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Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession

Lee-ford Tritt
University of Florida College of Law, tritt@law.ufl.edu

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SPERMS AND ESTATES: AN UNADULTERATED FUNCTIONALLY BASED APPROACH TO PARENT-CHILD PROPERTY SUCCESSION

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. Sincere thanks and appreciation to George L. Dawson, Nancy E. Dowd, Christine A. Klein, Lyrissa Lidsky, Joshua C. Tate, Michael Allan Wolf, and Barbara Bennett Woodhouse. I am also indebted to the participants of the 2008 Law and Society Meeting's Estates and Trusts Panel, especially Mary Louise Fellows, Ray D. Madoff, and E. Gary Spitko. Finally, thanks to Samuel J. Horovitz, Nathaniel T. Quirk, and Adam C. Losey for superb research assistance and much appreciated support.

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I. INTRODUCTION

A n important policy debate is emerging in American estates law concerning how the law of succession should change to encapsulate more fully the evolving notions of American families. Changing family structures and emerging technolo-

1. See Troxel v. Granville, 530 U.S. 57, 63 (2000) (The United States Supreme Court, acknowledging this social change, stated that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”); WILLIAM M. McGOVERN & SHELDON F. KURTZ, CONCISE HANDBOOK: PRINCIPLES OF WILLS, TRUSTS & ESTATES 49 (2005) (referring to the Statistical Abstract of the United States: 2002, No. 74 in that one in every three babies are of non-marital mothers); Tanya K. Hernandez, The Property of Death, 60 U. PITTS. 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,
Parent-Child Property Succession

Parent-Child Property Succession strategies influence the definition of "parentage" in law and society. These influences undermine the traditional definition of a parent-child relationship—the presence or presumption of a genetic link between two individuals. Recognition of parent-child status is of particular concern for estates law in determining distributions to "children" for intestacy and testacy purposes. The problem arises because of state estates law's continued reliance on the sanguinary nexus test (determinations based upon ties of "blood") as (i) the dominant criterion for intestacy preference assumptions (determining whether an individual has a right to take property when a "parent" dies without a will), and (ii) the standard for class gift terminology under a will or other dispositive instrument.

From an estates law perspective, the sanguinary nexus test has become an increasingly frustrating, and arguably arcane, legal tool in light of the diversity of family relationships extant in American life. Considering the evolving notions of family structures and advances in reproductive and genetic technologies involving cloning, surrogacy, egg/sperm donation, and genetic mapping, serious questions arise about whether a sanguinary nexus test can produce results consistent with the fundamental principles of estates law. As one commentator noted, reliance on a sanguinary relationship for property succession purposes "may be underinclusive because it excludes many currently existing family groups . . . [and] may be overinclusive because legal ties do not necessarily create familial ties."

While notions of what constitutes a family are evolving alongside advances in reproductive technology, states are "approaching [these] space age technolog[ies] with Model-T statutes and cases." For example, should each offspring of an active sperm donor, most likely wholly unknown to that donor, take a child's share of the donor's intestate estate if the donor dies without a will? Would a biological clone qualify as a child of the genetic material donor or the parents of the genetic material donor to whom the clone has a direct genetic link? If a child's genetic donors are of the same sex, does the sanguinary nexus test provide an adequate guide to that child's inheritance claims if the genetic parents die without wills? Should a child raised and supported by a perceived genetic father who actually had no genetic link to the child nevertheless take a child's share of the decedent's estate? These examples involving cutting-edge reproductive and genetic technology highlight the fact that the sanguinary nexus test is fast becoming too brittle.

The 2000 Census: More Say "I Do" to Cohabitation, PORTLAND OREGONIAN, June 6, 2001, at A1 (reporting that 9% of all couples declared themselves "unmarried couples").

2. See infra Part IV, discussing various methods of assisted reproductive technologies.


The question remains though, that if the sanguinary nexus test has become outdated, how should a parent-child relationship be expanded or redefined for the purposes of the law of succession? The answer to this question depends upon which overarching principle is used as the guiding principle in defining a parent-child relationship for property succession purposes—family law jurisprudence or property law jurisprudence. In other words, whose interests should take priority in making parent-child determinations for property succession purposes—those of the property owner or those of the child?

To date, family law and family courts have been at the forefront of discussions concerning parent-child relationships. Family law has already looked at different concepts of parentage: biological, legal, and functional parenting, to name a few. It should not be surprising then, that estates law scholars have tended to look to family law scholarship for guidance and family court parental-obligation decisions as a definitive factor in determining a parent-child relationship for the laws of succession. Thus, it is not surprising that the bulk of estates law scholarship concerning the definition of a parent-child relationship for property succession purposes is solely rooted in family law jurisprudence, not property law.

When the overlap and disconnect between family law and estates law jurisprudence is viewed through the lens of the law of parent-child property succession, however, the serious flaws in estates law's emphasis on family law come into focus. The concepts and theories developed under family law concerning parent-child relationships may provide guidance to estates law, but should not be determinative in the law of succession because the jurisprudential underpinnings of family law conflict with those of the law of succession. Estates law and family law have very different goals in defining a parent-child relationship. Many salient concerns regarding various issues evoked from a parent-child relationship during the parties’ lifetime are not necessarily relevant to issues concerning the distribution of one’s estate.

Generally, family law is child-centered and ultimately concerned with the best interest of the child, from support to guardianship. Thus, in the area of assisted reproductive technology (ART), for example, contemporary parentage law offers two general themes to guide policymaking: chil-

6. As a general rule, in cases where a family court deems a parent to have support obligations, the relationship between the obligated parent and child will also be deemed to qualify the child under the sanguinary nexus test for inheritance purposes. See Ralph C. Brasher, Children and Inheritance in the Nontraditional Family, 1996 Utah L. Rev. 93, 116 (stating that while “inheritance rights are dependent upon the determination of parentage, succession laws have no direct role in ameliorating the flaws and inconsistencies associated with inter vivos paternity proceedings”).

dren’s interests come first, and two-parent care is generally preferable to that of single parent care.8

In contrast, the underlying principal of estates law is not the best interest of the child—it is testamentary freedom.9 Although testamentary freedom and the furtherance of the testator’s intent involve evolving notions of family, the perspective of parentage in estates law should be property owner-centered, not child-centered. Family law simply has not “favor[ed] the fulfillment of individual purposes and the amplification of individual choice.”10 In fact, it seems counterintuitive to focus on the child’s perspective in a system where a property owner can simply disinherit a child.11 Therefore, the goals of family law and family courts in determining parent-child relationships are very different from estates law’s goals.

The problem with estates law scholars looking to family law to define the parent-child relationship is that these scholars not only tend to borrow the concepts; they borrow the mantra of the child-centered theology as well. Despite the abundance of literature on this issue, existing policy


11. Under American law, parents can disinherit their children—even if minor or disabled—without cause or remedy. Frances H. Foster, The Family Paradigm of Inheritance Law, 80 N.C. L. REV. 199, 220 (2001). Louisiana is the only state that protects children from intentional disinheritance. Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, and Estates 466 (7th ed. 2005) (“In all states except Louisiana, a child or other descendant has no statutory protection against disinheriting by a parent.”). Louisiana provides a forced share for children who are twenty-three years or younger or who are under a mental incapacity or physical infirmity and are permanently incapable of taking care of their persons or administering their estates. LA. CIV. CODE ANN. art. 1493(A) (2008).
analyses simply fail to challenge estates law's deference to family law. There is no better example of this acquiescence to family law dogma than the National Conference of Commissioners on Uniform State Laws' very recent amendments to the Uniform Probate Code's (UPC) definition of parent-child relationship for property succession purposes. Rather than abandoning the outdated sanguinary nexus test, the 2008 UPC Amendments retain this relic and slap band-aids on it (or new frameworks) to account for a few specific and selective relationships that fall outside of the traditional genetic definition, such as adopted children and children born of certain ART. While the drafters of the 2008 UPC Amendments have taken a step in the right direction, the complicated and ideologically inconsistent definitional additions to and exclusions from the sanguinary nexus test are inherently flawed in that they borrow heavily from family law concepts without refocusing these concepts to a property law perspective. This new and complicated rubric is unnecessary; the adoption of a purely functionally based approach to the definition of a parent-child relationship would best honor the fundamental policy rationales behind estates law.

Therefore, this Article proposes a new model of analyzing legal issues arising from the evolving notions of parenthood in America and uses it to develop rules to govern the definition of parenthood for succession law purposes while preserving testamentary freedom. To bring estates law back into step with modern family realities, this Article posits that an unadulterated functionally based approach should replace both the sanguinary nexus analytical framework and the recently adopted 2008 UPC Amendments approach. This unadulterated functionally based approach would be the only framework to determine a parent-child relationship—there would be no need for multiple frameworks—one for children born from sexual conception, one for children born of technological conception, and one for adopted children. Because succession laws look to familial relations only as an approximation of testamentary intent, the proposed framework in this Article focuses on the rights and best interests of the decedent only; in so doing, it often departs from analysis in other parent-child influenced case law where the focus—appropriately enough for other areas of family law, but not for estates law's approximation of testamentary intent—has primarily been on the rights and best interests of the child.

12. The model American law governing the transfer of property at death is the Uniform Probate Code (UPC). Article II of the UPC was first promulgated in 1969 and was extensively revised in 1990. This Article lays out the law of intestate succession, as well as substantive rules covering the execution and revocation of wills and certain other nonprobate instruments.

13. After acceptance of this Article for publication, but prior to publication, the UPC was amended to reflect changes in defining parent-child relationships for purposes of property succession. UNIF. PROBATE CODE §§ 2-104, 2-114-122 (2000) [hereinafter 2008 UPC Amendments]. This Article has been updated to reflect these changes and the pertinent 2008 UPC Amendments are discussed in Part VI.
To accomplish this goal, this Article uses parental support cases as a springboard for criticism of the current approach. As mentioned earlier, in cases where a family court deems a parent to have support obligations, the relationship between the obligated parent and child will also be deemed to qualify the child under the sanguinary nexus test for inheritance rights if the obligated parent died intestate. Surveying a variety of parental support cases involving novel family situations, this Article deploys a normative and pragmatic critique of estates law's reliance upon family law principles to determine relevant family relationships. From a normative standpoint, a close examination of parental support cases reveals how reliance upon family law principles undermines the integrity of testamentary freedom. Paradoxically, that potential attack on testamentary freedom has rather serious deleterious implications for effective family planning in modern society. From a pragmatic standpoint, the work demonstrates the growing impracticability of attending adequately to inheritance rights that arise from continued reliance on family law principles. This Article then articulates and defends an unadulterated functional approach to defining a parent-child relationship that would completely break genetic links (and legal parental determinations) for inheritance purposes. This Article concludes that paying greater fidelity to a wholly functionally based framework, rather than reliance upon blood relationships or family law jurisprudence, would help rehabilitate the core value of testamentary freedom in estates law.

