, it is unclear exactly how an intent-effectuating default rule scheme would look. A few possibilities are: abandoning default rules all together and switching over to a pure judicial discretion system; replacing default rules with default standards, which would be rebuttable and without the

65. There are, however, still possible issues of ambiguous language within the will and intended bequests to individuals who predeceased the decedent as well as the issue of wills which are, for one reason or another, not valid.

66. See Tritt, *Sperms and Estates*, *supra* note 9, at 379–80. The default rule of intestacy under the UPC breaks down further into two areas: pure intestacy laws in which there is no written instrument, usually a will, indicating the testator's expressed intent; and the intestacy statutes that operate more like "gap-filler" defaults in which the decedent has drafted an instrument but neglects, or chooses not, to override the state-supplied law (e.g., it is incomplete, it uses ambiguous terms, or the intended beneficiary has predeceased the decedent).

67. See Averill, *supra* note 30, at 912 (discussing the "generally accepted polic[y]" that "succession law should reflect the desires of the 'typical person'"); Spitko, *Expressive Function*, *supra* note 60, at 1068.

68. See Spitko, *Expressive Function*, *supra* note 60, at 1077–80. "[The UPC's] intestacy provisions do not purport to reflect the presumed intent of one typical intestate decedent. Rather, the provisions purport to reflect the presumed intents of many, indeed thirteen, typical intestate decedents who died in a variety of family circumstances." *Id.* at 1078.

69. In other words, the notion of a typical decedent should be viewed as one that can, and indeed should, mean multiple things to multiple people depending on the circumstances of the decedent.

70. See Hirsch, *Default Rules*, *supra* note 1, at 1068 (finding that default "rules" are far less risky than default "standards" and most people typically tend to be risk averse). Of course, if succession law default rules stray too far from testator's intent, efficiency would be compromised as well as individuals spending time and resources hiring attorneys to draft around the default rules. For a general discussion of efficiency in the context of corporate fiduciary obligations, see also Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. LAW REV. 115, 161–89 (2009).

binding and rigid force of default rules; or creating an extremely complicated set of default rules which attempt to account for every possible testamentary scheme. Some states have already begun experimenting with allowing some level of judicial discretion in the application of default rules.⁷¹

If, however, decedent's intent is the most important goal in shaping default rules, then increases in administrative costs and complexity will simply have to be accepted as the inevitable bedfellows of a succession system in which decedent's intent takes its rightful place on top of the pile of competing policy goals. In addition, effectuating testator's intent leads to the correct result. Intent effectuating default will provide flexibility to encapsulate the changing nature of the American family and further various economical and societal values⁷²

2. Majoritarian Defaults

Majoritarian default theory applies an economic theory originating in contract law to succession laws.⁷³ The theory places equal importance on default rules reflecting first, what a majority of decedents would want and second, being simple enough so that the maximum number of people can understand what they mean in order to opt out of drafting a will and thereby saving money.⁷⁴ Majoritarian defaults do not simply attempt to create defaults that incorporate what the most number of decedents possible would want.⁷⁵ According to the theory, there will come a point where the default rules, in an attempt to account for as many circumstances and scenarios possible, will lose their economic efficiency because they will become both too complex for individuals to understand while they are alive (when deciding whether or not to draft a will) and too difficult for courts to administer due to their complexity.⁷⁶

71. See Hirsch, *Default Rules*, *supra* note 1, at 1065 n.137 (listing state probate codes that allow for judicial discretion to some level).

72. See *supra* note 19.

73. For a detailed discussion of majoritarian defaults, see Hirsch, *Default Rules*, *supra* note 1, at 1039–42; John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 840 (2006) (“In contract, the early position on default rules was that courts ought to adopt a rule that a majority of contracting parties would favor.”); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 839 (2003) (discussing majoritarian default theory in contract law).

74. See Hirsch, *Default Rules*, *supra* note 1, at 1039–42.

75. See Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 213 (2006).

76. See Hirsch, *Default Rules*, *supra* note 1, at 1040 (“It follows that the wider the variety of alternative preferences that a default rule must anticipate, the fewer the number of parties who can take advantage of it to save transaction costs. ‘Plurality defaults’ afford less savings than ‘majoritarian defaults,’ . . .”).

There are flaws in the majoritarian default theory in succession laws that do not appear in the realm of contract law.⁷⁷ There is also a danger in the expressed willingness to ignore a minority of decedents' intent merely because some sort of majority has been attained with questionable economic benefit.⁷⁸

Another flaw in majoritarian default theory is raised by the simple question of "which majority?".⁷⁹ If one were to take the succession law pulse of various individual states and compare them, it is very likely that the results constituting a majority for majoritarian default rule purposes would differ. Indeed, it is also likely that these results would vary with a national majority.⁸⁰ What about an international majority?⁸¹ Ultimately, majoritarian default theory, like other default rule theories, is willing to buck decedent's intent for another purpose; in this case it just happens to be economic efficiency.

3. Normative Defaults

Normative defaults in succession laws attempt to provide "for the well-being of society"⁸² and are an amalgamation⁸³ of the public policy goals toward which succession laws should strive.⁸⁴ As one scholar has noted, "[t]he most fundamental change in American law . . . is the growing reliance on legislation to solve social and economic problems."⁸⁵ Ultimately, the intent of the dead does not weigh heavily in a utilitarian calcu-

77. For example, majoritarian defaults may not be very efficient at all since once a testator has hired a lawyer to draft a will, the lawyer will have to decipher the testator's intent. Additionally, it is potentially dangerous for testators to draft an imperfect will and rely on gap-fillers because there is no uniform set of gap-fillers in the law of succession. Should the testator move to another state or should the gap-fillers change for the testator's current unchanged location, the testator runs the risk of portions of his will changing unilaterally. This means that the testator would have to revise his will each time he moves or each time the gap-filler laws change. This certainly does not represent an economic efficiency. See Hirsch, *Default Rules*, *supra* note 1, at 1039–40.

78. Ferejohn & Friedman, *supra* note 73, at 834 ("As attractive as [a] majority rule might be as a decision procedure, there is nothing stopping a majority from taking advantage of a minority.").

79. See *id.* at 842 (finding that, in a discussion of majoritarian default rules in the area of constitutional law, "[t]he Supreme Court often adopts an intriguing tradeoff between federalist and nationalist values . . .").

80. This is, of course, to say *nothing* of the problem presented by pluralities.

81. A discussion of the succession laws of various countries is beyond the scope of this Article. Suffice it to say, however, that an international majority would certainly differ somewhat from a U.S. or state majority. See Ferejohn & Friedman, *supra* note 73, at 844 ("Particularly contentious at the moment is jurisprudence suggesting that the relevant majority on some issues includes international consensus.").

82. See Gaubatz, *supra* note 18, at 501.

83. See Hirsch, *Default Rules*, *supra* note 1, at 1036 ("It would seem, then, that intestacy law . . . has become a theoretical grab-bag.").

84. For a detailed discussion of normative defaults, see Gary, *Adapting Intestacy Laws*, *supra* note 35.

85. See Mary Louise Fellows, *Concealing Legislative Reform in the Common-Law Tradition: The Advancements Doctrine and the Uniform Probate Code*, 37 VAND. L. REV. 671, 671 (1984).

lus⁸⁶ (unless, of course, it is an individual's self-concern about the costs they specifically might incur in securing their desired testamentary wishes).

The most dominant goal of normative defaults is protecting the family.⁸⁷ While this is a noble goal, it is unclear why it should exist primarily in the realm of default rules.⁸⁸ If protecting the family is important enough to warrant upending an intestate decedent's likely intent via normative default rules, then the rules should become mandatory rules that a testator cannot draft around.

Another goal of normative defaults that has been advanced is the promotion of reciprocity, i.e., that default rules should reward caretaking behavior on the part of the survivors.⁸⁹ The reciprocity purpose of default rules is somewhat apparent in the elective share provisions of the UPC. The elective share (or forced share) allows a marital spouse who was disinherited from a will to take a specified portion of the estate notwithstanding the decedent's clearly stated intent.⁹⁰ The original justification for the elective share provision in the UPC was to provide support for the potentially disinherited spouse.⁹¹ However, recent commentary to the elective share section of the UPC suggests that it has adopted, at least in part, a reciprocity rationale.⁹²

Closely related to reciprocity is a subjective notion of fairness,⁹³ which implicates more than mere equality but advocates for equity in succession

86. Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 838 (2005).

87. See Gary, *Adapting Intestacy Laws*, *supra* note 35, at 10 ("Of all of these [societal] goals, concerns for the family are paramount."); Gaubatz, *supra* note 18, at 507; see also Fellows et al., *Public Attitudes About Property Distribution at Death*, *supra* note 41, 323-24; Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 250 (2008) (finding that historically, one of the primary functions of intestacy laws has been the promotion of the nuclear family); Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 651-52 (2002) [hereinafter *Parent-Child Relationship*] (finding that a significant consideration in addition to decedent's intent is the purpose of providing support for the decedent's family).

88. See Gary, *Adapting Intestacy Laws*, *supra* note 35, at 10 ("The tension between testamentary freedom and succession within the family does not exist when a decedent dies intestate because the decedent has not exercised the available testamentary freedom.").

89. See E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 270-78 (2002) [hereinafter *Inheritance Rights for Unmarried Committed Partners*] (stating that reciprocity in intestacy means recognizing and rewarding (1) those who contributed to the accumulation of wealth by the decedent and (2) those who have helped take care of the decedent); Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551 (1999); Frances H. Foster, *Linking Support and Inheritance: A New Model From China*, 1999 WIS. L. REV. 1199 (1999); Gary, *Parent-Child Relationship*, *supra* note 87, at 652-53 ("Reciprocity as a goal of intestacy statutes also has merit.").

90. See generally UNIF. PROBATE CODE § 2-202 (2008).

91. See Susan N. Gary, *The Oregon Elective Share Statute: Is Reform an Impossible Dream?*, 44 WILLAMETTE L. REV. 337, 339-41 (2007).

92. See UNIF. PROBATE CODE § 2-202 (amended 2008) (Purpose and Scope of Revisions) ("The revision of this [elective share] section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a *support theory back-up*." (emphasis added)).

93. See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16

laws.⁹⁴ The elective share provisions of the UPC are easily justified under the fairness objective.⁹⁵ The same criticism of protection of the family applies here as well: if fairness is such a paramount concern for default rules in succession, then they should be mandatory rules instead.

Yet default rules should not be treated as a testing ground for various social and economic theories because around half of all estates are probated via intestacy.⁹⁶ In addition to the large number of people whose estates are governed by the rules of intestacy, intestate estates are more likely than not to be lower-income.⁹⁷ Therefore, intestacy laws should be viewed with the same sacrosanct view of a decedent's intent in mind. To do otherwise would be to effectively punish a large segment of society who traditionally has more difficulty accessing the legal system.⁹⁸

Reflecting developing public policy is an amorphous concept which should be jettisoned in justifying default rules. Maintaining public policy as the guidepost for drafting default rules means that as public policy evolves, which it constantly and inexorably does, default rules will have to be changed. If the laws are not changed frequently enough to reflect continuously changing public policy, then the underlying intent itself is subverted. Having to frequently make substantive changes to default rules to reflect changing public policy cuts against the goals of having clear, stable, and uniform laws.

Additionally, public policy unduly politicizes an area of the law too important to be dragged into the paralyzing and often disingenuous world of politics. When the drafters of the UPC say that its default rules are drafted to reflect "developing public policy" they beg the question: whose public policy are they intending to reflect? As one example, there is an ongoing debate in various states across the country over whether, and if so to what extent, same-sex relationships should be afforded legal recognition and protection.⁹⁹ Instead of wading into a thorny political debate by adopt-

LAW & INEQ. 1, 12 (1998) ("A second objective of intestacy statutes is to produce a pattern of distribution that the recipients believe is fair and thus does not produce disharmony among expectant takers or disdain for the legal system.").

94. *Id.* (listing "equity considerations of financial dependence, reliance, unjust enrichment and trust").

95. *See supra* notes 88–91 and accompanying text.

96. *See* DUKEMINIER ET AL., *supra* note 28, at 71 (stating that most people die without a will).

97. *See* LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 33–36 (3d ed. 2002) ("One study found that, in terms of wealth, 72.3% of persons with estates valued between \$0 and \$99,000 do not have wills, 49.8% with estates between \$100,000 and \$199,000 do not have wills, but only 15.4% with estates between \$200,000 and \$1 million do not have wills.").

98. Succession laws that ignore, or even contradict, decedent's intent are dangerously close to becoming penalty defaults. *See infra* Part I.C.5.

99. Massachusetts, Connecticut, Iowa, New Hampshire, and Vermont recognize same-sex marriage. Washington D.C. recently passed a same-sex marriage bill which will take effect after review by Congress. New Jersey provides for same-sex civil unions. Hawaii has created the reciprocal beneficiary system to provide some legal benefits to same-sex couples. Oregon, Maine, Maryland, Nevada,

ing one public policy over another,¹⁰⁰ sticking to attempting to effectuate decedent's intent would allow the UPC to be as apolitical as possible¹⁰¹ since, after all, decedent's intent is the cornerstone of succession laws. In the end, the result would be the same, but it would be based on an ideologically consistent framework rather than on a complicated structure that was created under the guise of ulterior motives.

If the UPC drafters wish to avoid the perception that the UPC has "endorsed" same-sex relationships, they can abrogate this concern by switching to a scheme that values decedent's intent above all else, which does not require the UPC to make any policy statements or judgments about what is or is not the correct "developing public policy."

4. *Transformative Defaults*

Transformative defaults are very similar to normative defaults in that both implicate larger societal issues,¹⁰² and "[t]ransformative defaults are similar to normative defaults because both attempt to produce fair or just results."¹⁰³ However, while normative defaults attempt to reflect various social concerns, be they fairness, protecting the family, rewarding reciprocity, etc.,¹⁰⁴ proponents of transformative defaults believe that the laws themselves can be used to implement social change.¹⁰⁵

A subset of the transformative default is the so-called "expressive function,"¹⁰⁶ which states basically that intestacy laws are used to express society's approval or disapproval of certain behavior.¹⁰⁷ Individuals "who

and Washington state offer some form of domestic partnership system which provides benefits which vary in scope from state to state. Though California recognized same-sex marriages for a brief time as a result of a state supreme court decision, that same decision was effectively overturned by a statewide referendum; the approximately 18,000 marriages that occurred in the interim, however, are still recognized. Many states, on the other hand, have placed provisions in their state constitutions forbidding the recognition of same-sex marriage and in some cases civil unions and domestic partnerships as well. National Public Radio, *State By State: The Legal Battle Over Gay Marriage*, <http://www.npr.org/templates/story/story.php?storyID=112448663>.

100. By stating its goal as reflecting "developing public policy" and then ignoring the existence of same-sex couples in its intestacy statutes, the UPC has effectively taken a stance in this public policy debate. It has been said that "[s]ilence is sometimes the severest criticism." Charles Buxton, *Brainy Quote*, <http://www.brainyquote.com/quotes/quotes/c/charlesbux378076.html> (last visited Jan. 12, 2010).

101. See Hirsch, *Default Rules*, *supra* note 1, at 1058 ("In due time, scholars might rue the day when they gave their imprimatur to the politicization of inheritance law.").

102. For a detailed discussion of transformative defaults, see *id.* at 1053–59.

103. Schwartz, *supra* note 50, at 391.

104. See *supra* Part I.C.3 (regarding Normative Default Theories).

105. See Schwartz, *supra* note 50, at 391 ("[A] transformative default rule is adopted to persuade parties to prefer the result the rule directs."); Hirsch, *Default Rules*, *supra* note 1, at 1053–54 ("Law affects the actions of citizens . . . by 'making statements' that imbue those actions with new social meanings and alter the private judgments citizens face within their communities.").

