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Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code

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Changing family structures and emerging reproductive technologies 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 intestacy purposes and for the law of wills.

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

Recently, the Uniform Probate Code (UPC) 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 relationships 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. 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. Regardless of any articulated rationale, in light of this 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.

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? Moreover, should default rules embrace a consequentialist perspective that attempts to secure a particular policy preference?