To describe fully the unadulterated functionally based approach to defining the parent-child relationship for inheritance purposes, this Article will address the philosophical foundations of estates law and family law, as well as the doctrinal developments in each that have given rise to the current conflict. Accordingly, Part II, “Foundation Underpinnings of Pertinent Legal Disciplines,” introduces the doctrine of testamentary freedom for estates law purposes and explores the jurisprudence of family law in general. Part III, “Current State of Relevant Property Succession Law,” examines the various succession laws impacted by the debate concerning the definition of a parent-child relationship. Part IV, “Parent Making: The Processes and Problems,” describes the various technological advances in child creation and genetic testing that are influencing the notion of family structures, while highlighting the inadequacies of the sanguinary nexus test. Part V, “Case Analyses,” uses parental support cases for evaluating the desirability of family law’s potential influence on inheritance law. Part VI, “Defining the Parent-Child Status,” reviews various frameworks for defining the parent-child relationship, including the 2008 UPC Amendments, and proposes and explores the unadulterated functionally based approach as the sole framework to solve the various issues arising for the changing structures of the American family. Part VII, “Potential Criticisms of Unadulterated Functionally Based Approach,” evaluates the potential shortfalls of the unadulterated functionally based approach to defining the parent-child relationship for inheritance purposes. Finally, Part VIII reiterates the need to amend suc-
cession law to encapsulate more fully the evolving notion of parent-child relationships and advocates the adoption of the unadulterated functionally based approach to alleviate the concerns raised by the current reliance of the sanguinary nexus test.

II. FOUNDATIONAL UNDERPINNINGS OF PERTINENT LEGAL DISCIPLINES

A. PROPERTY SUCCESSION LAW

A substantive analysis of the definition of parent-child status for inheritance purposes must begin with an elementary overview of the traditional philosophical justifications for, and limitations upon, testamentary freedom—the basic estates law principle at stake in this conflict. An appreciation of the jurisprudential underpinnings of testamentary freedom is necessary because reliance upon the sanguinary nexus test can potentially thwart an individual’s desire concerning the distribution of his or her estate.

The principle of testamentary freedom, the governing principle underlying American estates law, provides that individuals have the freedom (or right) to control the disposition of their property at death. From this follows the generally accepted principle that “succession law should reflect the desires of the ‘typical person,’ both with regard to protecting expressions of desire and anticipating situations where those expressions are inadequately presented.”

14. See sources cited supra note 9. However, some scholars are skeptical concerning the actual deference paid to testamentary freedom in American estates law because of the potentially biased results of postmortem will contests. See, e.g., Melanie B. Leslie, The Myth of Testamentary Freedom, 38 Ariz. L. Rev. 235, 243-68 (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 non-relatives); see also Ray D. Madoff, Unmasking Undue Influence, 81 Minn. L. Rev. 571, 576 (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).

15. In theory, pure testamentary freedom places no limitations on how an individual chooses to distribute his or her property at death. Even though testamentary freedom is the underlying leading principle of Anglo-American estates law, complete testamentary freedom is not a universally accepted principle. Almost all states place statutory limits on the freedom of testation, though these limits are typically narrow and small in number. In addition, these limitations do not, in any event, significantly curtail individual liberty and are waivable. Although the statutes vary in considerable detail from state to state, the UPC provisions are generally representative of the type of legislation found in most common law states. See Unif. Probate Code § 2-202 (2000) (the surviving spouse’s elective share); Unif. Probate Code §§ 2-402, 2-402A (2000) (homestead allowance); Unif. Probate Code §2-404 (2000) (maintenance allowance); Unif. Probate Code § 2-403 (exempt property allowances).

16. Lawrence H. Averill, Jr., An Eclectic History and Analysis of the 1990 Uniform Probate Code, 55 Alb. L. Rev. 891, 912 (1992). Of course, there are other arguments for supporting succession law, such as notions of support, reciprocity, social good, and social engineering, to name a few.
The importance of testamentary freedom should not be underestimated. American society has long recognized the value inherent in protecting an individual's ability to acquire and transfer private property. Testamentary freedom is derived from general and well-established property law rights. 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. Thus, testamentary freedom can be viewed as one stick in the bundle of rights referred to as property rights.

Moreover, the principle of testamentary freedom is broader than a simple freedom to bequest one's property. In fact, testamentary freedom encompasses several distinct but interconnected property rights: the right to gift or devise property during life or at death, the right to choose who receives such property, the right to place conditions on the donative transfer, the right to choose the character and timing in and at which the beneficiary receives the property, and the right to appoint another person to make these choices.

Generally, there are three ways to manifest a testator's freedom or intent in the disposition of property at death: 1) wills, 2) will-substitutes (for example, revocable inter vivos trusts, contracts, life insurance, pension plans, and joint accounts), and 3) intestacy statutes. While wills, will-substitutes, and intestacy statutes differ in a variety of ways, they are similar in that they each provide a means of effectuating the testator's intent.

Rationales for testamentary freedom vary, and many theories have been proffered in support for the principle of this theory—some widely accepted, others more controversial. In general, testamentary freedom responds to basic human pleasures and desires and is supported by a variety of economic, philosophical, and societal values. The simplest 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. Others argue that robust testamentary freedom is natural; creates happiness; promotes wealth accumulation and responsibility; encourages industry, creativity, and productivity; reinforces family ties; and

17. Testamentary freedom extends the concept of absolute property ownership beyond the grave. See Tate, supra note 14, at 148.
19. Waggoner et al., supra note 9, at 7.
20. Basically, a will-substitute is the functional equivalent of a will executed during life. Will-substitutes recognize testator's intent by including provisions that dispose of a decedent's property at death according to his or her wishes.
allows the testator to adapt to the needs and circumstances of his particular family. 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.

B. FAMILY LAW

In contrast to probate law’s normative focus on testator intent (or in the context of intestacy, an approximation thereof), the focus of family law, appropriately enough for that context, is generally child-centered. This focus is best expressed by the “best interests of the child” principle which pervades family law practice and guides (to varying degrees) decisions, among others concerning legal parentage, custody, adoption, support, and visitation.

The present prominence of the best interests of the child standard in family law is in large part an outgrowth of its use in resolving custody disputes. The best interests principle “is the sine qua non of the family law process governing custody disputes,” and where the dispute is between natural or adoptive parents, all states mandate custody placement according to the best interests of the child. Likewise, the Uniform Marriage and Divorce Act, designed to codify the existing law of most jurisdictions, provides that “[t]he court shall determine custody in accordance with the best interest of the child.” Despite the near universal acceptance of the best interest standard and its role as the dominant rule in custody determinations, the standard has also been criticized for being inherently indeterminate and for introducing too much judicial discretion. Nonetheless, the best interests standard, often remedied in part by

24. See Tritt, supra note 9, at 117-30.
25. The history and evolution of American family law is beyond the scope of this Article.
29. UNIF. MARRIAGE & DIVORCE ACT § 402 (1973). In determining the best interests of the child, the Act directs courts to consider all relevant factors including:
(1) the wishes of the child’s parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;
(4) the child’s adjustment to his home, school, and community; and
(5) the mental and physical health of all individuals involved.
Id. The Act further directs that courts “shall not consider conduct of a proposed custodian that does not affect his relationship to the child.” Id.
legislative presumptions as to the placements that generally serve children's best interests, has remained the overarching custody rule. Thus, "[i]t is clear that the interests of the child now occupy the foreground of custody law. The child is seen as the person most centrally concerned and the person whose rights and liberties are most in play."32

Like custody, adoption statutes are often driven by public policy considerations as to the best interests of the child. Indeed, the best interests of the adopted child represent the "overriding consideration that must be addressed in each adoption case," and a judicial determination that the adoption is in the child's best interests is a prerequisite to placing a child for adoption, terminating parental rights, granting a petition, or issuing a final decree of adoption. Likewise, the Uniform Adoption Act is driven by the "guiding principle" of "a desire to promote the welfare of children . . . ."35

Visitation issues are also influenced by the best interests of the child principle. Even when the principle gives way to other determinations, the focus does not necessarily shift from the child's welfare or best interests. For example, in Troxel v. Granville, the Supreme Court struck down a "breathtakingly broad" visitation statute that, based solely on a judicial determination of the best interests of the child involved, allowed a court to effectively ignore and overturn any visitation decision made by a fit custodial parent whenever any third party affected by the decision filed a petition for visitation. Holding that the statute unconstitutionally infringed upon the "fundamental right of parents to make decisions concerning the care, custody, and control of their children," the plurality of the Court, noting a "presumption that fit parents act in the best interests of their children," criticized the lack of deference given to a parental determination that visitation was not in the best interests of the child: "The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the fit custodial parent's] determination of her daughters' best interests."39

Even if it is not the articulated standard, the best interests of the child are also paramount in child support issues, where judicial decisions are guided by the desire to assure adequate support for the child. Consider, for example, the case of Straub v. B.M.T. by Todd. There, a man agreed to "donate" sperm to a woman—not through a sperm bank, but rather

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31. See id. at 435.
32. Id. at 436.
33. See Linnert, supra note 26, at 321.
34. 2 AM. JUR. 2D Adoption § 131 (2008).
35. UNIF. ADOPTION ACT prefatory note (1994).
36. See Cynthia R. Mabry, "Who Is My Real Father?"—The Delicate Task of Identifying a Father and Parenting Children Created from an In Vitro Mix-Up, 18 NAT'L BLACK L.J. 1, 21-22 (2004); Meyer, supra note 26, at 1131-32.
38. Id. at 67.
39. Id. at 66-69.
40. 645 N.E.2d 597 (Ind. 1994).
through sexual intercourse—for the purpose of allowing her to conceive a child.41 The woman signed an agreement that the man would not be responsible for child support in the event of conception, which the man attempted to use as a defense when the woman eventually sought child support for a child born of the agreement.42 Noting the public policy favoring the welfare of a child and the exclusive right of a child to receive support, the court held the agreement to be void and unenforceable: “Any agreement purporting to contract away these rights is directly contrary to this State’s public policy of protecting the welfare of children, as it narrows the basis for support to one parent.”43

Even with respect to purported inheritance questions, family law principles have caused courts to focus on children. In In re Estate of Kolacy,44 the mother of two posthumously conceived children sought a declaration that the children were the intestate heirs of their deceased father, a classification that would affect their ability to collect Social Security benefits.45 In recognizing the children as the legal heirs of their father, the court focused in part on the children, discerning “a basic legislative intent to enable children to take property from their parents and through their parents from parental relatives,” and noting that “once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity, and legal protection which that status requires.”46 Similarly, in another Social Security benefits driven dispute regarding the heir status of posthumously conceived children, the Supreme Judicial Court of Massachusetts ruled that under certain circumstances, a posthumously conceived child may enjoy the rights of “issue” under state intestacy law.47 In crafting its opinion, the court noted the best interests of the child as one of three “powerful State interests” that had to be balanced and harmonized in order to effectively answer the question of whether posthumously conceived children enjoy inheritance rights through intestacy: “First and foremost we consider the overriding legislative concern to promote the best interests of children. . . . Among the many rights and protections vouchsafed to all children are rights to financial support from their parents and their parents’ estates.”48

From a family law perspective, defining parentage has implications concerning legal parentage, custody, adoption, visitation, and support. A child-centered focus to establishing child status is therefore appropriate and desirable in this context.