106. For a detailed discussion of the expressive function, see Spitko, *Expressive Function*, *supra* note 60.

107. *Id.* at 1100–01.

experience the law operating upon them personally and those who observe the law operating on others are likely to learn whom the law respects, ignores, privileges, and disadvantages [I]ntestacy law not only reflects society's familial norms but also helps to shape and maintain them."¹⁰⁸

It seems tautological to base an entire intestacy theory around the notion that laws express approval or disapproval for certain actions—is that not the basic function of most laws?¹⁰⁹ Laws are by their very nature, or at least as a side-effect of their existence, designed to establish boundaries of acceptable conduct.¹¹⁰ If the purpose behind the scholars pressing the expressive function of intestacy laws is to advocate inclusion for those who have been left out of intestacy laws,¹¹¹ effectuating the testator's presumed intent seems the most efficient and effective way to go about this.

5. *Penalty Defaults*

An intestacy policy that has, not surprisingly, proven unpopular is the so-called penalty default.¹¹² Originating in the realm of contract law,¹¹³ the penalty default function posits that instead of default rules reflecting decedent's probable intent, they should “enhance efficiency by contradicting preferences.”¹¹⁴ Penalty defaults, in essence, incentivize individuals to put a testamentary scheme in writing so as to avoid the “punishment” of an undesirable intestacy scheme controlling the disposition of property.¹¹⁵ This is primarily because the logical extension of the punitive theory is property escheating to the state.¹¹⁶

108. *Id.* at 1100. “[S]ome social conservatives fear, and advocates for gay and lesbian equality seek, reforms such as extension of intestate inheritance rights to same-sex couples principally for the message that such changes in the law would proclaim to society.” *Id.* at 1066. See also T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1529 (1999) (discussing the argument that current default rules function to express society's disapproval of nonheterosexual relationships).

109. “Law is a *solemn expression* of the will of the supreme power of the State.” CAL. CIV. CODE § 22 (2008) (emphasis added).

110. See *United States Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34, 37 (1930) (“[L]aw[.]’ used in a generic sense, . . . mean[s] the rules of action or conduct duly prescribed by controlling authority, and having binding legal force . . .”).

111. Prior to the 2008 UPC Amendments, posthumously conceived children were not considered children for intestacy purposes. Even after the 2008 UPC Amendments, the UPC still does not address (and therefore in essence does not permit) second-parent adoptions or spousal classification for same-sex couples. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 200 (2001) (“At the dawn of the twenty-first century, the inheritance system stands as one of the last bastions of the traditional American family. Many of its rules and doctrines appear frozen in time, remnants of a bygone era of nuclear families bound together by lifelong affection and support.”).

112. For a detailed discussion of penalty defaults, see Hirsch, *Default Rules*, *supra* note 1, at 1058–61.

113. See Ayres & Gertner, *supra* note 50.

114. Hirsch, *Default Rules*, *supra* note 1, at 1058.

115. *Id.*

116. What is more punitive than the government permanently taking ownership of the intestate property? Some scholars have advocated escheat as the ultimate weapon to incentivize will drafting. See

Under this regime, the default rules would effectively become a grossly regressive taxing scheme. Penalty defaults that escheated property to the state would create a binary system in which the right to disposition of property would extend beyond the grave for wealthy property owners but would terminate upon death for poor property owners.¹¹⁷

Though the extent and existence of testamentary freedom is the subject of considerable debate, the allocation of property rights should not be predicated merely upon the wealth of individuals.

D. Decedent's Intent Should Govern Default Rules in Succession Laws

As has been shown, testamentary intent is the most important policy concern for succession laws in general. For various reasons, this goal has decreased in importance when discussing default rules of succession laws. In fact, there seems to be an ideological trend in the United States to curtail testamentary freedom. It is time for the policy goal of default rules to match the overall goal of succession laws. Creating default rules whose primary, indeed only, purpose is to effectuate testator's intent will create a succession law system that is unified behind the same overarching concern. For this and the above reasons, this Article rejects all of the aforementioned default rule theories, except intent-effectuating default theory, as needlessly complicating the reasons for having default rules in the first place. If a particular paternalistic concern is sufficiently great to justify curtailing testamentary freedom, this concern should be addressed through the use of mandatory rules. Indeed, returning to intent-effectuation avoids a system of testamentary apartheid in which testator's intent is sacrosanct only if one is able to draft a complete will that is unambiguous enough to never implicate a default rule.¹¹⁸

II. CASE STUDY: THE UNIFORM PROBATE CODE (UPC) AND THE 2008 UPC AMENDMENTS

To better understand the substantive policy changes evidenced within the 2008 UPC Amendments, one must first look descriptively at the changes themselves. Inherent in evaluating these changes is a need to ex-

Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1312 (1969) ("A decedent who was unhappy with such [an escheat] schedule would presumably be induced to make a judgment by will which would probably be more thoughtful and sensible than a mechanical pursuit of his remote kindred.")

117. With "wealthy" and "poor" being respectively defined as those who can and cannot afford an attorney to draft a will.

118. Although there are noble societal needs concerning surviving spouses and child welfare, these needs do not have to displace testamentary freedom. The sustainability of a reasonable social safety net and redistributive concerns might be more efficient being implemented through the tax system and family law.

amine both the 1990 (pre-Amendment) rules and the 2008 UPC Amendments.

A. Pre-2008 UPC Amendments

In 1990, the UPC was substantially amended, including revisions to rules governing the parent–child relationship and class gifts.¹¹⁹ These 1990 Amendments are the “default rules” that help to illustrate the substantive overhaul proposed by the 2008 UPC Amendments.¹²⁰

Before the 2008 UPC Amendments, a parent–child relationship was primarily understood as a natural relationship based solely upon biological reproduction.¹²¹ Child status for inheritance purposes followed easily from the recognition of this natural fact, or, in the case of adoption, from the statutory creation of a legal substitute designed to replicate the genetic original.¹²²

Accordingly, the former UPC section 2-114 permitted children to inherit from their genetic parents.¹²³ In fact, children could inherit from both genetic parents regardless of their parents’ marital status—thereby overturning an old common law rule denying inheritance to children born out of wedlock.¹²⁴

The former statute also recognized a reciprocal parent–child relationship between an adopting parent and an adopted child.¹²⁵ For instance, parents could inherit from or through their adopted children, and adopted children could inherit from or through their adoptive parents.¹²⁶ Although an adoption generally severed the respective inheritance rights by and between genetic parents and their biological children (thereby effectuating a “fresh start” policy¹²⁷), former section 2-114(b) created a stepparent exception to this severance.¹²⁸ Under this exception, a child could inherit from or through a stepparent, a genetic custodial spouse, and a genetic

119. These revisions were so significant that many professors and practitioners label the UPC revision of 1990 as “the 1990 UPC.” See, e.g., Averill, *supra* note 30, at 892.

120. As a practical matter, establishing the law prior to the 2008 UPC Amendments is integral for illustrating the policy goals of the prior UPC in contrast to the policy goals implicit in the 2008 UPC Amendments.

121. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. SUPP. 125, 125 (2006).

122. *Id.* at 125–26.

123. UNIF. PROBATE CODE § 2-114 (amended 2008), 8 U.L.A. 91 (1998).

124. *Id.* § 2-114(a); see also Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Uniform Probate Code’s Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539, 542 (1998).

125. UNIF. PROBATE CODE § 2-114(b) (amended 2008), 8 U.L.A. 91 (1998).

126. *Id.*

127. The fresh start policy manifests the belief that it is in the best interest of a child to sever emotional and financial ties with the genetic parents to facilitate the creation of new ties with the adoptive parents. Roberts, *supra* note 124, at 542–43.

128. UNIF. PROBATE CODE § 2-114(b) (amended 2008), 8 U.L.A. 91 (1998).

noncustodial parent.¹²⁹ Finally, under former section 2-114, parents could lose their rights to inherit from or through their children if they refused to support their children.¹³⁰

The former UPC section 2-114 was blissfully simple and concise, yet maddeningly arcane and brittle. On one hand, the former UPC provision relied on familiar state family laws regarding the parent-child relationship, and it was written clearly enough for laymen to read and generally understand its implications. That clarity empowered individuals to opt out by drafting a will.

On the other hand, former section 2-114 did not account for new types of family structures, the decline of the nuclear family model, and advances in reproductive and genetic technologies involving surrogacy, sperm/egg donation, genetic mapping, and cloning. Nor did it take into account the growing number of same-sex couples or single individuals who were becoming parents through ART.

The bright-line tests and exceptions of the former Section 2-114 were quickly becoming outdated. A revision was sorely needed. Therefore, the Commissioners¹³¹ drafted and approved significant revisions to the parent-child relationship provisions and the class gift provision of the UPC in July of 2008.¹³² Unfortunately, to the majority of families for whom ART and adoption are fiscally out of reach, these changes amount to little more than technical corrections.

129. *Id.* For instance, when a child's parent dies or gives up parental rights, and the child's surviving parent remarries, this exception provides that remarriage of the surviving parent and subsequent adoption of the child by a stepparent does not sever the child's right to inherit from his deceased parent's relatives. The stepparent and genetic custodial parent inherit from or through the child; however, the genetic noncustodial parent no longer has the right to inherit from or through the child. *Id.* § 2-114(b) cmt.

130. *Id.* § 2-114(c). This change applies to both the mother and father, instead of solely to the father, as in the pre-1990 UPC. *Id.* § 2-114(c) cmt. Such a rule seems to endorse notions of family law or cultural norms (incentivizing parents to support their dependent children) as well as approximating decedent's intent for disposition of his property; when a parent has refused to provide support for the child, we assume that the decedent child would not have wished his nonsupporting parent to take from the estate.

131. The ten-person drafting Committee consisted primarily of trusts and estates and tax attorneys. National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Probate Code 3* (2008), <http://www.law.upenn.edu/bll/archives/ulc/upc/2008amends.pdf>. Interestingly, however, Committee member Harry L. Tindall (Chair of the Uniform Parentage Act drafting committee) practices in the area of family law—an area with significant influence on the 2008 UPC Amendments. See Law Firm Biography of Harry L. Tindall, <http://www.tindallfoster.com/familyattorneys/harry-tindall.htm> (last visited Jan. 12, 2010).

132. National Conference of Commissioners on Uniform State Laws, *Amendments to Uniform Probate Code* (2008), <http://www.law.upenn.edu/bll/archives/ulc/upc/2008amends.pdf>.

B. *The 2008 UPC Amendments*

1. *Parent–Child Relationship*¹³³

The 2008 UPC Amendments acknowledge that parentage is a much more complicated affair these days. For instance, it used to be that a mother–child relationship was self-apparent, as the mother actually gave birth to the child.¹³⁴ Because a woman giving birth to a child was relatively undisputed, the law rarely confronted the question of legal motherhood.¹³⁵ But egg donations and gestational surrogacy now make identifying a mother–child relationship more difficult. Fathers’ genetic connections always have been less apparent, so legal paternity traditionally has been inferred “through a network of presumptions and defenses.”¹³⁶ For example, the husband of a woman who gave birth was presumed to be the father of her child.¹³⁷ But, DNA testing and advancements in ART (such as sperm donations) make presuming and recognizing the father–child relationship more difficult as well.¹³⁸

Into this breach, the UPC has leapt. Rather than merely referring to or incorporating relevant state family law or the Uniform Parentage Act (UPA) to define a parent–child relationship, the UPC now seeks to explicitly define such relationships within its own text for its own purposes.¹³⁹

While often borrowing the UPA’s definitions and categories for determining parent–child status,¹⁴⁰ the 2008 UPC Amendments do not adopt verbatim all of the UPA’s definitions for the parent–child relationship.¹⁴¹ As a result, decisions determining legal parentage might not sync with decisions determining a parent–child relationship for inheritance purposes.

The 2008 UPC Amendments replace the former section 2-114 with nine intricate sections defining the parent–child relationship for succession

133. For other articles describing the parent–child relationship changes made by the 2008 UPC Amendments, see Tritt, *Sperms and Estates*, *supra* note 9, and Gary, *We are Family*, *supra* note 60.

134. See Marsha Garrison, *Law Making for Baby Making: an Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV 835, 912 (2000) (noting that “courts have not typically distinguished gestation from genetic tie for the simple reason that, for a child conceived sexually, they are inextricably linked.”).

135. *Id.*

136. Meyer, *supra* note 121, at 127.

137. *Id.*

138. See, e.g., *Doe v. Doe*, 20 So.3d 892 (Fla. Dist. Ct. App. 2d Dist. 2009) (holding that a father–child relationship that had been recognized in a valid divorce settlement rendered the child able to inherit from a trust which was restricted to “children and descendants by blood,” notwithstanding a DNA paternity test that indicated that the “father” could not have been the parent of the child).

139. Tritt, *Sperms and Estates*, *supra* note 9, at 407 (explaining that the UPA and state family laws provide “rules for determining [‘legal parentage’] in order to determine, among other things, family law issues, such as identifying who will [make] decisions concerning the . . . child’s well being,” have custody, provide support, and have visitation rights).

140. *Id.* at 407.

141. See UNIF. PARENTAGE ACT § 102 (2000).

law purposes.¹⁴² Interestingly, and perhaps tellingly, to determine a child's inheritance rights, the UPC has switched from defining the child's status to identifying and categorizing the parents' status. Thus, the UPC Committee drafted numerous complex rules regarding adoption, illegitimate children, ART, and posthumously conceived children.

i. Genetic Parents

The 2008 UPC Amendments retain genetics as the seminal building block for parent-child status. Under UPC section 2-117, "a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status,"¹⁴³ unless an individual is included or excluded as a "parent" under one of the other sections. Section 2-115(6) defines genetic mother as "the woman whose egg was fertilized by the sperm of a child's genetic father."¹⁴⁴ Section 2-115(5) defines genetic father as "the man whose sperm fertilized the egg of a child's genetic mother," or, if a presumption of paternity exists under applicable state law, the man for whom that relationship is established.¹⁴⁵

ii. Adoptive Parents

The newly added section 2-118 begins with the general rule that a parent-child relationship exists between an adoptive parent and an adopted child—an adopted child may inherit from the adoptive parent, and vice-versa.¹⁴⁶ Similar to the previous UPC provision, when a child is adopted, his legal relationship generally is severed with his genetic parents and begins anew with his adoptive parents.¹⁴⁷

142. See UNIF. PROBATE CODE § 2-114–2-122 (2008).

143. *Id.* § 2-117. Even the 1990 UPC represents a divergence from earlier versions of the UPC, where a child born out of wedlock was considered a child of his or her birth mother, but a parent-child relationship with the father for intestacy purposes was either determined by the UPA or was not presumed under applicable state law unless the parents were married (even if the marriage was void) prior to the child's birth or paternity was proven by clear and convincing evidence. UNIF. PROBATE CODE § 2-109 (amended 2008), 8 U.L.A. 284 (1998). Further, a father established merely by paternity testing could not inherit from the child unless the father had supported the child or openly held the child out as his own. *Id.*; see Megan Pendleton, *Intestate Inheritance Claims: Determining a Child's Right to Inherit When Biological and Presumptive Paternity Overlap*, 29 CARDOZO L. REV. 2823, 2833–34 (2008) (discussing the interplay of paternity and genetics between the UPC and UPA). Given the evolution of the UPC's position regarding children born out of wedlock, the UPC seemed to mirror its own rules in this area on normative theories—as children born to unmarried parents became more common and culturally accepted, the rules in this area were modernized to match the prevailing cultural norms.

144. UNIF. PROBATE CODE § 2-115(6) (2008).

145. *Id.* § 2-115(5). Accordingly, a "genetic father" may be "presumed" to be the father and not be the individual whose sperm actually fertilized the egg.

146. *Id.* § 2-118(a).

147. See *id.* § 2-119(a); see also *id.* § 2-119(e) cmt. (stating that a child's genetic parents are the parents determined under UPC section 2-120 or UPC section 2-121. Basically, UPC section 2-119(e)

Section 2-119 retains the stepparent adoption exception (in the case that a child's parent dies and the surviving parent remarries, this exception provides that remarriage of the surviving parent and subsequent adoption of the child by a stepparent will not sever the child's right to inherit from his or her deceased parent's relatives).¹⁴⁸ But the 2008 UPC Amendments also provide two new exceptions to adoption's fresh start policy. First, a child still may inherit from or through both genetic parents if the child is adopted by "a relative of a genetic parent, or by the spouse or surviving spouse of a relative of a genetic parent."¹⁴⁹ Here, only the child has the right to inherit; parents who give up custody cannot later inherit from their child.¹⁵⁰ Second, a child may inherit through his or her genetic parents if both the child's genetic parents die, and then some third party (relative or stranger) adopts the child.¹⁵¹

One of the most striking changes in the 2008 UPC Amendments includes technical definitions that define "adoptive parents" for inheritance purposes. Section 2-118(b) creates a parent-child relationship between an individual and child who is "in the process of being adopted" by the individual (but before the adoption is legalized formally).¹⁵² This relationship is created in two circumstances: (1) if a married couple is in the process of adopting a child when one of the spouses dies, then the surviving spouse finalizes the adoption;¹⁵³ and (2) if a stepparent is in the process of adopt-

puts a child of assisted reproduction or a gestational child in the same position as a genetic child for the purposes of section 2-119.).

148. *See infra* Part III.B.4.i; *see also* Gary, *We Are Family*, *supra* note 60, at 176 (stating that a child still inherits from the noncustodial genetic parent even if the noncustodial genetic parent no longer takes care of or even sees the child).

149. UNIF. PROBATE CODE § 2-119(c) (2008). A "relative" is defined as a child's "grandparent or a descendant of [the child's] grandparent." *Id.* § 2-115(9). Under the stepparent adoption scenario, a child could potentially inherit from three parents.

150. *Id.* § 2-119(c).

151. *Id.* § 2-119(d); *cf.* Roberts, *supra* note 124, at 553-54 (describing a scenario under the 1990 UPC where a child loses his inheritance rights from his paternal grandmother when both his genetic parents die and he is adopted by a person related to his genetic mother). Typically, this exception might apply where a mother (M) and father (F) have a child (C). Both M and F die, and C is adopted by new parent, (N). When M's father (G) dies intestate, C would inherit from G. The drafters likely perceive that in this scenario, C would stay in contact with his or her genetic family. In fact, the comment to section 2-119(d) states the assumption that the child will maintain ties with the genetic family and that the genetic family may play a part in deciding who will adopt the child. UNIF. PROBATE CODE § 2-119 cmt. (2008); *see also* E. Gary Spitko, *Open Adoption, Inheritance, and the "Uncleing" Principle*, 48 SANTA CLARA L. REV. 765, 784-85 (2008) (explaining that the probable rationale for the exceptions is that the genetic parent acted as a parent of the child and that the genetic family still considers the child to be a part of the family). Further, because M and F died rather than giving up C for adoption of their own volition, we may also presume that there was no intent to sever the familial ties at all, so implementing the fresh start policy here would benefit no one.

Finally, this provision likely would approximate the testator's intent—society would assume that a parent who has predeceased his or her own child would wish to provide support or inheritance to his or her own grandchild, even if necessity required that the grandchild had subsequently been adopted.

152. UNIF. PROBATE CODE § 2-118(b)(2) (2008).

153. *Id.* § 2-118(b)(1).

ing a child when the stepparent dies and the stepparent's spouse survived the deceased stepparent by 120 hours.¹⁵⁴

For example, under section 2-118(b), an individual who is "in the process of being adopted" by a married couple, but not yet legally adopted when one of the soon-to-be adoptive spouses dies, can nonetheless inherit from that deceased spouse.¹⁵⁵ This result ostensibly effectuates the decedent's intent, because the decedent apparently intended to complete the adoption and become a legal parent. (However, because this scenario does not constitute an exception to the UPC's genetic parent foundation, the adoptee would still be permitted to inherit from his or her genetic parents if either or both died during the process of the adoption.)

This new rule applies only to married couple adoption¹⁵⁶ and stepparent adoption,¹⁵⁷ not to couples who choose not to get married or cannot get married. Therefore, the rule discriminates against couples who choose not to get married or cannot get married.

Unfortunately, section 2-118 does not define "in the process of being adopted," leaving significant ambiguity and room for judicial interpretation; but, this is intentional.¹⁵⁸ The comments to section 2-118 state that this phrase is flexible and should be interpreted on a case-by-case basis.¹⁵⁹ Accordingly, this standard may not promote predictability and could lead to inconsistent results.

Curiously, section 2-119 does not provide for second-parent adoption;¹⁶⁰ the provision only allows for a genetic parent's parent-child relationship to continue when a *stepparent* adopts the child, not an unmarried partner (even though state adoption laws would continue to recognize the parental status of the genetic parent). Under the single-parent adoption rule, the genetic parent is legally displaced and no longer has a parent-

154. *Id.* § 2-118(b)(2) (noting that the genetic parent must survive the deceased stepparent by 120 hours for the child to inherit from the deceased stepparent); *see also id.* § 2-118(c) cmt. (stating that a child may inherit from and through a stepparent who dies while in the process of adopting the child when the child was born through assisted reproduction or is a gestational child. "An example would be a situation in which an unmarried mother or father is the parent of a child of assisted reproduction . . . and subsequently marries an individual who then begins the process of adopting the child but who dies before the adoption becomes final.").

155. *Id.* § 2-118(b)(1).

156. *Id.*

157. *Id.* § 2-118(b)(2).

158. UNIF. PROBATE CODE § 2-118(b)(1).

159. *Id.* § 2-118(b) cmt. Alternatively, because the process of adoption is governed by state family laws, family law (and not the UPC) is likely a better point of reference regarding the process of adoption and whether a parent was in the process of adopting a child for parent-child relationship purposes.

160. Tritt, *Sperms and Estates*, *supra* note 9, at 184 n.312. Second-parent adoption is a legal procedure that allows an unmarried same-sex partner to adopt his partner's biological or adopted children without terminating the first parent's right as a parent. Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 374-75, 380 (2005).

child relationship with the child for intestacy purposes.¹⁶¹ So, for example, if a genetic birth mother in a same-sex couple wishes her partner to adopt the child so that the couple may jointly raise the child, the UPC would sever the birth mother's parent-child relationship for inheritance purposes.¹⁶²

Although a growing minority of states has begun recognizing second-parent adoption,¹⁶³ the UPC provides no protections for children to inherit in states in which second-parent adoption is now recognized. Ironically, recognition of second-parent adoption or reliance on state law would likely approximate the intent of the testator—a parent who has adopted a child or has raised the child as his or her own would most likely wish and presume that, assuming a valid adoption, the child would inherit under state probate laws. From a family law perspective, parents in states that both allow second-parent adoption and enact the 2008 UPC Amendments are faced with a dilemma: if they choose to adopt the child to provide legal and parental rights during the parents' and child's lifetime, they risk detriment if the birth parent has not executed a valid will.

iii. *Children Conceived By Artificial Reproductive Technology*

For the first time, the UPC explored the parent-child relationship as it relates to the growing field of ART.

People use ART for a variety of reasons—some use ART to overcome infertility problems, some because they are in a same-sex relationship, and some use ART because they are single. ART can achieve conception without sex, so people who want a child may use sperm, ova, or gestational services that have been donated or sold. The parentage of children conceived through ART is often unclear and these children may have connections to multiple adults. For instance, it is now possible for a child to have three potential “mothers”: the egg donor, the gestational surrogate, and the woman who plans the pregnancy and intends to raise the child as the legal mother.¹⁶⁴ It is also possible for a child to have three potential “fathers”: the sperm donor, the husband to the gestational surrogate, and the

161. Wendel, *supra* note 160, at 374–75.

162. This absurd result happens in heterosexual unmarried relationships as well. *See id.* at 374, 380; *see also* Gary, *We Are Family*, *supra* note 60, at 178–79 (stressing that after the genetic parent's partner adopts the child, the genetic parent must adopt the child in order for the child to inherit from the genetic parent).

163. *See Human Rights Campaign, Second-Parent Adoption*, <http://www.hrc.org/issues/2385.htm> (last visited Jan. 12, 2010). Second-parent adoption is legal by court opinion or statute in the District of Columbia, California, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont. *Id.* Second-parent adoption has been granted in eighteen other states. *Id.*

164. Naomi Cahn, *Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?*, 2 GEO. J. GENDER & L. 1, 1 (2000).

man who plans the pregnancy and intends to be legally recognized as the father.¹⁶⁵

The 2008 UPC Amendments attempt to cover the possible parent-child scenarios that could result from existing methods of ART with specificity, using complicated codified variables. The Amendments attempt to create technology-specific rules targeted to the various types of ART that currently exist.¹⁶⁶ Unfortunately, sections 2-120 and 2-121 are complex, unwieldy, and “cloaked in language only a lawyer could love.”¹⁶⁷ When read together, these provisions clearly seek to determine parentage according to intent. “That is, the individuals who, at the time of conception, intended to raise the child [are] deemed to be the child’s parents” for inheritance purposes.¹⁶⁸ This bears repeating: it is important to remember that these rules apply only for determining parentage for inheritance purposes—not for family law purposes.

“The 2008 UPC Amendments divide the definition of a parent-child relationship for children conceived by ART into two sections”¹⁶⁹: (1) one in which no woman is acting merely as a gestational carrier, and (2) one in which a woman involved is acting solely as a gestational carrier.¹⁷⁰

a. No Mere Gestational Carrier Is Involved

Section 2-120 concerns parents who use ART and are each either the genetic or intended parent; no woman is acting solely as a gestational carrier in the process. Clearly in these cases, a parent-child relationship exists between the birth mother¹⁷¹ and the child.¹⁷² Therefore, if the birth mother was artificially inseminated (either by her husband or a sperm donor) or was impregnated using in vitro fertilization with an egg provided by an egg donor, the birth mother is deemed a “parent” for parent-child property succession purposes.

Generally, there is no parent-child relationship between a third-party donor of genetic material (a sperm donor other than the husband or an egg donor other than the mother) and the child.¹⁷³ Even though the donor is

165. *Id.*

166. These codified variables are inextricably linked to the development of ART. As ART is constantly evolving, the codified amendments’ variables will fast become antiquated.

167. Tritt, *Sperms and Estates*, *supra* note 9, at 410.

168. *Id.* The provisions are both gender- and marital status-neutral, thereby adding protections to same-sex and opposite sex unmarried couples.

169. *Id.* at 411.

170. *See* UNIF. PROBATE CODE §§ 2-120–2-121 (2008).

171. *Id.* § 2-120(a)(1) (defining birth mother as “a woman, other than a gestational carrier under section 2-121, who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child’s genetic mother.”).

172. *Id.* § 2-120(c).

173. *Id.* § 2-120(b) cmt. (stating that this section is consistent with UPA section 702).

technically the genetic parent of the child, there will be no parent-child relationship unless established under another provision of the UPC.

A parent-child relationship will exist between the child and the birth mother's husband if the husband provided the sperm and the sperm was used during the husband's lifetime.¹⁷⁴ Under this ART (sometimes called artificial insemination by husband, or AIH), the husband would nevertheless be the genetic parent. Note that this section only applies if the husband's sperm were used during his lifetime by his wife—it does not apply to posthumous conception.¹⁷⁵

In addition to the birth mother, a parent-child relationship will exist between the child and an individual, if any, who is identified on the birth certificate as the child's parent.¹⁷⁶ This section grants presumptive effect to a birth certificate identifying an individual other than the birth mother as the other parent of child conceived by ART.

A parent-child relationship also may be established by an individual (other than the birth mother) if the individual "consented" to the assisted reproduction by the birth mother with the intent to be treated as the other parent.¹⁷⁷ Consent may be established in two ways. First, consent is established if the individual signed a record, before or after the child's birth, evidencing the individual's consent.¹⁷⁸ Second, consent may be established if the individual functioned as a parent of the child no later than two years after the child's birth.¹⁷⁹ The 2008 UPC Amendments do not require the individual to function as a parent for any certain period of time.¹⁸⁰ Moreover, an individual who is prevented from carrying out his or her intent to function as the parent of the child "by death, incapacity, or other circumstances" can have a parent-child relationship with the child if the individual can establish that he or she intended to function as a parent of the child no later than two years after the child's birth.¹⁸¹

Interestingly, the 2008 UPC Amendments open the door for inheritance by a child conceived by ART through two parents of the same sex.

174. *Id.* § 2-120(d).

175. *Id.*

176. UNIF. PROBATE CODE § 2-120(e) (2008) (stating that the individual on the birth certificate is presumed to be the parent of the child).

177. *Id.* § 2-120(f). The individual's genetic material might or might not have been used to create the pregnancy.

178. *Id.* § 2-120(f)(1). Consent may be withdrawn, in a record, before the use of harvested eggs or sperm, or placement in utero of embryos. If a marriage is dissolved before such placement, the resulting child is not the child of the former spouse unless there is a signed consent to be the child's parent. *Id.* § 2-120(i).

179. *Id.* § 2-120(f)(2)(A); *see also id.* § 2-120(h)(1) (stating that there is a presumption that the birth mother's spouse satisfies § 2-120(f)(2)(A) unless clear and convincing evidence establishes otherwise).

180. *See id.* §§ 2-120(a)(3); 2-120(e); 2-120(f).

181. UNIF. PROBATE CODE § 2-120(f)(2)(B) (2008); *see id.* § 2-120(h)(1) (stating that there is a presumption that the birth mother's spouse satisfies section 2-120(f)(2)(B) unless clear and convincing evidence establishes otherwise).

Using section 2-120(f) as an example, because it uses words such as “individual” and “other parent” instead of “father” or “spouse,” a lesbian woman, other than the birth mother, who consented to the assisted reproduction with intent to be treated as the child’s other parent, is a parent of that child under the UPC.

b. A Gestational Carrier Is Involved

Section 2-121 defines the parent–child relationship when a child is born to a gestational carrier.¹⁸² That is to say, the birth mother is neither the intended parent nor the genetic parent, but rather she gives birth under a gestational agreement.¹⁸³ A parent–child relationship may be established by a court order designating an individual or individuals as the parent or parents of a child born to a gestational carrier—a woman who is not an intended parent and who gives birth to a child under a gestational agreement.¹⁸⁴ If there is no court order,

[w]ith respect to children born to a gestational [carrier], the child will be the child of the intended parents¹⁸⁵ and not of the gestational [carrier].¹⁸⁶ [But] [i]ntent alone is not sufficient. A parent–child relationship only exists if the intended parent functioned as a parent of the child no later than two years after the child’s birth or died while the gestational carrier was pregnant.¹⁸⁷

In addition, a married individual who dies while the child is being carried by a gestational carrier and who intended to be treated as a parent of the child born to the gestational carrier also is considered a parent under the UPC Amendments.¹⁸⁸

182. *Id.* § 2-121(a)(2) (defining gestational carrier as “a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child’s genetic mother.”); *id.* § 2-121(c) (stating that generally a parent–child relationship does not exist between the child and the child’s gestational carrier).