41. Id. at 598, 600-01.
42. Id.
43. See id. at 599-601.
45. Id. at 1258-59.
46. Id. at 1262-63.
48. Id. at 264-65.
III. CURRENT STATE OF RELEVANT PROPERTY SUCCESSION LAW

No conclusion should be made about how succession laws define a parent-child relationship without a review of the affected laws and an overall understanding of the purposes behind those laws. Although succession law statutes differ from state to state, there are a number of universal issues.49

Generally, succession statutes use rigid and mechanical rules based on formal legal relationships to identify a decedent’s family, rather than trying to determine whether a particular person functioned as part of the decedent’s family. To qualify as a family under most succession laws, with few exceptions, a surviving individual must have been married to the decedent or related to the decedent genetically or by adoption.54 Inheritance statutes that include definitions of “child,” “issue,” and similar terms typically provide merely that a child is a person (natural or adopted) who is entitled to take from the parent by intestate succession.

A. INTESTACY

When the wishes of a decedent are not known due to a lack of express intent (for instance, lack of a will, invalidity of a will or a valid will that
only disposes a portion of the decedent's probate property\textsuperscript{56}, intestacy statutes attempt to further an individual's testamentary freedom\textsuperscript{57} by disposing of property\textsuperscript{58} in accordance with the probable intent of the average intestate decedent.\textsuperscript{59} In addition to mandating who takes what when a decedent dies without a will, intestacy statutes serve other purposes as well. 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.\textsuperscript{60} In addition, courts have used the statutes as a way to identify the "natural objects of the legislator's bounty" in determining will contests alleging undue influence.\textsuperscript{61} Also, the statutes will be used to determine "heirs" for class gift purposes.\textsuperscript{62}

The goal of carrying out the presumed intent of the average intestate decedent is derived from the concept of testamentary freedom.\textsuperscript{63} In essence, the intestacy statutes create a default will.\textsuperscript{64} Intestacy statutes approximate the distributive scheme that the decedent likely would have chosen had he or she acted to provide for the distribution of his or her

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\textsuperscript{56} UNIF. PROBATE CODE § 2-101(a) (2000) (stating that "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this Code, except as modified by the decedent's will").

\textsuperscript{57} Mary Louise Fellows et al., Committed Partners and Inheritance: An Empirical Study, 16 LAW & INEQUALITY 1, 11-12 ("By reflecting probable donative intent of those likely to die without a will, the intestacy statute furthers testamentary freedom because it gives persons the right not to have to execute wills to assure that accumulated wealth passes to their intended takers."); Lawrence M. Friedman, The Law of the Living, The Law of the Dead: Property, Succession, and Society, 1966 Wis. L. REV. 340, 355 ("[I]ntestacy laws can even be analyzed as an extension of the principle of free disposition of property at death.").

\textsuperscript{58} Intestacy statutes only dispose of property held in the decedent's name alone. See DUKEMINIER & JOHANSON, supra note 11, at 59. The probate process administers a decedent's property either pursuant to a will or by intestacy. See id. Property held in a way that avoids probate passes by operation of law or the governing instrument. See id.

\textsuperscript{59} There is widespread acceptance among estates law scholars that an important goal of any intestacy scheme is and should be to further the donative intent of the intestate property owner. See Gary, supra note 3, at 7-8 ("The most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators. . . . To the extent possible, the statute should distribute the property to the persons the decedent would have chosen to receive the property if the decedent were making the decision."); Fellows et al., supra note 57 (commenting that intestacy statutes reflect society's commitment to donative freedom).

\textsuperscript{60} Gary, supra note 52, at 644 n.2 (noting that even though a decedent can avoid the application of intestacy laws by executing a will, intestate heirs can nevertheless challenge the will because they would take the property if the will is invalid).

\textsuperscript{61} Id. at 644; see also BLACK'S LAW DICTIONARY 1056 (8th ed. 2004) (defining "natural object of testator's bounty" as whoever would take under the laws of intestacy); RESTATEMENT (THIRD) OF PROP., supra note 9, § 8.1 cmt. c (defining natural objects of a testator's bounty as "the testator's closest family members").

\textsuperscript{62} Determination of "heir" status also has consequences beyond the probate system. For instance, the Social Security Act determines eligibility of benefits to dependent children of a deceased parent on the basis that the surviving child would be treated as an heir under the state's intestacy law. 42 U.S.C. §§ 402(d)(3), 416(h)(2)(A) (2000).

\textsuperscript{63} See Fellows et al., supra note 57, at 11-12.

\textsuperscript{64} See RESTATEMENT (THIRD) OF PROP., supra note 9, at ch. 1 (stating that intestate succession is "a default regime").
estate at death. By so doing, intestacy statutes assume that most decedents would want their property to pass to their family. In addition to furthering donative intent (the prominent goal of intestacy statutes), some scholars have identified subsidiary goals, such as the ideas that intestacy statutes should reflect society's view of fairness, be committed to promoting familial-type ties, be concerned with support, advance reciprocal obligations, and be administratively efficient. In any given case, these goals may coincide with the goal of fulfilling donative intent, but they do not necessarily do so and, hence, there are inherent tensions.

Typically, intestacy statutes provide a disposition for a surviving spouse, and any part of the decedent's estate that does not pass to a surviving spouse passes then to the decedent's children, if any, and then to more remote descendants. Therefore, the decedent's children have priority over most other surviving relatives. Because intestacy statutes give preference to children, it is imperative that they clearly articulate the requirements for establishing the parent-child relationship.

For intestacy purposes, a parent-child relationship is understood as a natural relationship based upon biological reproduction. Child status for inheritance purposes follows 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 biological original. Therefore, in order for an individual to take a child's intestate share, the individual must have been in a legally recognized parent-child relationship with the decedent, usually the genetic parent or the adoptive parent, regardless of the actual relationship of the decedent and child or whether the decedent even knew of the child's existence.

65. See WAGGONER ET AL., supra note 9, at 912 (noting that intestacy statutes seek to implement the "objective intent" of the average person); Lawrence W. Waggoner, The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code, 76 IOWA L. REV. 223, 230 (1991) (concluding that the decedent's intent is the "predominant consideration" behind an intestacy statute); T. P. Gallanis, Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality, 60 OHO ST. L. J. 1513, 1522 (1999) (stating that the official comments to the UPC state that intestacy rules in the probate code are "explicitly designed to mirror the likely intent of the patient, ward, or decedent").

66. See Gary, supra note 3, at 11.

67. See RICHARD R. POWELL, POWELL ON REAL PROPERTY § 90.02[3] ("[C]ertain societal goals can be accomplished through an intestacy scheme. These goals may include support for family members . . . ."); see also, WAGGONER ET AL., supra note 9, at 33-34 (describing what objectives guide policymakers in developing a system of intestate succession); Adam J. Hirsch, Default Rules in Inheritance Law: A Problem in Search of Its Context, 75 FORDHAM L. REV. 1031, 1033-37 (2004).

68. For a detailed discussion of common intestacy patterns in the United States, see RESTATEMENT (THIRD) OF PROP., supra note 9, ch. 2; see also WAGGONER ET AL., supra note 9, at 40-66; see also DUKEMINIER & JOHANSON, supra note 11, at 59-83.


71. Id. at 125-26.

72. But see infra Part VI (discussing the 2008 UPC Amendments).
Although it might seem like a straightforward mandate, ascertaining a parent-child relationship in a non-traditional family becomes complex. Whether the parent-child relationship exists between mother and a child or father and a child has an impact in recognizing child status. For instance, it was once thought that a mother-child relationship was self-apparent, in that the mother gave birth to a child. Therefore, legal parentage followed child birth, and all children had a right to inherit from their mothers. However, with the advent of egg donations and surrogacy, identifying a mother-child relationship based on genetics is no longer easy. For fathers, whose genetic connections are not as apparent, legal paternity is often inferred through a network of presumptions and defenses. In addition, because of DNA testing and advancements in ART (such as sperm donations), recognizing a father-child relationship, or a presumption thereof, may prove to be difficult as well.

As can be seen, the intestacy statutes use formal definitions to define the parent-child relationship by adopting rules based on legal relationships. By so doing, the intestacy statutes (i) exclude some individuals whom the decedent might have considered a child and may have preferred as a recipient of the decedent's property and (ii) include some individuals with whom the decedent might have had no relationship or even knew of his or her existence. Thus, typical intestacy statutes do not fulfill the primary goal of carrying out the decedent's intent.

B. Class Gifts

Class gifts may arise in two scenarios. First, when the instrument is executed by a testator that refers to his or her own children, a definitional issue arises. (For example, the testator's will bequeaths his or her estate to "my children"). Second, when the instrument is executed by someone other than a parent figure, another definitional issue arises. (For example, suppose a testator bequeaths his or her estate to A for life, remainder to A's children.) In construing the term "children," do we look at the testator's intention of what constitutes A's children, or A's view of what

73. For example, assume a gay male couple decides to have a child. One person obtains an egg from his sister, which they fertilize with the non-brother's sperm. The gay couple uses a surrogate (not the sister) to carry the child to term. When the child is born, with whom does he or she have a parent-child relationship—the sperm donor who intended the child to be his, the non-sperm donor brother who intended the child to be his, the genetic material donor sister who did not intend the child to be hers, or the birth mother who did not intend the child to be hers?


75. See Garrison, supra note 8, at 912.

76. Davis, supra note 74, at 86-87; see also, Garrison, supra note 8, at 912 (noting that "[b]ecause pregnancy and birth are relatively public and undisputed, the law has rarely confronted the question of legal motherhood at all").

77. Meyer, supra note 70, at 127.

78. Gary, supra note 52, at 654.
constitutes A's children? What rules of construction should determine whether class designations like "child," "issue," "heir," "grandchild," and "descendant" used in private dispositive instruments include individuals that claim membership in the class but are not genetically linked?

Whether an individual takes under a class gift provision depends on the testator's intent in using the terminology. When the testator's intent is clear from the instrument, the intent should be honored. In most cases, however, the dispositive instrument will not be helpful, and what should constitute child status probably was never considered by the testator in the first place. In construing the language then, courts generally try to deduce what the average donor using the language would have intended. Courts rely on intestacy statutes to determine distributions under wills and trusts for class gift purposes. Therefore, like intestacy, parentage is defined as being created either biologically or through adoption.

Generally, if the transferor of the class gift is a natural or adopting parent, statutes tend to provide that adopted and non-marital children are included in class gifts if they qualify to take under the rules of intestate succession. If the transferor of the class gift is someone other than the natural or adoptive parent, a so-called agency approach is typically used to define the class gift. If the child, usually a non-marital child, lived while a minor as a regular member of the household of an individual, then the child shares in a class gift to that individual's children.