183. *Id.* § 2-121(b). Gestational agreement is defined as an “agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent.” *Id.* § 2-121(a)(1). An intended parent is defined as “an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction.” *Id.* § 2-121(a)(4).

184. *Id.* § 2-121(b).

185. *Id.* § 2-120(d). If the child conceived by ART is adopted, then the adoption sections would govern. *See id.* §§ 2-118–2-119.

186. UNIF. PROBATE CODE § 2-121(c) (2008).

187. Tritt, *Sperms and Estates*, *supra* note 9, at 412; UNIF. PROBATE CODE § 2-121(d) (2008).

188. UNIF. PROBATE CODE § 2-121(f) (2008); *see id.* § 2-121(g)(1)–(2) (stating that the presumption under section 2-121(f) does not apply if there is a court order stating otherwise or there is a signed record stating otherwise).

iv. *Posthumously Conceived Children*

Sections 2-120 and 2-121, when read together, provide the limitations regarding inheritance by posthumously conceived children. As a result of ever-advancing medical technology, a testator's sperm or eggs may be extracted and frozen before or even after the decedent's death.¹⁸⁹ On the basis of technology alone (and putting all ethical concerns aside for the moment), the sperm and eggs may be used for conception long after the genetic donor has died. In recent years, the law has struggled with whether children conceived in this way should be able to take under probate law.¹⁹⁰

Under the 2008 UPC Amendments,

[a] posthumously conceived child will be treated as the child of the deceased individual if: (i) the individual intended to be treated as a parent of a posthumously conceived child is established by clear and convincing evidence, and (ii) the child is *in utero* not later than thirty-six months after the decedent's death or born not later than forty-five months after the individual's death.¹⁹¹

The rationale for the 36 to 45 month window is to provide the surviving spouse or partner enough time for a period of grieving and time to decide to have a child by assisted reproduction.¹⁹²

Interestingly, the surviving parent need not be the genetic parent of the posthumously conceived child.¹⁹³ Moreover, even if the genetic parent fails to provide a written record stating that he or she intends to be treated as the parent of a posthumously conceived child, the parent can still be considered the parent of the posthumously conceived child if clear and convincing evidence establishes that the parent intended to function as the parent of the child.¹⁹⁴

189. For a discussion of the moral, ethical, and legal issues surrounding posthumous conception (or posthumous assisted reproduction (PAR)), see G. Bahadar, *Death and Conception*, 17 HUMAN REPRODUCTION 2769 (2002).

190. See Tritt, *Sperms and Estates*, *supra* note 9, at 378; see also Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154, 160 (2008) (addressing the various legal issues and arguing that awarding inheritance rights to posthumously conceived children should turn on three factors: decedent's consent to the conception, proof of parentage, and length of time between the decedent's death and the conception).

191. Tritt, *Sperms and Estates*, *supra* note 9, at 412; UNIF. PROBATE CODE § 2-120(k) (2008).

192. UNIF. PROBATE CODE § 2-120(k) cmt. (2008).

193. Gary, *We Are Family*, *supra* note 60, at 184 (stating that there is no requirement for the parent to be the genetic parent because of the possibility of pooled parenting). For example, the mother of the decedent could request his sperm be extracted, procure a surrogate to carry the pregnancy, and then raise the child as her own. If, however, the parent is not the spouse or genetic relative of the decedent, the child will be excluded from class membership under section 2-705(e) unless the testator's will expressly states otherwise. UNIF. PROBATE CODE § 2-705(e) (2008).

194. Gary, *We Are Family*, *supra* note 60, at 184.

v. *Parents by Equitable Adoption*

Section 2-122 states that the 2008 UPC Amendments do not impede or affect the doctrine of equitable adoption.¹⁹⁵

Equitable adoption (also called virtual adoption, adoption by estoppel, and de facto adoption) is an equitable remedy construed by courts to avoid what is perceived as an injustice arising from a strict application of the intestacy statutes.¹⁹⁶ An equitably adopted child is a child not legally adopted by the decedent, although the child was raised by the decedent in the decedent's home as the decedent's child.¹⁹⁷ An individual asserts a claim of equitable adoption in order to take an intestate share of the decedent's estate.¹⁹⁸

vi. *"Functioning as a Parent of the Child" and Inheritance by a Genetic Parent*

Under section 2-114, a parent is barred from inheriting from or through a child if "the parent's parental rights were terminated."¹⁹⁹ Further, a parent may be barred from inheriting from or through a child even if his or her parental rights are not terminated, if (1) the child dies before reaching his or her eighteenth birthday, and (2) clear and convincing evidence illustrates that the parent's parental rights "could have been terminated . . . on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions of the parent toward the child."²⁰⁰

The rationale supporting the first clause of section 2-114 is immediately apparent: when a parent's rights have been terminated, the parent should not be allowed to obtain any benefit from the child's estate. This supports three intertwined policies: testator's intent, reciprocity, and punitive goals.²⁰¹ We are, however, left with a seemingly odd result from the

195. UNIF. PROBATE CODE § 2-122 (2008).

196. See Jan Ellen Rein, *Relatives by Blood, Adoption and Association: Who Should Get What and Why?*, 37 VAND. L. REV. 711, 767 (1984); James R. Robinson, Note, *Untangling the "Loose Threads": Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 955 (1999).

197. Robinson, *supra* note 196, at 955.

198. Tritt, *Sperms and Estates*, *supra* note 9, at 384; Robinson, *supra* note 196, at 955.

199. UNIF. PROBATE CODE § 2-114(a)(1) (2008); see also Tritt, *Sperms and Estates*, *supra* note 9, at 412 n.333.

200. UNIF. PROBATE CODE § 2-114(a)(2) (2008).

201. The UPC drafters likely presumed that a child whose parent's rights were terminated would not have wished that parent to inherit. As for reciprocity and penalty, if the parent was not providing for the child, it would seem inequitable that the child's assets should provide any benefit for the parent whose rights were terminated. Finally, we as a society may wish to demonstrate our disapproval of parents whose rights are terminated by making clear that those parents can no longer inherit from their children. Under some theories of social reform, mere articulation of this rule may go far toward im-

second portion of section 2-114, reiterating a bright-line rule that a parent whose rights *could have* been terminated cannot inherit from a child who dies before the child turns eighteen years of age.²⁰² One might wonder: if a parent's rights could have been terminated, why should the parent receive any benefit from his child's estate merely because the child reached eighteen years of age? Some scholars have opined that when the child reaches age eighteen, he or she can write a will, and thereby disinherit his or her parents.²⁰³ Moreover, the evidence proving that the parent should have lost parental rights is old and much harder to prove once the child reaches age eighteen.²⁰⁴ On the other hand, given the substantial numbers of Americans that die intestate,²⁰⁵ this rationale may prove to be a misguided delusion.

2. *Class Gifts*

Class gifts allow individuals to devise their property to members of a particular class (often those in a particular relationship with the testator²⁰⁶), rather than writing out the names of each person.²⁰⁷

Class gifts may arise in two scenarios. First, [a class gift may arise] when the instrument is executed by a testator that refers to his or her own children (For example, the testator's will bequeaths his or her estate to "my children.") Second, [a class gift may arise] when the instrument is executed by someone other than a parent figure (For example, suppose a testator bequeaths his or her estate to A for life, remainder to A's children.)²⁰⁸

Before the 2008 UPC Amendments, the members included in a class turned on whether the testator was a genetic or adoptive parent in relation

plementing more parental support for children.

202. See Gary, *We Are Family*, *supra* note 60, at 179.

203. *Id.*

204. *Id.*

205. See Tritt, *Sperms and Estates*, *supra* note 9, at 379 n.55.

206. Though the term "testator" is used, because of its simplicity, to denote the decedent who devises a gift to a particular class, the UPC equally applies to other sorts of dispositive transfers. See UNIF. PROBATE CODE § 2-701 (amended 2008), 8 U.L.A. 138 (1998).

207. UNIF. PROBATE CODE § 2-705 cmt. (2008) ("This section facilitates a modern construction of gifts that identify the recipient by reference to a relationship to someone").

A class gift is defined as a disposition to beneficiaries who are described by a group label and are intended to take as a group. Taking as a group means that the membership of the class is typically not static, but is subject to fluctuation by increase or decrease until the time when a class member is entitled to distribution; and upon distribution, the property is divided among the then-entitled class members on a fractional basis.

Lawrence W. Waggoner, *Class Gifts Under the Restatement (Third) of Property*, 33 OHIO N.U. L. REV. 993, 995 (2008) (footnotes omitted).

208. Tritt, *Sperms and Estates*, *supra* note 9, at 382.

to the class members.²⁰⁹ Generally, if the transferor of the class gift was a genetic or adoptive parent, the former UPC provided that the genetic²¹⁰ and adopted children were included in the class gift if they qualified to take under the rules of intestacy.²¹¹ By contrast, if the transferor of the class gift was someone other than the genetic or adoptive parent, the former UPC provided that an adopted child would be included in the class only if the child lived as a regular member of the genetic or adopting parent's (or an immediate relative of the genetic or adoptive parent's) household while the adopted child was a minor.²¹²

Why would the drafters propose a dichotomy according to the testator's relationship with the class members? By excluding from class membership those children that the parent did not hold out as his own by raising as minor children, this rule attempted to approximate and effectuate the testator's intent. When the testator devises a gift to his own children, we as a society presume that he intends to provide support for those children. Further, we presume that the testator is in the best position to know who may be included within the class of his children. When the testator devising a class gift is not the natural or adoptive parent, that testator may be unaware of potential class members—either persons who were later adopted (for example, adult adoptions as a means of circumventing probate laws in same-sex relationships) or illegitimate children. Thus, the default rule for class gifts, if the testator does not otherwise specify or define the class members, is that only adopted children that the parent raised while they were minor children (and held out as his or her own children) are included in the class gift.²¹³

The 2008 UPC Amendments to the class gift provision not only reflect changes to both the parent-child relationship as defined within the class, but they also signal a change in the meaning of children within the class (as defined by the default intestacy rules of sections 2-118 through 2-121).²¹⁴ The 2008 Amendments concerning class gifts apply to the treatment of genetic children, adopted children, nonmarital children, children conceived by ART, and gestational children. Similar to the former UPC provisions, the rule is unchanged regarding class gifts where the testator is an individual other than the parent of the child: if the adoptive parent did

209. Waggoner, *supra* note 207, at 995.

210. The genetic children may be born out of wedlock. UNIF. PROBATE CODE § 2-705(b) (amended 2008), 8 U.L.A. 143 (1998).

211. *Id.* § 2-705(b). The child must still satisfy section 2-705(a) to be included in the class gift. *See id.* § 2-705(a), (b) cmt.

212. *Id.* § 2-705(e)-(f); *see also* Tritt, *Sperms and Estates*, *supra* note 9, at 383.

213. UNIF. PROBATE CODE § 2-705(e)-(f) cmt. (amended 2008), 8 U.L.A. 143 (1998); *see also* Roberts, *supra* note 124, at 546.

214. The comments to section 2-705 state that the rules of construction for class gifts are consistent with RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §§ 14.5-14.9. UNIF. PROBATE CODE § 2-705 cmt. (2008).

not function as a parent of the child before the child reached eighteen years of age, the class will not include the child.²¹⁵ This provision, however, further states that relatives by marriage are not included in a class gift unless “when the governing instrument was executed, the class was then and foreseeably would be empty; or . . . the language or circumstances otherwise establish that relatives by marriage were intended to be included.”²¹⁶

The 2008 UPC Amendments also added a class-closing provision that incorporates three independent rules.²¹⁷ First, a child who is in utero at the testator’s death must live 120 hours after birth to be included in the class gift.²¹⁸ Second, if the distribution date is upon the death of the parent, the posthumously conceived child is included in the class gift if the child is “in utero not later than 36 months after the deceased parent’s death or born not later than 45 months after the deceased parent’s death.”²¹⁹ Third, a child in the process of being adopted when the class closes is included in the class gift only if “the adoption is subsequently granted.”²²⁰

It should be mentioned in passing that implementation of the 2008 UPC Amendments will necessarily influence the application and interpretation of numerous other UPC provisions. For example, the UPC antilapse provisions closely mirror the delineation of the parent–child relationship.²²¹ It goes almost without saying that for a child to take under the antilapse provision, courts will rely on the UPC’s internal definitions of parent or child in construing whether the antilapse provision may be invoked (i.e., if there are any children under the UPC definition who may take under the will).²²²

In sum, the 2008 UPC Amendments provide a series of technical rules to define the parent–child relationship as it relates to adoption, ART, and the implementation of (and reliance on) both statutes for class gift purpos-

215. UNIF. PROBATE CODE § 2-705(e)–(f) (2008).

216. *Id.* § 2-705(c)(1)–(2). An example of this section would be when H marries W, then H makes a devise to H’s uncles, but H has no uncles and W has five uncles. Therefore, based on section 2-705(c)(1), H’s class gift includes W’s uncles.

217. *Id.* § 2-705(g).

218. *Id.* § 2-705(g)(1). An example of this section would be if H, in his will, devised \$1,000 to H’s children, and H’s wife is pregnant at H’s death with child X. If child X lives 120 hours after he is born, then he will be included in the class gift made by H.

219. UNIF. PROBATE CODE § 2-705(g)(2) cmt. (2008) (stating that if the distribution date occurs before or after the deceased parent’s death, section 2-705(g)(2) does not apply).

220. *Id.* § 2-705(g)(3).

221. *Id.* § 2-603. In sum, antilapse provisions often may save devises in a will (or will-substitute) in case the devisee has predeceased the testator. Subject to a few conditions, a child of the devisee may take the parent’s share under the will. *See also* Averill, *supra* note 30, at 920–21.

222. In light of the substantive changes made to the parent–child relationship and class gift provisions of the UPC, the question arises whether the drafters of the 2008 UPC Amendments should have commented on or revised the antilapse rules as well. Some ambiguity may continue to exist (and may be a matter for courts to decide) regarding whether posthumously conceived children may take under an antilapse statute.

es. The 2008 UPC Amendments are a good step in the direction of expanding the definition of parent-child relationships for property succession purposes. Although overcomplicated and ideologically inconsistent in certain places, the 2008 UPC Amendments do a valiant job in trying to tackle complicated issues concerning stepfamilies and children born of ART (less so with nontraditional families and blended families). The remainder of this Article will evaluate the policy goals that are commonly used to justify probate legal schemes and will analyze the new UPC Amendments under those purported policy concerns.

III. ANALYSIS OF THE POLICY CONCERNS UNDERLYING THE UPC

A. *The 2008 UPC Amendments' Effects on Public Policy*

Having described in detail the 2008 UPC Amendments, this Article now proceeds with a normative analysis of those Amendments from both the intent-effectuating default rules perspective and a secondary, structural perspective. The UPC does not disclose whether the 2008 UPC Amendments were adopted to engender integration of shifting policies or merely to attempt to clarify or correct earlier versions. Several apparent policy contradictions and divergent effects on policy when applied under different states' laws warrant further examination.

The 2008 UPC Amendments

retain[] the sanguinary nexus definition of children based on blood or a presumption thereof as the seminal building block for child status, but expand[] the definition by including: (i) children of an adjudicated legal parent; (ii) adopted children; (iii) a limited exception for step-parent and interfamily adopted children and children adopted after both genetic parents have died; (iv) non-marital children; (v) children born of ART where there is documented parental intent; (vi) children born of ART where there is functional parenting; and (vii) equitably adopted children.²²³

In addition,

[t]he [2008 UPC Amendments] create[] one structure for defining child status that advocates the sanguinary nexus test [and its reliance on genetics as well as other structures] that disregard genetics (intent to parent, functional parenting, behavioral parenting,

223. Tritt, *Sperms and Estates*, *supra* note 9, at 407; *see also* UNIF. PROBATE CODE §§ 2-116-2-122 (2008). For good measure, there is also a behavioral aspect to defining parentage under section 2-114, but behavioralism is only applied in a child-centered manner.

and contractual parenting). If intent to parent is important, why is it ignored [for] genetic children that were accidentally conceived or conceived through forced intercourse? If functionalism is important, why do the statutes retain a genetics aspect—why not just implement functionalism? For defining parentage, the 2008 UPC Amendments at times rely upon legal parentage concepts and at other times ignore it. Similarly, at times the UPC acknowledges that a certain category of child may have multiple parents, and [at] other times it seems to indicate that the greatest number of parents a child could have is two.²²⁴

B. Does it Effectuate Decedent's Intent?

As discussed, effectuating decedent's intent should be the primary goal of default rules concerning succession laws. A critical problem and fatal flaw of the 2008 UPC Amendments is the perspective from which the parent-child test is to be applied. The 2008 UPC Amendments analyze the parent-child relationship from a child-centered view, advocating a type of fairness doctrine²²⁵ from the point of view of the child in creating succession law default rules. In essence, the 2008 UPC Amendments seem to be based on family law jurisprudence by focusing on the child's wellbeing. Despite this recognized difference in foundational underpinnings between family law (the best interest of the child) and the law of succession (effectuating decedent's intent), the presence of the child-centered family law policy influence on the 2008 UPC Amendments is ubiquitous. While these divergent policy views can often coexist in intestacy statutes while reaching harmonious results, several of the 2008 UPC Amendments defining the parent-child relationship clearly promote the best interests of the child while ignoring contrary expressions of decedent's intent.

For example, under section 2-118(b), an individual who is "in the process of being adopted by a married couple," but not yet legally adopted when one of the adoptive spouses dies, can nonetheless inherit from that deceased spouse.²²⁶ This result ostensibly effectuates the decedent's intent because the decedent apparently intended to complete the adoption and become a legal parent. However, because this scenario does not constitute

224. Tritt, *Sperms and Estates*, *supra* note 9, at 413-14.

225. *See, e.g.*, Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94 n.1 (1996) ("Although this Article does examine the adequacy of probate laws from a standpoint of 'fairness' to the child in a nontraditional family, the Article is principally concerned with incongruities and the overall lack of certainty presented by current inheritance schemes as applied to such a child.").

226. UNIF. PROBATE CODE § 2-118(b)(1) (2008). One additional requirement is that the decedent's surviving spouse subsequently be granted the adoption. *See id.* § 2-118.

an exception to the UPC's genetic parent foundation,²²⁷ the adoptee would still be permitted to inherit from his or her genetic parents if either or both died during the process of the adoption. The individual's ability to also inherit from his or her genetic parents flies in the face of the genetic parents' intent, which is clearly to sever all legal ties with the individual via adoption. Thus, to be consistent, if an individual may inherit from a prospective adoptive parent once the "process of being adopted"²²⁸ has begun on the basis of that adoptive parent's presumed intent, the individual should similarly be barred from inheriting from his or her genetic parents.

Other examples where the Amendments frustrate decedent's intent extend from the UPC's heavy reliance on broadly allowing inheritance from genetic parents. While the average decedent would probably like to provide for his or her genetic progeny under ordinary circumstances, it is a stretch to conclude that genetic parents would choose to favor upon death, above others important in their lives, a genetic child whom they never met or never even knew existed. Similarly, genetic parents who have children conceived by forcible intercourse or otherwise lack intent²²⁹ to parent a child may not wish to provide for such children upon death.

There is a tendency to think of intestate succession as a form of child support, whether the child is a minor or an adult, or whether the child is needy or financially successful.²³⁰ Advocating [the best interest of the child] rationale as the overarching concern of inheritance law, however, is rooted neither in the nature nor the history of inheritance law.

There is a fundamental difference between intestate succession and child support, inasmuch as no parent is under a legal obligation to leave his or her children anything, and there is no "right to inherit."²³¹ In fact, the testamentary freedom doctrine values the right of the testator to completely disinherit his or her adult children.²³²

In addition, succession law historically has, and continues to, provide limited and narrow support to a decedent's child, and this meager support

227. *See id.* § 2-117.

228. *Id.* § 2-118(b)(1).

229. *See, e.g.*, Phillips v. Irons, 2005 WL 4694579 at *1 (Ill. App. Ct. 2005); Ferguson v. McKiernan, 855 A.2d 121, 122 (Pa. Super. Ct. 2004).

230. *See* Gary, *Adapting Intestacy Laws*, *supra* note 35 (basing her proposal on two policies: approximation of decedent's intent and support for families, however formed).

231. *See, e.g.*, DUKEMINIER, *supra* note 28, at 62 (stating that the interest of an heir apparent is a "mere expectancy" and is "not a legal 'interest' at all").

232. Triitt, *Sperms and Estates*, *supra* note 9, at 417-18; Hernández, *supra* note 2; Friedman, *supra* note 21, at 15 (theorizing that the ease in which an individual may disinherit his or her own children is perhaps reflective of the respect American law has to the doctrine of testamentary freedom).

is only offered to minor children.²³³ If society's need to protect children in the inheritance context is of such monumental concern to infringe upon a property owner's right to testamentary freedom, then this concern should lead to the creation of a mandatory rule, not a default rule.

The 2008 UPC Amendments frustrate testamentary freedom in many ways. Outside of the adoption context, the 2008 UPC Amendments maintain the historic UPC position that a child can have no more than two parents for intestacy purposes. Even in the context of assisted reproduction without a gestational carrier, the Amendments use the term "other parent" to preclude the possibility of a child having more than two parents for intestacy purposes.²³⁴ This limitation excludes a variety of potential multi-parent or blended familial structures made possible through use of assisted reproduction, especially among gays and lesbians.²³⁵

Prior to the 2008 UPC Amendments, a child adopted by one genetic parent's spouse, i.e., that child's stepparent, could inherit through and from both genetic parents and the adoptive stepparent.²³⁶ The 2008 UPC Amendments retained this provision and added additional circumstances under which an adoptive child can inherit from more than two parents. Under the 2008 UPC Amendments, a child "in the process of being adopted" by either a married couple or a stepparent can inherit, if one adoptive spouse or the adoptive stepparent dies, from that deceased adoptive parent and both of that child's genetic parents.²³⁷ Additionally, under section 2-119(c), a child can potentially inherit from up to four parents.²³⁸ Such is the case when a child is adopted by a married relative of a genetic parent; the child can then inherit from or through both adoptive parents and both genetic parents.²³⁹ Allowing a child to inherit from three or even four parents in the adoption context is contradictory to the other parts of the 2008 UPC Amendments, which consistently limit a child's ability to inherit from a maximum of two parents.

The 2008 UPC Amendments yield mixed results for homosexual parents when applied in various different states. In states that allow second-parent adoptions,²⁴⁰ the 2008 UPC Amendments prove harmful to the existing parental rights of homosexual couples where one is a genetic parent.

233. *See, e.g.*, UNIF. PROBATE CODE §§ 2-402, 2-402A (homestead allowance); 2-404 (maintenance allowance); 2-403 (exempt property allowance) (2008).

234. *See, e.g.*, UNIF. PROBATE CODE § 2-120(f) (2008).

235. For example, the 2008 UPC Amendments would not allow a child to inherit from three parents where a gay man donates sperm to a lesbian couple for assisted reproduction, and all three intend to assume parental roles in the raising of the child.

236. UNIF. PROBATE CODE § 2-114 (amended 2008), 8 U.L.A. 91 (1998).

237. *See* UNIF. PROBATE CODE §§ 2-118(b)(1)–(2) (2008); *see also supra* Part II.A.2.

238. *See* UNIF. PROBATE CODE § 2-119(c) (2008).

239. *See id.* § 2-119(c).

240. *See supra* Part II.A.2.

Were the nongenetic partner to adopt the child,²⁴¹ the child would no longer inherit from the genetic-parent partner under the 2008 UPC Amendments, even if, for example, the partners were lesbians otherwise deemed parents under section 2-120(f).²⁴² This detrimental application to homosexual parents is not, however, mirrored in the application of the 2008 UPC Amendments to states that prohibit gay adoption. The 2008 UPC Amendments, via sections 2-120 and 2-121, actually open the door for inheritance by a child conceived by assisted reproduction through two parents of the same sex. Using section 2-120(f) as an example, because it uses words such as “individual” and “other parent” instead of “father” or “spouse,” a lesbian woman, other than the birth mother, who consented to the assisted reproduction with intent to be treated as the child’s other parent, is a parent of that child under the UPC.²⁴³ Such recognition would manifest a drastic shift in policy in states that do not allow gay marriage, civil unions, or second-parent adoption.

Default rules of succession law should facilitate the effectuation of testator’s intent and nothing else. Therefore,

[s]uccession law is, and should be, [properly] focused on the property owner.²⁴⁴ If providing for one’s child at death implements the dispositive wishes of the average intestate decedent, fulfilling this goal should be property owner centered rather than child-centered. Defining a parent-child relationship from a best interest of a child perspective does not achieve the traditional goals of inheritance laws—the focus in succession law is on the property owner and not on the expectations of surviving family members.²⁴⁵

Default rules of succession law should not favor any other policy to the detriment of furthering testamentary freedom. If decedent’s intent means anything, it cannot be rendered secondary to other theories. Decedent’s intent is still viewed as the most important purpose of our testacy laws; it is time that decedent’s intent return as the primary purpose for intestacy laws as well, both in theory and in practice.

241. Adoption of the child by the nongenetic partner may be desirable for a number of lifetime reasons, including the ability to make medical decisions on the child’s behalf, health insurance benefits for the child, or other similar traditional parentage rights.

242. This result is a consequence of UPC section 2-119(e), which, in the context of a subsequent adoption, treats individuals established as parents under UPC section 2-120(f) as genetic parents, from whom adopted children generally cannot inherit.

243. See UNIF. PROBATE CODE § 2-120(f) (2008).

244. This Article does not debate whether child support obligations should survive a parent’s death and become a debt of the estate.

245. Tritt, *Sperms and Estates*, *supra* note 9, at 414–15. See also Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 939 (1989).

C. Structural Goals of Succession Law Default Rules

Within the broader scope of the UPC's policy to effectuate decedent's intent, there are narrower structural goals that underlie effective succession law default rules. Included in these structural goals are the principles that succession law default rules should be administratively efficient; rigid enough to provide a predictable outcome for courts, property owners, and benefactors; easily understood by the general public; and flexible enough to adapt to future developments.²⁴⁶ This section analyzes whether the 2008 UPC Amendments satisfy these structural goals and whether they are suitable for adoption by states.

1. Ease of Administration

Ease of administration is a prized feature of succession default rules and is a principle concern of American succession law.²⁴⁷ "Even though [] succession laws may [] have [the] purpose" of effectuating testator's intent, "the efficacy of such [purpose] may depend upon the ease with which [the laws may] be administered."²⁴⁸ The UPC states that one of its purposes is "to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors."²⁴⁹ Ease of administration, in itself, though, does not justify undermining respect for effectuating testator's intent.²⁵⁰

The 2008 UPC Amendments in Subpart 2 provide courts with specific instructions regarding numerous parent-child possibilities. They also provide clear temporal cutoffs, such as the 120-hour requirement in section 2-118(b)(2), the two-year requirement in section 2-120(f)(2)(A), and limiting in sections 2-120(k) and 2-121(h) the time frame within which a posthumously conceived child can be treated as an heir of the deceased genetic parent. However, despite the clarifications of some issues, these Amendments will likely plague courts with the same difficulties navigating

246. See Averill, *supra* note 30, at 913-14 (discussing the general need for "predictability, provability, and correctness in result" in regard to the 1990 UPC).

247. Spitko, *Expressive Function*, *supra* note 60, at 1066 (listing "desire for simplicity and certainty" among the "hierarchy of values upon which [the intestacy statutes in the UPC are] based."); see also Spitko, *Inheritance Rights for Unmarried Committed Partners*, *supra* note 89, at 285; Cristy G. Lomenzo, Note, *A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses*, 46 HASTINGS L.J. 941, 945 (1995); Tanya K. Hernández, *supra* note 2, at 1016 ("Intestate statutes preserve judicial economy by setting forth a predefined hierarchy of persons who qualify for distribution."); Gaubatz, *supra* note 18, at 515 ("Simplicity in the administration of estates is an important goal both to society and to its members."); Lawrence W. Waggoner, *Spousal Rights In Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 726-28 (1992) (explaining that the drafters of the UPC rejected equitable distribution as the basis for the elective share, in part, because of the uncertainty and difficulty in administration).

248. See Gaubatz, *supra* note 18, at 514.

249. UNIF. PROBATE CODE § 1-102(b)(3) (2008).

250. Gaubatz, *supra* note 18, at 534-35.

through their complex structure and numerous variables that will severely restrict the ability of individuals to understand and rely on the Amendments as their distribution scheme.²⁵¹

2. *Predictability and Certainty*

Like ease of administration, predictability is an important feature of succession law.²⁵² The predictability of the Amendments, too, represents an important quality of a default rule.²⁵³ Professor Mary Ann Glendon has discussed how discretion, which tends to be at odds with predictability, operates in family law and succession law.²⁵⁴ She notes:

[G]ranting the necessity for a great deal of judicial discretion in dealing with the economic and child-related effects of divorce, it is important to recognize that this discretion need not be uncontrolled and that significant predictability *can* be introduced into a discretionary system. . . . [T]he fact that no two family situations are identical does not mean that there are not regularly recurring fact patterns that can and should be treated in the same way.²⁵⁵

Commentators diverge, however, as to whether inheritance law should promote the application of a rigid default rule or, instead, a discretionary standard. It is certainly true that as an inheritance rule becomes more rigid, then the more comfortable estate planners, benefactors, and testators will be with the predictability of outcomes in the probate court.²⁵⁶ In reality, if a decedent preferred discretion as a means of effectuating intent rather than rigid standards, then the decedent's obvious preference would be to draft a will.²⁵⁷ In the context of the 2008 UPC Amendments, it is clear that the Commissioners provided a checklist of parent-child relationships

251. *See infra* Part III.

252. Spitko, *Expressive Function*, *supra* note 60, at 1066. *See also* Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will*, 77 MINN. L. REV. 659, 660 (1993) (“[T]wo of the primary goals of probate reform are to reduce litigation and to facilitate estate planning”); Paula A. Monopoli, “Deadbeat Dads”: *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 292–96 (1994).

253. *See* Hirsch, *Default Rules*, *supra* note 1, at 1065–67; Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 605 (1992) (recognizing the relevance of risk aversion to the preference for rules). *See generally* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Kaplow, *supra*; Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940, 957 (1923) (discussing the predictability of rules in the commercial context); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 601–05 (2003).

254. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986).

255. *Id.* at 1170–71.

256. Applying the principle of predictability, “[r]isk averse benefactors will likewise want to know with assurance the distributive consequences of their munificence.” Hirsch, *supra* note 1, at 1066.

257. *Id.* at 1067.

for the purpose of increasing the predictability of the parent–child relationships that do not pass the sanguinary nexus test. This predictability benefits both the courts and the parties involved.

Clarity issues and structural and stylistic complexities aside, the 2008 UPC Amendments appear to provide a rather comprehensive definition of the parent–child relationship that should produce consistent outcomes. The 2008 UPC Amendments mark the Commissioners’ attempt to “catch up” to changing times. Changing family structures²⁵⁸ and emerging technologies influence the definition of “parentage” in law and society, but the UPC had held firm to its formalistic ties to genetics and adoption for defining a parent–child relationship.²⁵⁹ This reliance had become an increasingly frustrating—and arguably arcane—legal tool to predict intestacy outcomes in light of the diversity of family relationships extant in American life. Therefore, in the 2008 UPC Amendments, the Commissioners markedly redefine the parent–child relationship by increasing its scope, thereby opening the door for some of those in untraditional familial relationships to benefit from a more predictable set of rules governing parent–child property succession.