C. Equitable Adoption

A child who has been adopted pursuant to a state's required adoption statute is treated as a child of the adoptive parent or parents, and enjoys the status of a genetic child, including the ability to inherit from or through the adoptive parent or parents. Although not adopted with statutory formalities, an equitably adopted child nevertheless may be able to maintain a claim in equity as an intestate heir even though he or she was not a genetic or legally adopted child.

79. In adoption scenarios, traditionally and until quite recently, the prevailing presumption was that when a person not a party to the adoption made a class gift to someone else's children, the donor only intended genetic children born into the class. See Jan Ellen Rein, Relatives by Blood, Adoption and Association: Who Should Get What and Why, 37 Vand. L. Rev. 711, 733 (1984). This is known as the stranger-to-the-adoption doctrine. Today, this rule has come to be regarded with disfavor, but it has not been totally abandoned. Dukeminier & Johanson, supra note 11, at 89.

80. For purposes of this discussion, this Section assumes that neither the doctrine of worthier title nor the Rule in Shelley's Case is applicable.

81. Rein, supra note 79, at 732. Perhaps lawyers should interview clients more carefully about these issues and be more precise in defining genetic terms under dispositive instruments.

82. For example, F.S. §732.608 (construing genetic terms for class gift purposes should be in accordance with rules for determining relationships for intestate succession).

83. See Waggoner et al., supra note 9.

84. See, e.g., Unif. Probate Code § 2-114 (amended 2008) (stating that an adopted individual is the child of his or her adopting parents and not of his or her natural parents). Some statutes make an exception for stepparent adoptions. See id.
Equitable adoption (also called virtual adoption, adoption by estoppel, and de facto adoption)\(^8\) is an equitable remedy construed by courts to avoid what is perceived as an injustice arising from a strict application of the intestacy statutes.\(^8\) 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.\(^8\) An individual asserts a claim of equitable adoption in order to take an intestate share of the decedent’s estate.\(^8\) Considering that under the laws of succession informal adoptees have no standing, courts’ application of this doctrine is particularly striking.\(^8\)

Courts have developed two separate theories to justify the results achieved by the doctrine of equitable adoption: the contract theory and the estoppel theory.\(^9\) “Courts using the contract theory presuppose that [the decedent] as promisor has contracted to effect a legal adoption [with the parents] and that by granting relief, the court is specifically enforcing the contract.”\(^9\) This justification for the implementation of the doctrine, however, is deficient. Courts have difficulty identifying a “mutuality of remedy, and other aspects of the so-called contract seem dredged up for the occasion.”\(^9\) Scholars have queried whether anyone, without court approval, has the authority to make a legal contract designating the child’s adopter.\(^9\) Also, there is a problem in determining whether the child is a third party beneficiary or an actual party to the agreement (and whether the child is too young to enter a contract).\(^9\) Finally, the remedy of specific enforcement is a fiction in that at least one party to the con-

86. Robinson, supra note 85, at 955; Rein, supra note 79, at 767.
87. Robinson, supra note 85, at 955.
88. See id.; Clark, supra note 85, at 925; Rein, supra note 79, at 767.
89. Rein, supra note 79, at 767.
90. See Rein, supra note 79, at 770; J.L.J., Jr., Note, Equitable Adoption: They Took Him Into Their Home and Called Him Fred, 58 Va. L. Rev. 727, 730-36 (1972); Robinson, supra note 85, at 956.
91. Rein, supra note 79, at 770. See In re Williams’ Estates, 348 P.2d 683, 684 (1960) (“It is generally recognized that where a child’s parents agree with the adoptive parents to relinquish all their rights to the child in consideration of the adoptive parents’ agreement to adopt such child, and to care and provide for it the same as though it were their own child, and such agreement is fully performed by all parties connected with such contract except there is no actual adoption, the courts will decree specific performance of such contract and thereby award to the child the same distributive share of the adoptive parents’ estate as it would have been entitled to had the child actually been adopted as agreed.”). For other cases stressing contractual aspects of the situation, see Habecker v. Young, 474 F.2d 1229, 1229-30 (5th Cir. 1973) (applying Florida law); In re Estate of Lamfrom, 368 P.2d 318, 320-321 (Ariz. 1962); Laney v. Roberts, 409 So. 2d 201, 203 (Fla. Dist. Ct. App. 1982).
92. Rein, supra note 79, at 772.
93. Id.
94. Robinson, supra note 85, at 956.
The estoppel theory surmises that equitable estoppel should apply because the child has performed his or her part of the bargain, and thus the adoptive parent's estate should be equitably estopped from denying the child's status as an heir. Courts using the estoppel theory emphasize the child's performance of filial services and protect the child "against the fraud of the adoptive parents' neglect or design in failing to do that which he in equity was obligated to do." "Equitable estoppel is a rule of fundamental fairness whereby a party is precluded from benefiting from his inconsistent conduct which has induced reliance to the detriment of another."

A problem arises under this theory concerning the required element of the child's detrimental reliance—should the reliance be on the contract to adopt per se, or upon the representation of status? Reliance on the agreement is usually impossible because a young child cannot comprehend the import of a contract. Reliance on the representation of status is almost as difficult to establish. Courts that adhere to the reliance requirement find themselves rejecting meritorious equitable adoption claims for want of reliance. Therefore, courts that follow the theory find themselves in the position of honoring only the claims of plaintiffs who have conditioned filial devotion upon an implicit promise of heirship.

At times, it is difficult to ascertain under which theory the court is proceeding because courts commonly overlap the theories or merge the two theories together. For instance, both theories are predicated on the existence of an agreement to adopt. Regardless of the theory used, unless the courts find substantial compliance with the adoption statutes, the courts almost unanimously require that a contract to adopt be proved in order for a court to grant equitable relief. Therefore, both of the purported theoretical bases for equitable adoption are very limited in ap-

95. See CLARK, supra note 85, at 926 ("It does some violence to the concepts of contract to say that on the death of the [equitably adoptive] parent a contract to adopt may be specifically enforced, since in fact such a contract could possibly not be specifically enforced in all respects, as for example in a suit by the natural parent against the foster parents.")

96. Robinson, supra note 85, at 956.
97. Rein, supra note 79, at 771 (citing Jones v. Guy, 143 S.W.2d 906 (Tex. 1940)).
98. Id. at 776 (citing In re Marriage of Valle, 53 Cal. App. 3d 837, 840 (1975)).
100. Id.
101. Rein, supra note 79, at 776-77.
102. Id. at 777. As a result, most of these courts apply the reliance requirement rather loosely. See id.
103. Id. at 771. See, e.g., Calista Corp. v. Mann, 564 P.2d 53 (Alaska 1977); see also Ramsay v. Lane, 507 S.W.2d 905 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).
104. See Rein, supra note 79, at 772.
105. Id. Professor Rein suggests that courts insist that a contract be proved because courts want to ensure that the decedent intended to adopt the child as an heir, and that the child grew up believing that a legal adoption had in fact taken place. Id. at 784.
application and may produce inconsistent and inequitable results.\textsuperscript{106}

It should be noted, however, that one court has abandoned the need to prove a contract to adopt. In \textit{Wheeling Dollar Savings \\& Trust Co. v. Singer},\textsuperscript{107} a case involving a testamentary trust which directed payment of income to the testatrix's niece for life and remainder to the niece's children, the West Virginia Supreme Court of Appeals observed that:

[\textit{I}n many instances a child will be raised by persons not his parents from an age of tender years, treated as a natural child, and represented to others as a natural or adopted child. In many instances, the child will believe himself to be the natural or formally "adopted" child of the "adoptive" parents only to be treated as an outcast upon their death. We cannot ascertain any reasonable distinction between a child treated in all regards as an adopted child but who has been led to rely to his detriment upon the existence of formal legal paperwork imagined but never accomplished, and a formally adopted child. Our family centered society presumes that bonds of love and loyalty will prevail in the distribution of family wealth along family lines, and only by affirmative action, i.e., writing a will, may this presumption be overcome.]\textsuperscript{108}

The court rejected the requirement of a contract to adopt and held that a finding of equitable adoption would be appropriate if a plaintiff could prove by "clear, cogent and convincing evidence" that his status is identical to that of a formally adopted child.\textsuperscript{109}

Of course, even for those to whom equitable adoption applies, there are many remaining issues. Can the equitably adopted child inherit through the equitably adopted parents from said parents' blood relatives?\textsuperscript{110} If the equitably adopted child is allowed to inherit from his equitably adopted parent, may the child also inherit from his or her genetic parents? Does an equitably adopted child have standing to contest the unfavorable will of his or her equitably adopted parent?\textsuperscript{111} Would an equitably adopted child be included in a class gift made by a stranger to the informal adoption?\textsuperscript{112}

\textsuperscript{106} \textit{Id.} at 767.
\textsuperscript{107} 250 S.E.2d 369 (W. Va. 1978).
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{See} Pouey v. Garner, 626 S.W.2d 337 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (holding that an equitably adopted child cannot inherit through the equitably adopted parents' bloodline). \textit{But cf.} Wheeling, 250 S.E.2d at 371 (permitting the equitably adopted daughter to take a child's remainder interest of a testamentary trust under a will that a stranger to the equitable adoption executed).
IV. PARENT MAKING: THE PROCESSES AND PROBLEMS

Two branches of technological advancements highlight the inadequacies of succession law’s devotion to the sanguinary nexus test. First, advances in ART throughout the past half-century have changed the reproductive landscape by allowing the “creation of children in ways previously unthinkable.” As a result, these technologies—most importantly, the timing issues raised by posthumous conception and the social implications of ART—challenge “traditional” concepts of family through a dilution of the import of a genetic link in defining familial relationships.

Because ART may achieve conception without sex, an individual or individuals who want a child may use sperm, ova, or gestational services that have been donated or sold. The legal parentage of children born through ART is often unclear, and legislatures have been slow to respond to the changing concepts of family and parent-child relationships. For instance, it is now possible for a child to have three potential “mothers”—one who is the egg donor, one who was the gestational surrogate, and one who planned the pregnancy. It is also possible for a child to have three potential fathers—one who is the sperm donor, one who is married to the gestational surrogate, and one who planned the pregnancy.

The second technology that has raised estate law issues is genetic mapping and testing. It is now easy and cost-effective to identify those individuals who have in fact provided the genetic materials for the creation of a child with a very high degree of precision. At least four percent of men are raising a child as their biological progeny who was actually sired by another man. Thus, strict adherence to the sanguinary nexus test could have adverse effects on family harmony. Because of the sanguinary nexus test’s reliance on blood connections, it is possible to exclude from child status, with DNA testing, a child who the property owner believed was his or her genetic child but with whom the property owner lacked a

115. For a detailed review of the murkiness of inheritance laws concerning children born from ART, see Brashier, supra note 6, at 115-16.
116. Problems leading to the lag in legislative responses are the rapid advancements in new methods of creating children and the ever evolving shifts in parenting norms. See Garrison, supra note 8, at 839.
118. Id.
genetic link. In addition, DNA testing allows posthumous testing for paternity long after a decedent’s death, thereby inviting claims against the estate from alleged children whom the decedent may not have even known existed. Therefore, genetic testing and mapping play an instrumental role in defining the parent-child relationship for inheritance purposes.