Without the 2008 UPC Amendments, only parents and children who passed the sanguinary nexus test or endured a legal adoption could be certain that their relationship would be recognized by intestacy law.²⁶⁰ But now, however, the family whose child is born by ART can sift through the checklist of parent–child relationships, find the provision that applies to their method of ART, and decide with reasonable certainty that they do not need a will to bequeath to their child. Alternatively, the family might find that the rigid rules do not effectuate their intent, and as a result, they can effectuate their wishes through a will. Obviously, the predictability of the 2008 UPC Amendments makes the courts’ review easier, too.

258. *See supra* note 2 and accompanying text.

259. For a thorough analysis and history of parent–child relationships for property succession purposes, as well as the call for a novel, functional approach to parent–child property succession, *see* Tritt, *Sperms and Estates*, *supra* note 9.

260. A survey of UPC section 2-114 reveals that the Commissioners made no mention of children born by ART nor the several other contingencies that come along with childbirth by ART, including parents whose child is a product of their gametes, parents whose child is a product of one of the parent’s gametes but not the other, parents whose child was born to a gestational carrier, parents who used ART and were divorced before, during, or after the pregnancy, and lastly, parents whose child was born via ART after the death of one of the parents. *But cf.* *V.C. v. M.J.B.*, 748 A.2d 539, 556 (N.J. 2000) (“[W]e should not be misled into thinking that any particular model of family life is the only one that embodies ‘family values.’ . . . Those attributes may be found in biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried persons. . . . Moreover, our judicial system has long acknowledged that ‘courts are capable of dealing with the realities, not simply the legalities, of relationships’ and have adjusted the rights and duties of parties in relation to that reality. . . . [T]he nuclear family of husband and wife and their offspring is not the only method by which a parent–child relationship can be created.”).

One notable exception in the 2008 UPC Amendments that could foreseeably lead to inconsistent outcomes and thus undermine predictability is the ambiguity surrounding the phrase “in the process of being adopted” used in section 2-118.²⁶¹ The ability of a child to inherit from his or her future adoptive parent turns on whether that child was “in the process of being adopted” when that parent died.²⁶² This phrase is not defined by the UPC and appears to be open to court interpretation. Because this phrase could conceivably cover a number of different factual situations,²⁶³ courts will likely reach inconsistent outcomes in this area. Additionally, as new reproductive technologies and new familial structures emerge that are not specifically addressed by the 2008 UPC Amendments, outcomes in probate courts will likely become increasingly less predictable.

In sum, the stiff nature of the rules provides clarity where untraditional parent-child relationships fall under the Amendments’ categories of parent-child. This aspect of the 2008 UPC Amendments is laudable,²⁶⁴ especially when compared to the minimalist approach taken by the previous UPC section 2-114. In addition, by enhancing the predictability of the parent-child relationships, the 2008 UPC Amendments further the overarching policy goal of effectuating testamentary intent.²⁶⁵ Under the 2008 UPC Amendments, members of an untraditional family who want to carry out their testamentary wishes need not resort to effectuating a will merely because they could not predict court outcomes in this area under the previous UPC section 2-114.

3. *Is it Understandable to Members of the General Public?*

Because citizens may choose whether to bequeath their property by will or to allow intestacy statutes to control its distribution, the intestacy statutes must be sufficiently clear to enable an informed decision to be made. If written in a confusing or deceiving manner, these statutes would potentially frustrate the distributive intent of every decedent who had erroneously relied on their terms. While the 2008 UPC Amendments defining the parent-child relationship are substantive improvements in clarity, their textual and structural arrangement leaves much to be desired.

261. UNIF. PROBATE CODE § 2-118(b) (2008).

262. *Id.*

263. As examples, “in the process of being adopted” could include any number of factual situations prior to receiving an order of adoption, including: the filing of adoption paperwork, the future adoptive parents’ temporary custody of the child, the commencement or completion of the pre-adoption screening process by an adoption agency or social service investigator, or even the exhibition of expressions of intent to adopt by the future adoptive parents.

264. See Spitko, *Inheritance Rights for Unmarried Committed Partners*, *supra* note 89, at 284–87.

265. See generally Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More like the Internal Revenue Code?*, 77 MINN. L. REV. 639, 641 (1993).

Substantively, the 2008 UPC Amendments improve clarity by specifically addressing numerous scenarios that were ambiguous or not addressed under the prior UPC version, and by reflecting the societal shift away from the traditional nuclear family due to both scientific advances in ART and individual choices in family structure. For example, the 2008 UPC Amendments expand on and clarify the rights of children (i) adopted by a stepparent;²⁶⁶ (ii) adopted by a relative or spouse or surviving spouse of a relative;²⁶⁷ or (iii) adopted after the death of both genetic parents²⁶⁸ to inherit from or through the biological parent who either is deceased or has given up parental rights.²⁶⁹ As another example, “[t]he 2008 UPC Amendments divide the definition of a parent–child relationship for children conceived by ART into two sections.”²⁷⁰ The first section²⁷¹ “deals with children born other than to a gestational mother (i.e., where the birth mother is either the genetic parent or intended parent),”²⁷² and the second section²⁷³ “deals with children born to a gestational mother (i.e., where the birth mother is someone who is not the intended parent or genetic parent but who gives birth to a child under a gestational agreement).”²⁷⁴ By breaking down the numerous possibilities of parent and child rules under different adoption scenarios and under the numerous forms of ART that are currently in use, the 2008 Amendments allow individuals occupying these various roles to more accurately understand the intestate distribution of their property should they choose to allow some or all of it to fall to intestacy.

Structurally and stylistically, however, the 2008 UPC Amendments prove to be complicated and confusing to the average reader. The added complexities of the 2008 UPC Amendments can be divided into two types: (1) the textual complexity, and (2) the interdisciplinary complexity between the UPC and other bodies of law—namely, family law.

266. UNIF. PROBATE CODE § 2-119(b) (2008). “For example, consider if a child’s biological married parents divorced. If the child’s mother remarries and the child’s new step-father adopts the child, the UPC allows the child to not only inherit from his or her mother and newly adopted father, but also from and through his biological father.” Tritt, *Sperms and Estates*, *supra* note 9, at 410 n.313.

267. UNIF. PROBATE CODE § 2-119(c) (2008). The UPC defines “relative” as a grandparent or descendant of the grandparent, which would include, for example, the child’s aunts and uncles. *See id.* § 2-115.

268. *Id.* § 2-119(d).

269. “Note, however, that the genetic parent who is no longer legal parent, and the genetic parent’s family, will not be able to inherit from or through the child. This lack of reciprocity demonstrates the child-centered nature of the 2008 UPC Amendments.” Tritt, *Sperms and Estates*, *supra* note 9, at 410 n.316.

270. *Id.* at 411.

271. UNIF. PROBATE CODE § 2-120 (2008).

272. Tritt, *Sperms and Estates*, *supra* note 9, at 411.

273. UNIF. PROBATE CODE § 2-121 (2008).

274. Tritt, *Sperms and Estates*, *supra* note 9, at 411.

i. Textual Complexity

It is important that a default rule be easily understood by those to which the law applies.²⁷⁵ Indeed, if people have to consult a lawyer to decipher the text of an intestacy statute, then the default has failed because “[o]nce the client has borne the expense of a conference to establish the relevant data, the further expense of drafting (versus abstaining from drafting) becomes marginal, hence robbing the default rule of its potential for transaction-cost efficiency.”²⁷⁶ Even a simple glance at the 2008 UPC Amendments, instead, reveals their complexity.

The first feature a reader of the 2008 UPC Amendments to Subpart 2, entitled “Parent-Child Relationship,” will notice is that they are considerably longer than their pre-2008 counterparts. In fact, the 2008 UPC Amendments expand the parent-child relationship statutes from one section and its three subsections to nine sections with nine definitions and twenty-eight subsections.²⁷⁷ These sections and subsections burden the reader with excessive legalistic language and numerous cross-references, conditions, variables, and exceptions.²⁷⁸ This shift in quantity comes at the cost of simplicity and understandability.²⁷⁹ The Commissioners noted that the restriction of the categories of intestate beneficiaries makes it easier to prove heirship.²⁸⁰ Once a person has finally finished reading through the 2008 UPC Amendments, that person then faces the equally daunting task of decoding the cross-references found throughout the 2008 UPC Amendments.²⁸¹ In practical terms, a person needs a strong attention span to read

275. See Ayres & Gernet, *supra* note 50, at 99; Hirsch, *Default Rules*, *supra* note 1, at 1062–64. See generally Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995) (addressing the problem from the perspective of mandatory rules); Clayton P. Gillette, *Cooperation and Convention in Contractual Defaults*, 3 S. CAL. INTERDISC. L.J. 167, 183–84 (1993) (suggesting that complexity increases error costs, i.e., the risk that a default rule will be misapplied); JANET FINCH ET AL., *WILLS, INHERITANCE, AND FAMILIES* 4 (1996); Gary, *Parent-Child Relationship*, *supra* note 87, at 653.

276. See Hirsch, *Default Rules*, *supra* note 1, at 1064.

277. Compare UNIF. PROBATE CODE § 2-114 (2004) with UNIF. PROBATE CODE §§ 2-114–2-122 (2008).

278. See generally UNIF. PROBATE CODE §§ 2-115–2-121 (2008).

279. An illustrative example of this complexity is section 2-120(f), which conditions the application of its rule with numerous cross-references by beginning: “[e]xcept as otherwise provided in subsections (g), (i), and (j), and unless a parent-child relationship is established under subsection (d) or (e)” *Id.* § 2-120(f). Notwithstanding the complexity of applying the multiple subparts of section 2-120(f), it clearly becomes quite a chore for the average citizen to examine all of the other cross-referenced sections to determine whether section 2-120(f) might even apply to that person’s parent-child relationship.

280. UNIF. PROBATE CODE art. II, pt. 1, cmt. (amended 2008); 8 U.L.A. 271 (1998) (pre-1990 version of article II).

281. For example, UPC sections 2-116–2-121 each provide exceptions that require cross-referencing throughout the entirety of the Amendments. And on top of all that, the legislative note to UPC section 2-115 include references to two sections of the Uniform Parentage Act (2000), as amended.

through the 2008 UPC Amendments and then reread them to understand the numerous cross-references.

Even more glaring in complexity to the average reader than the quantity of 2008 UPC Amendments and their cross-references, however, is the scientific terminology in the 2008 UPC Amendments. For example, in UPC section 2-121(h) readers are required to determine when a “[p]osthumously [c]onceived [g]estational [c]hild”²⁸² is treated as in “gestation.” In that same subsection, one of the sub-subsections include that a posthumously conceived gestational child is treated as in gestation if the child is “in utero not later than 36 months after the individual’s death.”²⁸³ Unfortunately, the definition section to UPC section 2-121 fails to define the terms “in utero” or “gestation.”²⁸⁴ “Gestation” is “the carrying of an embryo or fetus inside a female viviparous animal.”²⁸⁵ In addition, “in utero” is defined as “occurring or residing within the uterus or womb; unborn.”²⁸⁶ It becomes clear that, even with a dictionary and encyclopedia, one reading the Amendments may need to consult a doctor and a lawyer to even understand the terms used. This complication, however, is not limited to the text of the 2008 UPC Amendments. The legislative note at the end of UPC section 2-120 suggests that states should enact a provision requiring “genetic depositories” to provide a consent form to depositors.²⁸⁷ Yet the 2008 UPC Amendments fail to define the term “genetic depository,” leaving courts and citizens alike guessing as to its precise meaning. In sum, the 2008 UPC Amendments use very sophisticated language without providing the reader with adequate explanation.

One structurally misleading mistake²⁸⁸ is found in the title of section 2-117. While this section defines the underlying foundation of the UPC’s parent–child relationship as being between a child and that child’s genetic parents (subject to exceptions), the title focuses exclusively on the section’s assertion that no distinction is made based on the parents’ marital status. Thus, it is impossible for a reader to rely on the titles to locate the general rule behind identifying the default parent–child relationship.

282. UNIF. PROBATE CODE § 2-121(h) (2008).

283. *Id.* § 2-121(h)(1).

284. *Id.* § 2-121(a). A glance at the definitions reveals complexity and confusion. For example, the definition of a “Gestational child” is “a child born to a gestational carrier under a gestational agreement.” *Id.* § 2-121(a)(3). Indeed, there are definitions of “Gestational agreement” and “Gestational carrier,” however, they are equally as confusing and fail to clarify for those who may not know what gestation means.

285. Wikipedia, Gestation, <http://en.wikipedia.org/wiki/Gestation> (last visited Jan. 12, 2010).

286. Wiktionary, In Utero, http://en.wiktionary.org/wiki/in_uteru (last visited Jan. 12, 2010).

287. UNIF. PROBATE CODE § 2-120 cmt. (2008).

288. As Paul “Bear” Bryant said, “[w]hen you make a mistake, there are only three things you should ever do about it: admit it; learn from it; and don’t repeat it.” CREED KING & HEIDI TYLINE KING, *I AIN’T NEVER BEEN NOTHING BUT A WINNER* 98 (2000).

Additionally, Subpart 2 begins with a section of definitions of terms applicable to the entire subpart.²⁸⁹ Then, however, several individual sections within Subpart 2 begin with additional definitions of terms.²⁹⁰ The problem here lies in the fact that these terms defined within later sections are used in additional sections, including use in sections before the sections in which they are defined. For example, three sections²⁹¹ discuss the term “gestational child” before it is eventually defined in section 2-121. Two easy measures could be taken to ameliorate this problem. Because the two adoption sections²⁹² discuss “child[ren] of assisted reproduction” and “gestational child[ren]” several times, these sections could come after the assisted reproduction and gestational carrier sections.²⁹³ Thus, the sections should follow a rational order based on subject matter and their dependence on one another, an order such as: (i) Child Born to Gestational Carrier, (ii) Child Conceived by Assisted Reproduction Other than Child Born to Gestational Carrier, (iii) Adoptee and Adoptee’s Adoptive Parent or Parents, and (iv) Adoptee and Adoptee’s Genetic Parents. The other practical and logical solution to this problem would be to place all definitions in the initial “Definitions” section;²⁹⁴ indeed it appears that because the definitions are mutually exclusive, there is no need to limit their application to individual sections.

ii. *The Duplication of Complexity in Family and Inheritance Law*

One further source of potential confusion to average citizens is that their states’ family-law determination of who is a “parent” may conflict with the 2008 UPC Amendments’ definition of the parent-child relationship for intestacy purposes. Curiously, Subpart 2 defines “genetic father” as the man with whom the father-child relationship is established “under the presumption of paternity” under applicable state law,²⁹⁵ instead of simply as determined under state law. Ostensibly, a man may be deemed a child’s father under state law, yet not meet a presumption of paternity and thus not be that child’s father for intestacy purposes. This creates an obvious source of confusion to someone who, for instance, has been adjudi-

289. UNIF. PROBATE CODE § 2-115 (2008).

290. *See, e.g., id.* §§ 2-120, 2-121.

291. *Id.* §§ 2-118–2-120.

292. *Id.* §§ 2-118, 2-119.

293. *Id.* §§ 2-120 and 2-121, respectively. The adoption sections probably come first because of adoption’s historic place in the UPC. The assisted reproduction and gestational carrier sections probably follow afterwards because they were just recently added as part of the 2008 UPC Amendments to the UPC.