The parenting possibilities of ART and genetic testing present a host of legal issues. Fully comprehending the inadequacies of the sanguinary nexus test requires a rudimentary knowledge of these technological advances in child-creating and genetic mapping.

A. METHODS OF ASSISTED REPRODUCTIVE TECHNOLOGY

ART refers to methods of achieving pregnancy other than coitus and is widely used to help couples and single persons procreate where procreation by sexual intercourse has failed or is not desired. Individuals use ART for a variety of reasons. Some use ART to overcome problems of infertility, others use ART because they are in a same-sex relationship. And others use ART because they are single.

In the past half-century, there has been a revolution in reproductive and genetic technology. Advances in ART provide new and diverse opportunities to create children.

I. Artificial Insemination

Artificial insemination is one of the oldest and most common forms of ART. In this procedure, sperm is non-coitally introduced into the woman’s uterus, cervical canal, or vagina. If the sperm used to inseminate a woman is obtained from her husband through a process

120. Although one might presume that a female would know if a child was her genetic child, because of baby swapping incidents at hospitals, this possibility remains a reality.


123. See LORI B. ANDREWS, THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY 220 (1999) (reporting that the ART industry has an annual revenue of $2 billion and results in tens of thousands of births yearly).

124. Kindegran, supra note 114.

125. ANDREWS, supra note 123, at 219 ("This is truly the Wild West of medicine.").

126. The first reported artificial insemination of humans was performed by English surgeon John Hunter in 1790. Kathryn Venturatos Lorio, From Cradle to Tomb: Estate Planning Considerations of the New Procreation, 57 LA. L. REV. 27, 30 (1996) (citing Jeffrey M. Shaman, Legal Aspects of Artificial Insemination, 18 J. FAM. L. 331 (1980)).


known as artificial insemination husband (AIH), and the husband also functions as the social father of the child created, then artificial insemination poses little challenge from an estates law perspective because there are no problems with filiation. AIH is simply an alternative means of conception resulting in a child with two clearly identifiable parents. If, however, the sperm is obtained from a donor, a process known as artificial insemination donor (AID), and the donor has no intention of serving as the social father, estates law issues arise because the identity of the father for inheritance purposes becomes unclear because the genetic father is different from the intended father. Also, there seems to be confusion under various state laws concerning insemination when the insemination is not conducted by a doctor, when the woman is not married, or when the sperm donor is known as opposed to anonymous.

2. *In Vitro Fertilization*

In vitro fertilization, or IVF, involves the fertilization of a human egg outside of a woman’s body and the subsequent transfer of the fertilized egg to a uterus. The mother-to-be is given hormones to increase egg production, and then gametes are extracted from the genetic parents. Next, the gametes are fertilized in a Petri dish and the resulting zygote is allowed to develop into a pre-embryo. After pre-embryos are screened for genetic abnormalities or diseases, the screened pre-embryos are implanted in the mother-to-be’s uterus and any surplus pre-embryos are cryopreserved for future use. Demand for IVF has risen in recent years in large part because of increasing success rates and decreasing costs. If one woman intends to raise the child, supply the egg, and give birth, the technology poses little challenge from an estates law perspective. Yet, because an egg can be retrieved from one woman and transferred to the uterus of another woman, the egg donor and the woman

129. *Id.*
130. *Id.*
131. For instance, through artificial insemination, it is possible for a child to have three potential “fathers”—one related to the child genetically, one married to the surrogate who gave birth to it, and one who planned the pregnancy. Most states have statutes concerning situations involving sperm donors, specifying that men who provide sperm to sperm banks are not fathers of any resulting child. There are statutes in thirty-five states that address artificial insemination. See Polikoff, *supra* note 8, at 63; *Adoption Law & Practices* § 14.20[2] (Joan Heifetz Hollinger ed., 2001).
132. See Polikoff *supra* note 8, at 64-65; *Adoption Laws & Practices, supra* note 131, § 14.05.
134. *Id.*
135. *Id.*
136. It has been reported that, by 2003, IVF accounted for more than 1% of total live births in the United States or nearly 50,000 children each year. *Centers for Disease Control & Prevention, U.S. Dep’t. of Health & Human Servs., Assisted Reproduction Technology Success Rates: National Summary and Fertility Clinic Reports* (2005).
giving birth may not be the same person. Further, the woman intending to raise the child may not be either the egg donor or the woman giving birth. These scenarios raise issues in defining a parent-child relationship for inheritance purposes in a system that relies upon the sanguinary nexus test as a determinative factor.

3. **Cryopreservation**

Cryopreservation uses liquid nitrogen to freeze and preserve for future use cells and tissues, including sperm, ova, ovaries, or embryos. Cryopreservation and long-term storage of sperm, eggs, and embryos create the potential for a child to be not only born, but also conceived, years, or even decades, after the death of the genetic parents. One question raised by this process is to what extent a posthumously conceived child should have inheritance rights, given that conception was after the death of the genetic parent.

4. **Gamete Intrafallopian Transfer**

Gamete intrafallopian transfer is similar to an IVF in which unfertilized gametes are transferred to the healthy fallopian tubes of a woman and fertilization occurs in the fallopian tube instead of in a Petri dish. This procedure permits the same possible combinations of egg donors, gestational mothers, and third-party sperm donors as with IVF, and, accordingly, the same estate law issues arise.

5. **Surrogacy**

Under surrogacy technology, the child's birth parent is not a legal parent. Most surrogacy laws assume that the "surrogate" birth mother is genetically related to the child; they thus fail to address the increasingly common phenomenon of gestational surrogacy. With gestational surrogacy, it is possible for a child to have three "mothers"—one who is genetically related to the child, one who gave birth to the child, and one who planned the pregnancy and intended the child to be hers. Current laws, even in states with statutes governing surrogacy, typically fail to of-

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137. There has been relatively little regulation of egg providers. Only a small number of cases have regulated parenthood through the use of eggs. Garrison, supra note 8, at 897.


139. BLANK & MERRICK, supra note 128, at 87.


141. Gestational surrogacy is where an egg is provided by a donor and fertilized and implanted into a surrogate who is not the egg donor.

142. Garrison, supra note 8, at 839.
fer clear, or even murky, answers as to the rights and obligations of these various parties.

6. Cloning

As advances in technology verify the potential for human cloning, the possibility of offspring with a single genetic progenitor remains plausible. Cloning would produce "children who have but one source of genetic material[s] . . . [but] . . . whose genetic material[s] can be traced directly to [the clone's] grandparents." The implications to the law of inheritance are obvious. Is the cloned child treated as the child of the genetic material donor or as a child of the individuals with whom the child shares the genetic link?

Within these various options discussed above there is still more flexibility. For example, cryopreservation can involve preservation of oocytes, ovarian tissue, embryos, or sperm (which itself can either be privately or anonymously donated). Artificial insemination can be by a husband, a donor, or even a combination of husband and donor. Surrogacy can be traditional, where the birth mother is not the legal mother but is the genetic mother, or gestational, where the birth mother is neither the legal mother nor the genetic mother. The net result is a confusing array of "parents."

These various ART options can help people overcome obstacles to reproduction arising from personal choice, biological limitations of same-sex couples, infertility, death of a partner, risk of disease transfer to a partner, risk of genetic disease to a child, or risk of future infertility or premature death of a partner. Professor Charles Kindregan offers the following non-exhaustive list of some of the ways ART allows for non-coital reproduction:

[S]ame-gender female partners who can employ intrauterine insemination to produce a pregnancy in one of the partners with the sperm of an anonymous donor or a known donor; same-gender male partners who can employ a traditional surrogate to carry a child for them using the sperm of one of them to produce the pregnancy by intrauterine insemination; same-gender female partners who agree that one of them will become pregnant by in vitro fertilization or a similar procedure, such as gamete intrafallopian transfer, gamete uterine transfer or peritoneal ovum and sperm transfer; same-gender female partners who agree that they will employ a gestational surrogate to carry a child for them using the egg of either one of them and donated sperm; same-gender female partners using donated sperm and donated eggs which are fertilized in vitro, producing embryos

144. Shapiro, supra note 113, at 86.
145. Rothschild, Issue of Issue, supra note 140.
146. See id.
147. See id.
148. See Kindregan, supra note 114, at 6.
intended to be implanted in one of them; same-gender male partners
who provide the sperm of one of them to fertilize a donated egg in
vitro, with the resulting embryo to be carried by a female gestational
carrier; male and female couple who employ the sperm of a donor to
make the female pregnant by intrauterine insemination because of
the infertility of the male partner, or to avoid a disease carried by the
male partner or because of Rh blood incompatibility; male and fe-
nale couple who use an embryo produced by another couple which
is fertilized in vitro and cryopreserved in order to be implanted into
[th]e uterus of the female; same-gender female partners who use an
embryo produced by another couple which is fertilized in vitro and
cryopreserved in order to be implanted into the uterus of one of the
female partners; male and female couple who use their own gametes
but employ intrauterine insemination to produce a pregnancy be-
because male impotence makes sexual intercourse impossible; un-
partnered female who uses donated sperm to become pregnant by
intrauterine insemination; unpartnered female who uses donated
sperm and in vitro fertilization to become pregnant because of defec-
tive or diseased fallopian tubes; unpartnered male who uses either
his own sperm or donated sperm and by use of intrauterine insemi-
nation employs the services of a surrogate carrier to give birth to a
child he intends to raise.149

These examples, "combined with the ability of reproductive medical
science to cryopreserve gametes or embryos, the availability of post-birth
adoption to cement a legal parent-child relationship and use of co-parent-
ing agreements,"150 are the tip of an iceberg of a myriad of ways where
legal issues concerning parentage arise in the context of the non-tradi-
tional family.

For probate purposes, one obvious implication of these new technolo-
gies is that the traditional postmortem gestational window of nine months
may be insufficient because children can now be conceived years after the
death of one or both genetic parents. Indeed, not only does technology
allow for posthumous conception, it even allows for posthumous extrac-
tion of gametes to be used in posthumous conception. In July 1998, Gaby
Vernoff, a California woman, was impregnated with sperm that had been
frozen for fifteen months; the sperm, collected by a team of doctors who
went to the coroner's office to perform the procedure, had been extracted
from her husband's epididymus thirty hours after his death.151 Putting
aside, temporarily, the crucial152 issue of intent to procreate presented by
posthumous gamete extraction and some other forms of gamete extrac-

149. Id. at 6-7.
150. Id. at 7.
151. A Birth Spurs Debate on Using Sperm After Death, N.Y. TIMES, Mar. 27, 1999, at
A11.
152. While the issues of consent and intent are pertinent to the ethical debate of the
propriety of certain forms of ART, this Article does not address that debate. Rather, as
explained above, the issues of consent and intent are critical here for their approximation
of testamentary intent.
posthumous conception as a whole is a relevant and viable consideration for probate law. The tension is apparent. In striking the appropriate balance, the law must also consider the practical need for finality in probate.

A second, far broader implication of these new technologies is their practical social effect. Following in the footsteps of increasing divorce rates and the increasing acknowledgement of same-sex couples, ART presents the most recent example of the evolution away from the traditional concept of family through a dilution of the import of a genetic link in defining familial relationships. Whether due to gamete donation or surrogacy, ART allows for a deviation between children's intended parents and their genetic or even gestational parents.

Augmenting the dilution of the genetic link's import in defining familial relationships that result from the increased use of ART is a further dilution of that link brought about by changes in methods of ART itself. For example, the once-popular method of Confused Artificial Insemination, whereby the husband's sperm is mixed with a donor's sperm so as to keep the actual fertilizing sperm unknown—a method that "allows the [father] to embrace the possibility that he is the child's natural father"—has been abandoned and is now "virtually extinct." Advances in the continually developing forms of ART could continue to further dilute the role of the genetic link in parentage. Technology to create artificial sperm from bone marrow has experts speculating that within five to ten years it will be possible to bear children without a male genetic father. Going a step further, one human genetics professor at Oxford University, noting an evolutionary decline in the male-creating Y chromosome, predicts that heterosexual reproduction may have a remaining shelf life of 125,000 years.

153. Gamete extraction need not be posthumous to raise issues as to intent and consent. Daniel Christy, an Iowa man, was critically injured in a motorcycle accident in September of 2007. As he lay dying in a hospital bed, unconscious and with little brain activity after suffering a series of strokes, his parents and his fiancé got a court order allowing them to harvest his sperm before he died. Jennifer Hemmingsen, Judge: Family Can Get Dying Son's Sperm, GAZETTE ONLINE, Sept. 13, 2007, http://www.gazetteonline.com/apps/pbcs.dll/article?AID=/20070913/NEWS/70913034/1001/NEWS. Doctors removed sperm from Christy inside the hospital's surgical intensive care unit. Jennifer Hemmingsen, Racing Against Time, Man's Sperm Harvested Before He Dies, GAZETTE ONLINE, Sept. 15, 2007, http://www.gazetteonline.com/apps/pbcs.dll/article?AID=/20070915/NEWS/70914054/1001/NEWS. About fifteen minutes later, hospital staff turned off Christy's respirator, and within a few minutes he died. Id. Not to overstate the point, conception through ART should not be viewed with a skepticism that assumes lack of consent. Indeed, conception through ART often evinces a conscious decision indicative of intent to procreate even more so than conception through sexual intercourse. See Kindregan, supra note 116 ("[P]ersons who employ reproductive technology are making a conscious decision to procreate a child, whereas 'natural' reproduction often occurs simply as the result a sexual intercourse without a specific reproductive intent.").

155. See id.; see also Kindregan, supra note 114.
156. See Shapiro, supra note 113, at 83-86.
158. See Kindregan, supra note 114.
years; after that, male infertility and the disintegration of the Y chromosome could “lead to the extinction of the male gender.”

B. GENETIC TESTING

Advanced technology now enables scientists to establish, with a high degree of probability, if not certainty, which individuals provided the genetic material that created a child. Not only is this technology feasible, but it has become increasingly common, visible, and inexpensive. DNA testing can be used not only to establish paternity, but to disestablish paternity (or overcome presumptions of paternity) as well.

Although commonly used in American courts now, DNA testing was not always highly regarded by American courts. By the late 1960s, DNA testing had become accurate enough to be used not only to prove paternity, but to disprove paternity as well. Although the American Medical Association advocated the use of DNA testing to prove paternity as early as the 1950s, American courts were reluctant to accept it as evidence. DNA evidence was first introduced in the United States court system in 1986, but it was not until 1998 that all United States jurisdictions allowed DNA evidence. Recognizing the significant evidentiary value of DNA testing, all fifty states and the federal government have integrated it as an essential tool in investigations.

There are several different DNA technologies available for testing, the most reliable of them being Polymerase Chain Reaction and Short Tandem Repeats. This method requires only a minimal amount of genetic material and allows damaged and contaminated DNA samples to be analyzed, thereby allowing for reliable posthumous paternity testing. Al-

160. When combined with the so-called “genetic blood marker” tests, such as standard blood grouping or HLA tests, DNA analysis can determine paternity with over 99,999,999% accuracy. E. Donald Shapiro et al., The DNA Paternity Test: Legislating the Future Paternity Action, 7 J.L. & HEALTH 1, 29 (1993).
161. Several popular television talk shows entertain viewers by featuring live paternity testing.
165. Id. at 129.
166. Cynthia Bryant, Note, When One Man’s DNA Is Another Man’s Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners, 33 COLUM. J.L. & SOC. PROBS. 113, 117-18 (2000).
though unpleasant, the increase in the accuracy of posthumous paternity testing has a corresponding increase in requests for exhumation of the purported father's remains.\footnote{170}

Ironically, as advances in DNA testing strengthen the results of the sanguinary nexus test, the question for succession law has become not whether DNA testing can establish whether an individual genetically parented the child, but rather, whether the fact is relevant in determining a parent-child relationship for inheritance purposes. Because of DNA testing, we are confronted with the reality of the disjunction between social and/or legal parenting and genetic ties.\footnote{171} To discover that a perceived "natural" parent has in fact no genetic tie to his or her children is disruptive. Does the individual cease to be a parent in the eye of society? Will he or she no longer want to provide for the child? Likewise, to what avail is determining posthumous paternity if the alleged father never had a relationship with the claimant or might not have even known of his or her existence? At a minimum, advances in DNA testing force us to reevaluate exactly how important genetic links really are.

V. CASE ANALYSES

What makes an individual recognizable as a parent to a child is a complex question. The reasons for recognizing child status change depending on whether the status is recognized for family law or estates law purposes. A review of some family court parental determination cases exposes the inherent conflict between these two legal disciplines and illustrates why the child-centered approach is inadequate for succession law purposes.

A. \textit{FERGUSON v. MCKIERNAN}\footnote{172}

In 1991, Joel McKiernan began a sexual relationship with his co-worker, Ivonne Ferguson.\footnote{173} Ferguson was married at the time, but she and her husband had separated years earlier.\footnote{174} The relationship between McKiernan and Ferguson was sporadic, and it continued in an on-again, off-again fashion for approximately two years.\footnote{175} In 1993, after their affections for each other had waned, Ferguson approached McKiernan in regards to conceiving a child.\footnote{176} McKiernan declined.\footnote{177} After discovering that she could only conceive through in vitro fertilization, Ferguson

\begin{itemize}
\item \footnote{170} Brashier, \textit{supra} note 6, at 141.
\item \footnote{171} Shapiro, \textit{supra} note 113, at 87 (noting that this is usually a problem with regards to fatherhood, but it does affect motherhood in the instances of babies being switched at birth).
\item \footnote{172} 855 A.2d 121 (Pa. Super. Ct. 2004).
\item \footnote{173} \textit{Id.} at 122. Throughout the affair, Ferguson, for unknown reasons, represented to McKiernan that she was on birth control, when in fact she had had a tubal ligation. \textit{Id.} Ferguson later discovered that the tubal ligation could not be reversed and she could only conceive a child through in vitro fertilization. \textit{Id.}
\item \footnote{175} \textit{Id.} 855 A.2d at 122.
\item \footnote{176} \textit{Id.}
\item \footnote{177} \textit{Id.}
\end{itemize}
again approached McKiernan and asked if he would provide his sperm for the procedure. 178 Ferguson assured McKiernan that she had thoroughly considered being a single mother and that she was in the financial position to support a child. 179 Reluctant at first, McKiernan agreed to provide his sperm, on the condition that he would be an anonymous sperm donor and that he would have no responsibility to any of the children born from the procedure. 180

Throughout the pregnancy McKiernan intended to remain anonymous and uninvolved. 181 He did not attend any of Ferguson's prenatal examinations. 182 Subsequently, Ferguson went into premature labor with twins. 183 Upset about the chance that she could lose the twins, Ferguson contacted McKiernan. 184 Believing that Ferguson had nowhere else to turn, McKiernan attended the birth, but he continued to maintain his anonymity. 185 McKiernan was not named on the children's birth certificate as father. 186 In fact, in accordance with McKiernan and Ferguson's agreement, Ferguson named Paul Ferguson, now her ex-husband, as father on the children's birth certificates. 187

McKiernan visited the hospital on a few occasions after the children were born and on one other occasion two years later when he was in town to visit his parents. 188 He never provided financial support or gifts to the children and never held himself out as a parent of the children. 189 There was no other contact between Ferguson and McKiernan until 1999, when Ferguson filed for child support. 190

As a result of Ferguson's suit, the Pennsylvania court system acknowledged that Ferguson's intentional deception was "despicable," but, nevertheless, found that McKiernan was responsible for child support payments. 191 McKiernan appealed to the Superior Court of Pennsylvania, but to no avail. 192 The Superior Court affirmed the rulings of the lower courts, finding that even though the oral agreement between Ferguson and McKiernan constituted a valid contract, the contract was

178. *Id.*
179. *Id.*
181. *Ferguson,* 855 A.2d at 122. However, when McKiernan's brother questioned Ferguson about the pregnancy, she revealed that McKiernan was the sperm donor. *Ferguson,* 60 Pa. D. & C.4th at 358. McKiernan himself later confirmed to his brother that he was the donor. *Id.* McKiernan also admitted to his parents that he was the donor after they had received anonymous phone calls. *Id.*
182. *Id.* at 357.
183. *Id.* at 358.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Ferguson,* 855 A.2d at 122.
189. *Id.*
190. *Id.*
191. *Ferguson,* 855 A.2d at 123.
192. *Id.*
nonetheless unenforceable. The court reasoned that the right to support belongs to a child, not a parent, and, as such, a parent does not have the status to bargain that right away.

The conflict between family law jurisprudence and estates law jurisprudence is evident in this case. The court is concerned with establishing legal parentage, incident to which duties and obligations arise. The purpose of succession law is to determine the distribution of a decedent’s estate. Once parental obligations attach, why should default inheritance rights attach as well? Here, McKiernan entered into a valid agreement that he would be treated as if he was an anonymous donor and, accordingly, have no parental responsibility or obligations. In addition, McKiernan was not identified as the father at the birth of the children, he never acknowledged that he was the father of the children, and he had no contact with the children until the child support suit was filed over five years later. There was no functional parent-child relationship. In defining this parent-child relationship for inheritance purposes, McKiernan’s view of the relationship becomes imperative in order to respect McKiernan’s testamentary freedom. There is no need to coordinate child status for both child support purposes and inheritance purposes.

B. SHONDEL J. V. MARK D.

Over the spring of 1995, Shondel J. and Mark D. were involved in a sexual relationship while living in the country of Guyana. The next January, Shondel gave birth to a daughter and listed Mark as the father. At the time of the birth, Mark was living in New York. 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. In the same statement, Mark explicitly acknowledged his paternal responsibilities, including child support.