294. *Id.* § 2-115.

295. *Id.* § 2-115(5).

cated as the father for family law purposes yet whose “child” might not inherit from him should he die intestate.²⁹⁶

In *Shondel J. v. Mark D.*, for example, Shondel J. and Mark D. were involved in a sexual relationship while living in the country of Guyana during the spring of 1995.²⁹⁷ The next January, Shondel gave birth to a daughter and listed Mark as the father.²⁹⁸ At the time of the birth, Mark was living in New York.²⁹⁹ Upon finding out about the birth, Mark declared in a sworn statement, notarized by the Guyana General-Counsel, that he was convinced that he was the child’s father.³⁰⁰ In the same statement, Mark explicitly acknowledged his paternal responsibilities, including child support.³⁰¹ Mark began providing financial support to the child, visited the child in 1996, listed the child as his daughter and primary beneficiary on his life insurance policy, and sent regular child support payments until 1999.³⁰² Because the child support payments became less frequent, Shondel filed an action in 2000 seeking orders of filiation and support.³⁰³ Mark eventually requested a DNA test, which showed that he was not the child’s father.³⁰⁴ Agreeing with the family court, the Court of Appeals of New York found that even though Mark was not the child’s genetic father, he was estopped from denying his paternity because the child had come to rely on him as her father to her detriment.³⁰⁵ Should these facts not satisfy the presumption of paternity under state law, the child, though adjudicated the child of Mark D., would not inherit from Mark D. under the 2008 UPC Amendments.³⁰⁶ Such a result would be counterintuitive to members of the general public, who in all likelihood assume that a court determination of parenthood is binding for all legal purposes, including inheritance.

In addition, if another set of statutes already had the substance of the Amendments included in that set of statutes’ definition of parent–child, why should the UPC not simply refer to the other set of statutes’ definition of parent–child?³⁰⁷ Without that reference, the cost to the Amendments’ simplicity remains; however, the marginal benefit of the Amendments is limited only to the differences between the Amendments and the other set of statutes. If that difference in the parent–child definition is minute—as is

296. See, e.g., *Shondel J. v. Mark D.*, 853 N.E.2d 610 (N.Y. 2006).

297. *Id.* at 611.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 612.

304. *Id.*

305. *Id.* at 614–16.

306. See UNIF. PROBATE CODE §§ 2-115(5)–(7), 2-117 (2008).

307. See Gary, *We Are Family*, *supra* note 60, at 173.

the difference between the Uniform Parentage Act (UPA) and the Amendments—then the Commissioners fail to strike the correct balance.

a. Background of the Interaction Between Family Law and Inheritance Law

Since 1973, the UPA has maintained a complete set of rules for determining the legal parents³⁰⁸ of a child for purposes of child welfare and to assist child support.³⁰⁹ The UPA addresses the gamut of possible parent-child relationships, and its definitions have been revised to meet both traditional and modern family structures.³¹⁰ Accordingly, under the 1990 UPC, the definition of parent-child referred to state law partially based on the UPA's definition.³¹¹

Since 1973, the UPA has defined the parent-child relationship with the objective of providing clear rules for the benefit of children.³¹² A mother under the UPA, as amended in 2002, includes a woman who gives birth to the child, a woman who is adjudicated to be the mother, a woman who adopts the child, and a woman who is the legal mother via a gestational agreement.³¹³ Likewise, the UPA's definition of a legal father includes an un rebutted presumed father, a man who acknowledges paternity, a man adjudicated to be the father, a man who adopts the child, a man who consents to be the legal father by means of assisted reproduction, and a man who is the legal father under a gestational agreement.³¹⁴ Accordingly, for almost twenty years, the UPC has deferred to state law, partially based on the UPA,³¹⁵ for the definition of parent-child.³¹⁶ The 2008 UPC Amendments, however, mark a shift in the UPC's reliance on the UPA.

The UPA, indeed, makes a valiant effort to evolve³¹⁷ its definition of the parent-child relationship to evolving social norms.³¹⁸ Accordingly, the

308. UNIF. PARENTAGE ACT § 102(14) (2002).

309. See Unif. Parentage Act Summary, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upa.asp (last visited Jan. 12, 2010) [hereinafter UPA Summary].

310. See *id.*

311. See UNIF. PROBATE CODE § 2-114(a) (amended 2008) (“The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].”).

312. For example, these rules provide for the mandate of child support. See UPA Summary, *supra* note 309.

313. UNIF. PARENTAGE ACT § 201(a) (2002). See also UPA Summary, *supra* note 309.

314. UNIF. PARENTAGE ACT § 201(b) (2002). See also UPA Summary, *supra* note 309.

315. “To provide states with clear guidelines about determining parentage under a variety of circumstances, addressing the issues surrounding paternity and the challenges created by assisted reproduction, the Uniform Law Commission developed the UPA.” Gary, *We Are Family*, *supra* note 55, at 174.

316. See *supra* note 301 and accompanying text.

317. Aside from the UPA, the Uniform Law Commission (ULC) promulgated the Uniform Status of Children of Assisted Conception Act (1988) and the Uniform Putative and Unknown Fathers Act (1988). By means of incorporation, the 2002 UPA incorporates the substance of these two earlier acts. See UPA Summary, *supra* note 309.

318. The UPA Summary provides that “[t]echnology has changed the combinations and permutations

relevant questions arise as to: (1) what are the differences between the 2008 UPC Amendments' definition of parent-child and the UPA's definition, and (2) whether the UPC would account for those differences as exceptions, at a lower cost to the UPC's simplicity, had the UPC merely referred to family law for the definition of parent-child.³¹⁹

b. The Differences Between the UPA and the 2008 UPC Amendments

The differences between the UPA and the 2008 UPC Amendments' definitions of parent-child are minimal. Accordingly, the question that must be raised is whether, because of the differences between the Amendments and the UPA's definition of parent-child, the UPC could have merely referred to the UPA's definition and provided exceptions where necessary, rather than promulgating the extensive 2008 UPC Amendments.

The first set of differences arises as exceptions to the general rule that, following adoption, a child no longer inherits from his genetic parents.³²⁰ Carried over from the UPC as it was prior to the 2008 UPC Amendments, the first difference is that when a stepparent adopts a child, that child can inherit from a genetic parent despite the fact that the genetic parent is no longer the legal parent (under the UPA).³²¹ The second, related, difference is that a child can inherit through his genetic parents if the adoption occurs after the death of both genetic parents.³²² In addition, the third and final exception is that a child continues to inherit from the genetic parents where the child has been adopted by a "relative"³²³ or by a surviving spouse of a "relative."³²⁴

of the parent-child relationship, and the new Uniform Act simply reflects that fact," and concludes that "[t]he new Uniform Parentage Act confronts the complicated issue of establishing legal parentage against the complications that technology provides." UPA Summary, *supra* note 309.

319. This idea already has some support. As Gary points out:

In some respects the UPC, as modified by the UPC Amendments, mirrors the UPA, and in others it differs from the UPA. In the areas in which the UPA and the UPC reach the same result, perhaps it would make sense to have the UPC simply incorporate state law (the UPA or other state law). The UPC could define a parent for intestacy purposes as a "legal parent." Then, when different rules are needed because of the different purposes of the UPA and the UPC, those rules can be exceptions to the underlying concept of legal parentage. The reason for specific provisions in the UPC would be in situations in which the UPC needed to create exceptions or additions to the definition of the parent-child relationship created under the UPA.

Gary, *We Are Family*, *supra* note 60, at 175 (internal citations omitted).

320. UNIF. PROBATE CODE § 2-114(b) (amended 2008).

321. UNIF. PROBATE CODE § 2-119(b) (2008).

322. *Id.* § 2-119(d).

323. *Id.* § 2-115(9).

324. *Id.* § 2-119(c).

Moving the focus to the (hopeful) adopting parents, the second set of differences arises when a person dies while “in the process of”³²⁵ adopting a child. Although the deceased would never be the legal parent under the UPA or 1990 UPC, under the 2008 UPC Amendments a child may inherit through the deceased who was “in the process of” adopting the child if the deceased was married and the deceased’s surviving spouse completes the adoption,³²⁶ or if the deceased was a stepparent and the deceased’s spouse (the adoptive legal parent) survives the stepparent by 120 hours.³²⁷

Considering the abovementioned distinctions between the UPC and UPA’s definitions of family, it is clear that the UPC could avoid the 2008 UPC Amendments’ added complexity by merely referring to the UPA’s definition, in addition to providing a few exceptions.³²⁸ Additionally, by duplicating only parts of the UPA’s definition of family, the UPC’s failure to duplicate everything in the UPA suggests implicitly that the UPC does not endorse that which it did not duplicate. This is another way that the added complexity can lead to irrational results.

4. Flexibility

Although the 2008 UPC Amendments can be praised for their rigid predictability, questions arise as to whether the 2008 UPC Amendments’ unbending definition of parent–child, structurally speaking, can withstand the test of time.³²⁹ Intestacy laws must be flexible enough to accommodate the lives and familial situations of all members of society and be adaptable to future changes to avoid being rendered outdated or inapplicable.

The 2008 UPC Amendments’ narrow focus on legal adoption and children conceived by ART precludes other common, but untraditional, family structures found in the United States. For instance, many individuals cannot afford marriage, divorce, or legal adoption (or, an individual might distrust the legal system). Neverthe-

325. *Id.* § 2-118(b)(1). Without a definition of “in the process of,” the only hint the Commissioners provide as to the meaning of that term is that it is not limited to the filing of legal process. *Id.* § 2-118(b)(1), cmt. Comments appear in the 2008 Annual Meeting draft.

326. *Id.* § 2-118(b)(1).

327. *Id.* § 2-118(b)(2).

328. Because some terminology is different between the UPC and UPA, one cannot be certain that the distinctions listed in this Article are exhaustive. However, they are the most glaring.

329. Opining on this same discussion of flexibility, it seems that the substance of the 2008 UPC Amendments fails the flexibility test:

The 2008 UPC Amendments’ narrow focus on legal adoption and children conceived by ART precludes other common, but untraditional, family structures found in the United States. For instance, many individuals cannot afford marriage, divorce, or legal adoption (or, an individual might distrust the legal system). Nevertheless, these individuals may be part of a blended family that raise and treat non-genetic children as their own.

Tritt, *Sperms and Estates*, *supra* note 9, at 420 (internal citations omitted); *see also* Gary, *We Are Family*, *supra* note 60, at 175–76.

less, these individuals may be part of a blended family that raise and treat non-genetic children as their own [and would intend to pass property to these children upon death.]³³⁰

For instance, as homosexual couples become more socially accepted and legally recognized as parents for the family unit, to effectuate decedent's intent, intestacy statutes must provide for inheritance by children through two male or two female parents.

The recent [2008] UPC [A]mendments still do not adequately address the emerging issue of second-parent adoptions by gay and lesbian couples and the interplay with state marriage or partnership laws. Amended UPC §§ 2-705 and 2-118–19 limit the right of adopted children to [inherit] from their genetic parents. The previous UPC rule merely prohibited adopted children from inheriting from their natural parents. The new rules, codified at § [sic] 2-118 and 2-119, refer only to the rights of adoptees to inherit from a genetic parent in limited cases where the genetic parent's spouse is adopting the adoptee. In states where [same sex] marriage is not recognized, the [2008] UPC [A]mendment[s] would seem to limit the child from [inheriting] from one of her parents. For example, if the genetic mother in a lesbian couple wishes her partner to adopt the child, the genetic mother risks her child being unable to inherit from the genetic mother because this scenario does not fit one of the exceptions to the [sic] 2-119 (a) severing the parent-child relationship between an adoptee and the adoptee's genetic parents.³³¹

[As another] example, a couple might not be able to afford a divorce. The wife could leave the husband with their infant children and begin another relationship with her new partner who would al-

330. Tritt, *Sperms and Estates*, *supra* note 9, at 420 (internal citations omitted). "These individuals might be more likely than others to die intestate, but are overlooked in intestacy statutes." *Id.* at 420 n.367.

For example, a couple might not be able to afford a divorce. The wife could leave the husband with their infant children and begin another relationship with her new partner who would also raise and support the wife's children. Or, a wife might have an affair and become pregnant. The genetic father of the child may not relinquish parental rights, but the wife's husband may nevertheless raise and support the child as his own. It goes without saying that there are many examples of non-traditional family structures that are ignored by the language of the new statutes. *See also* Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. & FAM. STUD. 231, 236 (2007) (describing how male parenting patterns differ from female patterns, including how men parent "serially" based on the person with whom they share their household).

Id. at 420 n.368.

331. *Id.* at 409 n. 309. *See* UNIF. PROBATE CODE § 2-118 cmt. (2008).

so raise and support the wife's children. Or, a wife might have an affair and become pregnant. The genetic father of the child may not relinquish parental rights, but the wife's husband may nevertheless raise and support the child as his own. It goes without saying that there are many examples of non-traditional family structures that are ignored by the language of the new statutes.³³²

Accordingly, even putting the evolving technology of the 2008 UPC Amendments aside, there remains a lack of flexibility even for plausible family scenarios.³³³

The 2008 UPC Amendments attempt to cover with specificity, using complicated codified variables, the possible parent-child scenarios that could result from existing methods of ART.³³⁴ “[These] codified variables are inextricably linked to the development of ART. As ART is constantly evolving, the codified [2008 UPC Amendments’] variables will fast become antiquated.”³³⁵ The 2008 UPC Amendments’ new recognition of current technology may even become outdated before becoming effective by states.³³⁶ The legislative process is slow in nature compared with the corresponding effects of the technical novelty of the 2008 UPC Amendments.³³⁷ Because the 2008 UPC Amendments provide little flexibility for quickly evolving technology,³³⁸ their rigidity in the area of ART seems misplaced.³³⁹ As new methods of ART emerge, courts will struggle to fit them into the 2008 UPC Amendments’ specific provisions. Such undertakings will unduly burden courts and likely result in inconsistent outcomes. Ultimately, ART advances will necessitate the frequent modification of the 2008 UPC Amendments, or, more likely, the development of new standards that are general and flexible enough to extend their applicability to any new developments and advances in the field of ART.³⁴⁰

332. Tritt, *Sperms and Estates*, *supra* note 9, at 409 n.368 (citing Dowd, *supra* note 330, at 236).

333. Admittedly, untraditional parent-child relationships that fail to follow the formalities (marriage, adoption, divorce) would face the same problems under the UPA as they do in the UPC. Put another way, flexibility would still be a concern for these families under the suggested approach of referring to the UPA's definition of parent-child.

334. UNIF. PROBATE CODE §§ 2-120-2-121 (2008).

335. Tritt, *Sperms and Estates*, *supra* note 9, at 421. See Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 99 (2004) (“discussing technology, such as artificial wombs and frozen stem cells, that can be used to produce eggs or sperms and cloning,” Tritt, *Sperms and Estates*, *supra* note 9, at 421 n.369).

336. Tritt, *Sperms and Estates*, *supra* note 9, at 421. See also Gary, *We Are Family*, *supra* note 60, at 175-76.

337. As part of Professor Tritt's call for a functional approach to inheritance laws, he notes that “[s]pecific and explicit multi-faceted tests in a field involving ever-shifting technological variables break easily when technology evolves.” Tritt, *Sperms and Estates*, *supra* note 9, at 421.

338. See Knaplund, *supra* note 335.

339. “A brittle rubric is doomed to quickly shatter and to become obsolete.” Tritt, *Sperms and Estates*, *supra* note 9, at 421.