Subsequent to the birth of the child, Mark’s actions were consistent with those of a father. Mark began providing financial support to the child. Later, in 1996, he visited the child in Guyana. In 1998, Mark signed a statement in a Guyana registry indicating that he was the child’s father and changing the child’s last name to his. He later listed the child as his daughter and primary beneficiary on his life insurance pol-

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193. Id.
194. Id.
195. See Ferguson, 60 Pa D. & C. 4th at 358.
197. Id. at 611.
198. Id.
199. Id.
200. Id.
201. Id.
202. Id.
203. Id.
204. Id.
icy. In 1999, Mark married another woman, with whom he had children.

In the summer of 2000, Shondel began to receive the child support payments less frequently. As a result, in August of 2000, she filed a court action against Mark, seeking orders of filiation and support. At first, Mark responded by requesting visitation of the child. However, Mark later requested a DNA test. The test showed that in fact Mark was not the father of the child.

An appointed Law Guardian found that Mark’s actions were consistent with those of a father, and therefore, equitable estoppel prevented him from claiming that he was now not the father of the child even though he was not genetically the father of the child. The Court of Appeals of New York affirmed this ruling. The court stated that “the case turns exclusively on the best interests of the child.” Accordingly, it found that it was in the best interests of the child that Mark be estopped from denying his paternity because the child had come to rely on Mark as her father to her detriment.

Once again, family law goals collide with estates law goals. Whether Mark and the child qualify as a parent-child relationship for inheritance purposes should focus on Mark’s recognition of a parent-child relationship. Because of deceit, Mark believed this child to be his child. Even though Mark was deceived, and, in fact, there was no genetic relationship between Mark and the child, Mark was ordered to pay child support. Absent the development of a functional parent-child relationship between Mark and this child, granting inheritance rights to this child would frustrate donative intent and potentially diminish any inheritance Mark may intend to provide for those with whom Mark has developed a parent-child relationship.

C. PHILLIPS V. IRONS

In January of 1999, Dr. Richard Phillips, M.D. and Dr. Sharon Irons, M.D. started dating and began a relationship together. The relation-

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205. Id.
206. Id.
207. Id.
208. Id.
209. Id. at 612.
210. Id.
211. Id.
212. Id. at 612-13.
213. Id. at 614.
214. Id. at 616.
215. Id.
216. See id. at 612, 616.
218. Id. at *1. The fact scenario focuses on the ruling in the parentage action. The citations are taken from a subsequent case on other issues that includes the facts of the parentage action.
ship between Phillips and Irons grew quickly. Soon the couple was engaged to be married.

While a couple, Phillips and Irons discussed the prospect of having children. Phillips made it known to Irons that he was against having children prior to marriage. Accordingly, he explained to Irons that he intended to use a condom if the two were to have sexual intercourse prior to marriage. Irons understood and agreed.

Throughout the duration of the relationship, Phillips and Irons engaged in sexual relations only three times—but never sexual intercourse. The relations took place sometime between February 19, 1999 and March 19, 1999. Vaginal penetration never occurred; rather, the two only performed oral sexual acts. During the relations, Irons indicated that she did not want to have actual sexual intercourse because she was on her period. However, Irons used Phillips' semen obtained from the oral sex act to successfully artificially inseminate herself, unbeknownst to Phillips.

In May of 1999, Phillips discovered that Irons was in fact still married to another man, Dr. Adeboale Adeleye. She had earlier lied to Phillips, telling him that she was already divorced. However, the divorce had not taken place. To show Phillips that she planned to get the divorce, Irons showed him a "Petition for Dissolution of Marriage," filed on May 20, 1999, indicating her intent to finalize the divorce. The petition also included a portion where Irons swore that she was not pregnant. Nevertheless, Phillips ended the relationship.

On December 1, 1999, Irons gave birth to a daughter, Serena. Irons listed Adeleye—not Phillips—as the father on Serena's birth certificate. However, on November 21, 2000, Irons filed a "Petition to Establish Paternity and Other Relief" against Phillips. Prior to the filing of the petition, Phillips had no knowledge of Iron's pregnancy or the birth

219. Id.  
220. Id.  
221. Id.  
222. Id.  
223. Id.  
224. Id.  
225. Id. Two of the three instances took place on the same day. Id.  
226. Id.  
227. Id.  
228. Id.  
229. Id.  
230. Id.  
231. Id.  
232. Id.  
233. Id.  
234. Id.  
235. Id.  
236. Id.  
237. Id.  
238. Id.
of the child. DNA testing proved that Phillips was in fact Serena’s biological father. Accordingly, the court awarded child support to Irons in the amount of $800 a month, which was later increased to $1,600 a month.

This case demonstrates why family law jurisprudence or parental support obligation determinations should not be considered in estates law. Phillips had no knowledge of Serena, nor did he have a functional parent-child relationship with her. It was alleged that Phillips did not even have sexual intercourse with Irons. The court was concerned with the best interest of the child in determining child support. Although a noble goal, estates law is concerned with the distribution of a decedent’s estate in a way that would foster donative intent. If the status of this relationship does not change, Serena should not be recognized as a child for inheritance purposes.

VI. REDEFINING PARENT-CHILD STATUS

Current estates law is clearly inadequate to resolve issues arising from the evolving notions of American families. Changing family structures, various forms of ART, and advances in genetic testing have rendered the sanguinary nexus test archaic and impractical. No longer should genetic relationships be a necessary or a sufficient condition for establishing parent-child status for inheritance purposes. As society and family law have redefined parentage from its traditional genetic definition, the law of succession continues to treat the nuclear family as a bastion while ignoring the reality that the nuclear family has “failed.”

The static nature of estates law, however, has not inhibited debate among estates law scholars concerning the parent-child status for inheritance purposes. To date, in an attempt to redefine the parent-child relationship to comport with the diversity of modern relationships extant in American life, scholars have advocated two approaches: the formal approach and the functionally based approach.
A. THE FORMAL APPROACH

The formal approach looks to the formal legal status of the individuals. According to the formal approach, terms such as "parent" refer only to the genetic parent unless explicit statutory language legally recognizes an alternative form. This approach accepts the sanguinary nexus definition of children "based on blood," but expands the opportunities for families to establish other legal ties, for example, the extension of inheritance rights to legally adopted children. Currently, under the formal analysis, only individuals related by blood or adoption qualify as a parent-child relationship. Given that there are only limited statutory exceptions to the traditional definition of a parent-child relationship, the formal approach continues to privilege the traditional family over alternative family units. In addition, this ad hoc approach to fixing modern problems that were entirely uncontemplated by the drafters of the laws addressing them has been proven inadequate, left courts frustrated, and exposed the need for a legislative reaction to evolving family structures and ART-born legal issues. To accommodate the ever changing dynamics of the American family, a formal approach to defining parent-child status would need to be so riddled with additions and exceptions that it would no longer be useful.

B. THE FUNCTIONALLY BASED APPROACH

Instead of focusing on the identities and the formal attributes of the individuals within the relationship, the functionally based approach focuses instead on the nature of the relationship between the individuals. This approach recognizes that the human family is a social relationship, not an entity defined by nature. In defining a parent-child relationship, the functionally based approach’s principal concern is whether the individuals shared the essential characteristics of a traditionally accepted parent-child relationship. In other words, did the parent and child act like a parent and child? Therefore, the specific characteristics of each

248. Id. at 1641.
249. Id. at 1645.
250. Id.
251. See Kindregan, supra note 116.
252. For an example, see the 1990 UPC Amendments discussed infra in Subsection C of this Section.
254. Id.; Hernandez, supra note 1, at 1006 (Non-nuclear families should be legitimized "that share the essential qualities of traditional relationships for a given context by inquiring whether a relationship shares the main characteristics of caring, commitment, economic cooperation and participation in domestic responsibilities"); Mary D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mothers and Other Nontraditional Families, 78 Geo. L.J. 459, 573 (1990) ("[C]ourts should redefine parenthood to include anyone in a functional relationship that a legally recognized parent created with the intent that an additional parent-child relationship exist.").
relationship become determinative in the recognition of a parent-child relationship.255

Family law scholars have advocated a more functionally based definition of family that more closely reflects societal trends in family structures rather than a traditional and formal view of family.256 Scholars have developed this approach under various headings, such as functional parent, de facto parent,257 in loco parentis,258 equitable estoppel,259 emotional or psychological parent,260 equitable parent,261 and nonexclusive parent.262 Regardless of the descriptive term used, the concept seems to be rooted in the psychological parent described in Goldstein, Freud, and Solnit's Beyond the Best Interests of the Child.263 "The psychological parent may be a biological[,]... adoptive, foster, or common-law... parent, or any other person. There is no presumption in favor of any of these after the initial assignment at birth. . . ."264

Recognizing the realities of the diversity of family structures extant in American life, family courts have begun to implement family law scholars' redefinition of parent-child status as being functionally based, rather than genetic. For instance, in Braschi v. Stahl Associates Co.,265 a housing regulation dispute, the New York Court of Appeals adopted a functionally based approach to define family as opposed to a formal approach.266 The court stated:

[W]e conclude that the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order.

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255. Many scholars have written in favor of the functional approach. See, e.g., Joseph G. Goldstein et al., Beyond the Best Interests of the Child 7 (2d ed. 1979); Barlett, supra note 7; Polikoff, supra note 254, at 573; Gay, supra note 3, at 41-42.

256. Hernandez, supra note 1, at 1004; see also Janet L. Dolgin, Defining the Family: Law, Technology, and Reproduction in an Uneasy Age 4, 29 (1997); Mary Ann Glendon, The Transformation of Family Law 4-6 (1989) (noting the change in the family structure to include families in many different forms); Barlett, supra note 7, at 294 (proposing a concept of "nonexclusive parenthood" for a child that has developed significant relationships with persons outside the nuclear family); Polikoff, supra note 244, at 471-74 (advocating a new definition of parenthood to adapt to the complexities of modern families); Looking for a Family Resemblance, supra note 250, at 1646.


258. See Burks, supra note 257, at 257.


260. See V.C. v. M.J.B., 748 A.2d 539, 546 n.3 (N.J. 2000) ("The terms psychological parent, de facto parent, and functional parent are used interchangeably. . . . Psychological parent is the preferred term.").


262. See Burks, supra note 257, at 254.

263. Storrow, supra note 122, at 666 (citing Goldstein et al., supra note 255).

264. Goldstein et al., supra note 255, at 98.


266. Id. at 53-54.
The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.\textsuperscript{267}

Likewise, in Goodridge v. Department of Public Health,\textsuperscript{268} a landmark case recognizing same-sex marriage, the Massachusetts appellate court endorsed the functionally based approach to parentage in stating that:

[The Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.\textsuperscript{269}]

Although family law and family courts have begun to define family in a functionally based manner,\textsuperscript{270} the implementation of the approach has been, and should be, child-centered for family law purposes. Because of family law's overarching concern for a child's well being, the functionally based approach has been used to implement and further the best interest of the child ideology. Accordingly, this child-centered focus influences and molds court decisions concerning legal parentage, custody, visitation, and support issues.