340. Many states do not allow surrogacy arrangements—these states have either declared surrogacy

If the Commissioners had merely referred to the UPA for the definition of parent-child while providing a few exceptions, then the UPC's definition of parent-child would not have the same flexibility concerns. As Gary aptly points out, "[i]f one statute rather than multiple statutes addresses the issues of determining parentage of children created using assisted reproduction, adopting states will need to change only one statute when statutory change becomes necessary due to technological advances."³⁴¹

IV. RECOMMENDATIONS REGARDING THE ADOPTION OF THE UPC AMENDMENTS

A. State Legislatures

Some states have already begun the process of considering and adopting the 2008 UPC Amendments.³⁴² As discussed above, the 2008 UPC

arrangements illegal per se or have declared the contracts unenforceable. See Ashley E. Bashur, *Whose Baby is it Anyway? The Current and Future Status of Surrogacy Contracts in Maryland*, 38 U. BALT. L. REV. 165, 193-94 & n.224 (2008). For these states, if the UPC revisions are adopted as-is, then the UPC would legally recognize a form of parent-child relationship for inheritance purposes that the state has already declared illegal for parentage or family law purposes. The internal cohesiveness between succession, property, and family laws within a state would be at risk—aside from the issues of statutory interpretation that arise from conflicting state laws.

States that do allow surrogacy contracts often have restrictions on who may become a surrogate mother and further whether she may be compensated. *Id.* at 197-200. Moreover, state laws vary widely regarding whether the genetic parents (or the parents contracting with the surrogate, if not the egg and sperm donors) must adopt the child after delivery. *Id.* at 171-73. Some states issue prebirth orders designating the proper parents to be listed on the child's birth certificate. See, e.g., Liz Maples, *Casey Surrogate Baby Case Takes Another Twist*, ADVOC.-MESSENGER, Oct. 27, 2005, available at http://reproductivelawyer.com/press_casey.cfm (last visited Jan. 12, 2010) (discussing a groundbreaking Massachusetts case where the contracting parents requested a court order enjoining that their names be placed on the child's birth certificate, rather than the surrogate mother's name (the presumed mother under Massachusetts law)); Lawrence A. Kalikow, *Surrogacy and the Law of Pennsylvania*, PENNSYLVANIA SURROGACY, March 2009, http://www.pasurrogacy.com/Surrogacy_and_the_Law.html (relying on *J.F. v. D.B.* to conclude that Pennsylvania allows issuance of prebirth orders to name the contracting parents on the birth certificate and alleviating the need for postbirth adoption of the child). Other states, such as California, analyze which mother intended to have the child and raise it as her own when determining whom to place on the birth certificate, generally finding that the surrogate is not the legal mother of the child. See Bashur, *supra*, at 168-69 (surveying state laws on surrogacy, including a review of California surrogacy standards in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)).

On the other hand, many states require postbirth adoption by the parents who contracted with the surrogate, particularly if the parents are not the genetic sperm or egg donors. *Id.* at 171-73. In this case, the UPC revisions would be superfluous because the child's right to inherit through the parent-child relationship would already be recognized under the adoption provisions of the UPC. In sum, many of the UPC's ART sections seem superfluous at best because they are already addressed by other areas of state law. At worst, these revisions conflict with current state laws and provide confusing and unnecessarily technical language sure to mire the most diligent probate court judge in questions of scientific technology, statutory interpretation, and legislative intent.

341. Gary, *We Are Family*, *supra* note 60, at 175-76.

342. To date, both Colorado and Minnesota have introduced bills proposing adoption of the 2008 UPC Amendments. H.B. 09-1287 (Colo. 2009); H.F. 1228 (Minn. 2009); S.F. 369 (Minn. 2009).

Amendments create serious concerns with regard to adoptions, class gift designations in wills, and the definitions of parents and children. Regardless of these concerns, when considering adoption of the 2008 Amendments, legislatures should consider that the parent-child relationship amendments represent a change to the entire testacy and intestacy schemes and may conflict with the state's family law definition of a parent-child relationship, so that *a la carte* adoption of some provisions and rejection of others may create "loopholes" within succession law and other aspects of state law.

States might want to consider rejecting UPC section 2-116 or modifying it to rely on the UPA's definition of child simply to avoid confusing the public.³⁴³ Section 2-116 states that so long as a parent-child relationship is determined to exist, notwithstanding the section 2-119 exceptions, the child can inherit from the parent and the parent from the child.³⁴⁴ This Amendment is hardly controversial, and it simply lays the ground rules for the remainder of Subpart 2. Therefore, states that choose to adopt other portions of Subpart 2 are strongly encouraged to adopt section 2-116.

At first glance, section 2-117 also seems noncontroversial, and its actual language is not offensive. The provision merely states that "a parent-child relationship exists . . . regardless of the parents' marital status."³⁴⁵ Of greater concern is what section 2-117 removes from the 1990 UPC—in the 1990 version, the UPC allowed the parent-child relationship to be established under the UPA or relevant state law.³⁴⁶ Instead, the UPC proposes its own definition of the parent-child relationship—one that is so complex, it requires several sections to replace the former section 2-114.

Because section 2-117 promotes technicality at the expense of efficiency and simplicity, legislatures might consider relying on the UPA or other governing state law concerning parentage. This will prevent a disconnect between probate laws and other areas of state law.³⁴⁷ This disconnect reduces efficiency and risks not effectuating the decedent's wishes—if a decedent believed a child was his or her own based on the ruling of a family court, the reasonable person would have no notice that probate laws differ

343. Further, as stated *supra*, the definition of parent as endorsed by the UPA is different from that of the new UPC. This may create serious confusion among individuals who may be under the mistaken impression that because the individual was adjudicated to be a parent under state law for family law purposes, they may assume taking under the intestacy scheme. Families may not even be aware of the disconnect in their state laws until probate proceedings, when it is too late to remedy the issue.

344. UNIF. PROBATE CODE § 2-116 (2008).

345. *Id.* § 2-117.

346. UNIF. PROBATE CODE §2-114 (amended 2008).

347. Though reliance on family law or other state law principles may have its pitfalls (and may not fully reflect testator's intent), when given the all-or-nothing scenario of the 2008 UPC section 2-116 or nothing, it would be better to reject the amendment and rely on other state laws. Moreover, reliance on state laws for the parent-child relationship will undermine uniformity of probate laws (to the extent that states have not adopted the UPA), but in this case uniformity should be sacrificed in the name of simplicity and clarity.

in their definitions of “child.” Further, while reliance on underlying state law may thwart one stated goal of the UPC, to promote uniformity, cultural shifts in recent years reflect a wide array of state recognition regarding nontraditional families. *See supra* Part III.C. Rather than the one-size-fits-all model of the UPC’s definition of the parent–child relationship, states can rely on their own laws as being internally cohesive.

For sections 2-118 and 2-119 (governing the parent–child relationship when the child is adopted), states that intend to adopt the 2008 UPC Amendments should consider making two significant changes regarding parental rights and adoption. First, legislatures should consider substituting the term “spouse” to reflect states with domestic partnerships; alternatively, a state could add an exception allowing unmarried couples to demonstrate consent to parenthood under a clear and convincing evidence standard (allowing recognition of a parent–child relationship after demonstrating that unmarried partners intended to serve as parents). If states choose to adopt 2-118, its protection should not extend solely to married couples, when the UPC has elsewhere promoted gender- and marriage-neutral language.

Second under section 2-119, states should expressly allow a parent–child relationship with the genetic parent for inheritance purposes in second-parent adoptions.³⁴⁸ As written, section 2-119 states that a parent–child relationship does not exist with the genetic parent after adoption except in the express situations included in sections 2-119(b) through (e).³⁴⁹ Because second-parent adoptions are absent from the exceptions, the child would no longer be able to inherit from the genetic parent after adoption. This is in direct contrast with family law in many states that recognize both the genetic parent and the second parent as “parents” for family law purposes. At best, section 2-119 is technically confusing; at worst, it eliminates the right to inherit for children, in direct conflict with the adopting parent’s intent. In a state that values the decedent’s intent and perception of who are members of his or her family, the genetic parent would be forced to write a will (and define “child” to include the adopted child) to allow a child for which they “functioned as a parent”³⁵⁰ to inherit.³⁵¹ Even if a state chooses not to rely on family law definitions of the parent–child

348. Currently ten states and the District of Columbia allow second parent adoption for same-sex couples statewide: California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, Vermont; although not statewide, some jurisdictions in sixteen other states allow second parent adoption for same-sex couples: Alabama, Alaska, Delaware, Hawai’i, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, Texas, Washington, West Virginia. State-by-State: Second Parent Adoption Laws, http://www.familyequality.org/resources/publications/secondparent_withcitations.pdf.

349. UNIF. PROBATE CODE § 2-119 (2008).

350. UNIF. PROBATE CODE § 2-115(4) (2008).

351. *Id.* § 2-119.

relationship, the state should add a second-parent adoption exception to section 2-119.

As the final substantive amendment to the intestacy scheme, section 2-120 proposes that a parent-child relationship may exist for inheritance purposes when a child is posthumously conceived only if there is clear and convincing evidence that the parent consented to being a parent and that the posthumously conceived child must be in utero within 36 months or born within 45 months after the decedent's death.³⁵² This provision is not particularly controversial, because it effectuates the intent of the decedent—succession law's chief policy goal. Aside from difficulty in meeting the rigorous "clear and convincing" burden of proof, this statute effectuates testator intent and also creates a clear and predictable rule that is fairly easy for the public to understand and digest. Because instances of posthumously conceived children are on the rise and state laws are scarce concerning issues that rise from this particular type of conception, a state legislature should consider adopting section 2-120(k) even if it chooses to reject the remaining parent-child amendments and rely on other state laws to define the parent-child relationship.

Finally, section 2-705 proposes revisions regarding class gift constructions in wills. Although section 2-705 fails to adequately account for adult adoptions (and whether these adoptions contradict the testator's intent), the provisions seem to be fairly drafted, and states should strongly consider adopting it. Further, states should carefully consider the definitions in section 2-115, as section 2-705 relies on these definitions to define the parent-child relationship. If states adequately vet the remainder of the 2008 UPC Subpart 2 changes, i.e., adding provisions for second-parent adoptions as necessary and relying on the UPA or applicable state law as necessary to define the parent-child relationship, section 2-705 may be adopted verbatim. Though section 2-705 is a default rule for testacy purposes and should represent the intent of the majority of testators (thus excusing most from "opting out" of the default definitions), its potentially deleterious effects are diffused by careful definition of "child" or other class memberships.

B. What's a Lawyer to Do?

What is an estate lawyer to do when drafting a will in a state that is considering adopting or has adopted the 2008 UPC Amendments? Most probate laws are default laws, meaning that lawyers can draft out of those laws by providing express language to the contrary in the will.³⁵³ In any

352. *Id.* § 2-120(f)(2)(C), (k).

353. See John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105, 1112 (2004) (stating that, similarly, default rules typically may be altered within the realm of trust

state that has adopted the current UPC (and thus more likely to adopt the 2008 UPC Amendments), lawyers should analyze whether their clients may fall into the “traps for the unwary” under the 2008 UPC Amendments (particularly class gifts and devises to children). Even where the 2008 UPC Amendments have not yet been adopted, the lawyer should plan for the contingency that the 2008 UPC Amendments will be adopted by the client’s state by drafting out of the most controversial of the 2008 UPC Amendments.³⁵⁴

In particular, lawyers should define “parent,” “child,” “children,” “descendant,” “descendants,” “heir,” and “heirs” for each particular testator (paying heed to the possibility of past or future sperm/egg donations, posthumous conception, and posthumous sperm harvesting and conception) and should evaluate the client’s (or potential client’s) family structure to determine whether drafting a will would help the client to avoid insidious effects of the 2008 UPC Amendments. Second, the lawyer should carefully craft definitions of class members for class gift purposes to verify that all of the intended recipients fall within the class (rather than relying on the state’s default definitions of the class members). Third, the lawyer should at least consider defining devisees by name rather than relationship to the testator when the devisee’s right to take under the will may be disputed.³⁵⁵ In sum, by creative and proactive lawyering, a lawyer may re-

laws, with only a select few default rules being mandatory).

354. Lawyers should strongly consider defining the terms “parent,” “child,” “descendant,” and “heir”—and should specify in the definition of “child” whether to include after-born or posthumously conceived children, define adopted children, and should consider how to define roles for purposes of class gifts. Same-sex couples in states that have not yet recognized marriage or committed relationships should have their wills reviewed and updated regularly, since divorced spouse statutes will not prevent the partner from taking. *See, e.g.*, UNIF. PROBATE CODE § 2-802 (2005) (amended 2008) (state statutes revoke the surviving spouse status of the divorced spouse). They also need to name the partner or child rather than referring to a class or relationship in the will (i.e., if children are born after the will’s execution but not legally adopted—if for example no second parent adoptions—the children need to be defined and/or listed by name in the will). For a further discussion of same-sex estate planning concerns, see Aimee Bouchard & Kim Zadworny, *Growing Old Together: Estate Planning Concerns for the Aging Same-Sex Couple*, 30 W. NEW ENG. L. REV. 713 (2008).

A simpler definition for “child” within the testator’s will could be: “Child” is a person who the testator openly held out as his or her own child and treated like a child before the child reached eighteen years of age. Openly holding out or treating like his or her own child could include: living with the testator or testator providing significant monetary support to the child prior to the child’s eighteen birthday. Further drafting would be necessary to include posthumously conceived children if the testator wishes to opt out of the UPC default rule.

Moreover, the relationship of class members to take under the will should be explicitly defined in the will, rather than relying on definitions from the underlying state law default (to prevent over-inclusiveness or under-inclusiveness in the class as the law’s definition of the class may change prior to the testator’s death).

Explicitly defining terms also helps on the chance that the testator moves to another state prior to death—some states, for example, may refuse to recognize the designation of spouse or child from another jurisdiction. *See* Bouchard & Zadworny, *supra*, at 723–24. Definitions of the terms will clarify the testator’s intent.

355. Though this approach may require more frequent monitoring or revisions to the will, it may be the best approach for testators in stable but nontraditional families who may not be recognized by

lieve his client from being affected at all by the 2008 UPC Amendments as well as future amendments.³⁵⁶

CONCLUSION

As suggested in this Article, the law of succession seems to be experiencing an identity crisis. Despite its historical legacy, succession law seems to have neither a complete descriptive theory, explaining what the law is, nor a complete normative theory, explaining what the law should be. Although scholars and legislatures tend to pay lip-service to succession law's historical core goal of effectuating a decedent's testamentary intent, this once central value has been cast to the periphery of legal relevance. To date, scholars and legislatures have employed a bottom-up approach to advocating, revising, and updating rules concerning succession law—embracing a consequentialist perspective that attempts to secure a particular policy preference. Accordingly, various rules are advocated and adopted in an ad-hoc manner with no comprehensive goal. The result is that succession law jurisprudence has become a theoretical amalgamation of policies. This becomes evident when analyzing the 2008 UPC Amendments—the result of which seems to be overly complicated and ideologically and internally inconsistent.

In an attempt to resolve the identity crisis, this Article articulates and defends a rich positive and normative framework for analyzing and developing succession law default rules. The Article's normative claim is that the only goal of succession law default rules should be to effectuate testator's intent. In addition to creating this analytical framework, this Article provides a nuanced positive description of the new 2008 UPC Amendments and their implications to help provide a framework for future debate.

current probate law.

356. Though it likely goes without saying, lawyers should be vigilant to verify that future Amendments to the testacy and intestacy default rules are in fact rules that can be opted out of (and not mandatory rules). If a rule such as Florida's Elective Share, for example, is adopted, it may be a mandatory rule that lawyers will need to entirely revise the will to accommodate. *See supra* Part II.A.1 for a discussion of mandatory rules.