As family law scholars began to flesh out a functionally based approach for parentage purposes, estates law scholars took notice and began to debate functionalism's merits for succession law purposes.\textsuperscript{271} To date, however, estates law scholars have not debated the redefinition of parent-child status from a pure functionally based approach but rather from a hybrid functionally based approach.\textsuperscript{272} The hybrid functionally based approach accepts the sanguinary nexus definition of children "based on blood or formal legal registration process" but expands the definition by

\begin{itemize}
\item \textsuperscript{267} Id.
\item \textsuperscript{268} 798 N.E.2d 941 (Mass. 2003).
\item \textsuperscript{269} Id. at 962.
\item \textsuperscript{270} A functionally based approach has had a very limited application in succession laws. Intestacy laws have begun to use a functionally based approach in very limited circumstances—or, more accurately, a negative functionally based approach. See Paula A. Monopoli, "Deadbeat Dads": Should Support and Inheritance Be Linked?, 49 U. MIAMI L. REV. 257, 260 n.11 (1994) (reviewing statutes and case decisions barring parents and spouses from inheritance in cases of abandonment, desertion or failure to support); Alison M. Stemler, Note, Parents Who Abandon or Fail to Support Their Children and Apportionment of Wrongful Death Damages, 27 J. FAM. L. 871 (1989) (discussing legislative and judicial responses to prevent distribution of wrongful death awards to parents who abandon or failed to support their children).
\item \textsuperscript{271} See generally Gary, supra note 3, at 42-56.
\item \textsuperscript{272} See id. at 72.
\end{itemize}
including a functional aspect to the parent-child definition.\textsuperscript{273} For instance, Professor Gary proposed a revision to inheritance laws that added "a functional definition to the existing formal definitions of parent and child."\textsuperscript{274} The proposal does not disturb existing rules governing parent-child status, such as paternity or adoption, but adds a new layer onto the already established formal definition.\textsuperscript{275}

This Article suggests that the sanguinary nexus test for defining child status should be replaced by an unadulterated functionally based approach that inquires into the existence, or lack thereof, of a parent-child relationship as the sole means for determining child status for purposes of succession laws.\textsuperscript{276} Parenthood is increasingly seen as a functional status, rather than one derived from biology or legal entitlement.\textsuperscript{277} Therefore, this approach advocates a complete break in the link between genetic and social parenthood.\textsuperscript{278} The mere contribution of genetic material is not a sufficient condition to establish parent-child status.\textsuperscript{279} The unadulterated functionally based approach will include as child status those individuals the decedent treated as his or her children. If there was not a parent-child relationship, an individual would not take a child’s intestate share, regardless of a genetic link. Accordingly, some children may have no parents for inheritance purposes. Conversely, some children may have multiple parents (two, three, four, or more) for inheritance purposes. Such an approach would ensure consistency in our treatment of property owners and would focus attention on property rights and the intent of the property owner rather than family law policy and technological novelty.

Although recognizing the realities of modern family structures is an admirable goal, implementing an unadulterated functionally based approach must nevertheless provide a feasible method for determining child status. There must be definitive criteria for establishing child status. For instance, many adults have relationships with children that, although close, are not the sort of relationships that rise to parent-child status.\textsuperscript{280} Therefore, a showing that the decedent simply took an individual into his or her home would not be sufficient.\textsuperscript{281}

\textsuperscript{273} See id. at 31-32.
\textsuperscript{274} Id. at 72.
\textsuperscript{275} Id.
\textsuperscript{276} Of course, the vast majority of individuals who satisfy this framework would be related by blood or adoption.
\textsuperscript{278} See Polikoff, supra note 8, at 58; R. Alto Charo, Biological Determinism in Legal Decision Making: The Parent Trap, 3 TEX. J. WOMEN & L. 265, 267-68 (1994).
\textsuperscript{279} See Polikoff, supra note 8, at 58.
\textsuperscript{280} Gary, supra note 52, at 683.
\textsuperscript{281} Id.
Accordingly, to determine child status for inheritance purposes, courts would be required to evaluate the nature and strength of the relationship between the decedent and child by considering a variety of factors that the statute considers relevant. In order to establish child status, clear and convincing evidence of a parent-child relationship from the property owner's perspective would be dispositive. Factors a court must consider are: (i) whether the decedent held him/herself out to be a parent of the child for a substantial period of time (if the decedent died while the child was in gestation, such time could include the pregnancy of a partner or surrogate mother or the time and effort spent during which ART is procured); (ii) whether benefits of love and affection accrued to the child; (iii) whether the parent-child relationship was publicly recognized (which could include the period while the child was in gestation); (iv) whether the decedent desired to have the rights afforded to a parent; and (v) whether the decedent performed obligations of parenthood for a substantial period of time. These factors should be interpreted broadly because functioning as a parent will be different depending on the particular family structure.

The unadulterated functionally based approach to defining child status would be applicable for class gift purposes as well. If the dispositive instruments were silent, a functional relationship would be determinative for both instruments executed by the property owner referring to his or her children and for instruments executed by the property owner referring to another's children. In In re Estate of Coe, a case involving the stranger to the adoption rule, the court stated that:

We cannot believe it probable that strangers to the adoption would differentiate between the natural child and the adopted child of another. Rather, we believe it more likely that they accept the relationships established by the parent whether the bond be natural or by adoption and seek to advance those relationships precisely as that parent would. None of us discriminates among children of a relative
or friend based upon a biological basis . . . . We ought not impute to others instincts contrary to our own.289

Likewise, in Wheeling Dollar Savings & Trust Co. v. Hanes,290 a case interpreting child status for class gift purposes, the West Virginia court opined that:

While there may be testators and trustors who are so concerned with medieval concepts of 'bloodline' and 'heirs of the body' that they would truly be upset at the thought that their hard-won assets would one day pass into hands of persons not of their blood, we cannot formulate general rules of law for the benefit of eccentrics.291

In following the wisdom of these courts, class gifts would apply the unadulterated functionally based approach to defining child status.

For posthumously conceived children, in the absence of a testamentary-type document providing otherwise,292 the default rule should be that such a child does not inherit from the deceased genetic donor because the child did not "survive"293 the decedent, nor was there a functional parent-child relationship.294 Of course, if the decedent expresses the intent in a testamentary-type instrument that such a child should inherit, the testator's intent should be honored if such child was born within a prescribed period of time as to not delay the administration of the estate for too long a period.295

Professor Follows once opined that "[d]onative transfer law . . . does not accomplish the property owner's will, but accomplishes only the property owner's will as the state identifies it."296 Under an unadulterated functionally based approach however, succession laws will mirror more closely the property owner's actual intent, thereby furthering testamentary freedom.

289. Id. at 575.
291. Id. at 503.
292. See, e.g., FLA. STAT. ANN. § 742.17(4) (West 2008).
293. UPC § 2-103 states that "[a]ny part of the intestate estate not passing to a decedent's surviving spouse . . . passes in the following order to the individuals . . . who survive the decedent" (emphasis added). See also, Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 966 (D. Ariz. 2002) (stating that the requirement that an heir must survive a decedent is "indicative that [he or she] must be in existence at the time of the decedent's death").
294. This is consistent with several multi-disciplinary task forces' conclusions concerning posthumously conceived children. Three groups have recommended legislation that would preclude a child conceived after its parent's death from inheriting: 1) the National Conference of Commissioners of Uniform State Laws (in 1988); 2) the New York State Task Force on Life and the Law (in 1998); and 3) the American Bar Association's Committee on Laws of Assisted Reproductive Technologies and Genetics (in 1999). For a thorough discussion on posthumously conceived children and inheritance, see Kirstine S. Knaplund, Postmortem Conception and a Father's Last Will, 46 ARIZ. L. REV. 91 (2004).
295. Requiring a testamentary-type instrument would fulfill the cautionary, evidentiary, and protective functions of will act formalities concerning gratuitous transfers at death. For a discussion of these policy issues, see DUKEMINIER & JOHANSON, supra note 11, at 200-01.
C. The 2008 UPC Amendments (Or, the Kitchen Sink Approach)

The 2008 UPC Amendments are a great step in the direction of expanding the definition of parent-child relationships for property succession purposes. The drafters of the 2008 UPC Amendments do a valiant job in tackling complicated issues concerning blended stepfamilies and children born of ART. The result, however, seems overly complicated and ideologically inconsistent. The kitchen sink approach, adopted by the 2008 UPC Amendments, retains the sanguinary nexus definition of children based on blood or a presumption thereof as the seminal building block for child status, but expands 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.

Although the 2008 UPC Amendments add a plethora of new categories of "child" to existing law, the kitchen sink approach does not redefine the parent-child status for inheritance law. The kitchen sink approach is merely an effort to increase the number of potential child intestate share beneficiaries. The overarching public policy rationale behind these revisions is that when it comes to inheritance by potential children, simply put, the more the merrier. This over-inclusive policy is wholly inconsistent with the jurisprudential underpinnings of property law, testamentary freedom, and portions of the 2008 UPC Amendments themselves. However, it is in lockstep with child-based policy rationales drawn from family law. Thus, the drafters of the 2008 UPC Amendments have erroneously accepted child-based policy rationales plucked from family law as gospel in dealing with property law issues.

In revising the definition of parent-child relationships, the drafters of the 2008 UPC Amendments borrowed heavily from the Uniform Parentage Act (UPA). The UPA provides rules for determining a parent-child relationship for legal purposes in order to determine, among other things, family law issues, such as identifying who will be making decisions concerning the minor child's well being and who will be providing support. Relying on the UPA to establish child status for inheritance purposes, however, is suspect. The UPA was created and is maintained to establish legal parentage for family law purposes—acting in the best interest of the child. As the Minnesota Supreme Court noted in In re Estate of

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297. *Unif. Probate Code* §§ 2-116-2-122 (amended 2008). For good measure, there is also a behavioral aspect to defining parentage under UPC § 2-114, but behavioralism in only applied in a child-centered manner. See *Unif. Probate Code* § 2-114.

298. The 2008 UPC Amendments replace one section of the earlier code that defined a parent-child relationship with eight sections. It would take at least five pages of this Article just to reproduce the new sections that define a parent-child relationship.

The Parentage Act and the Probate Code are independent statutes designed to address different primary rights. The purpose of the Parentage Act is to establish "the legal relationship . . . between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations." Child support is the major concern under the Parentage Act. The purpose of the Probate Code, on the other hand, is to determine the devolution of a decedent's real and personal property.

I. Genetic Parents

The 2008 UPC Amendments keep genetics as the foundation for establishing a parent-child relationship. Under UPC Section 2-117, a "parent-child relationship exists between a child and the child's genetic parents, regardless of their marital status," unless an individual is included or excluded as a parent under one of the other sections. This Section overturns the common law rule that denied inheritance to non-marital children.

UPC Section 2-115 defines "genetic mother" as "the woman whose egg was fertilized by the sperm of the child's genetic father." Genetic father is defined as "the man whose sperm fertilized the egg of the genetic mother" or if a presumption of paternity exists under applicable state law. Generally, paternity is presumed if before the child reaches the age of two, the father and child live in the same household and the father openly holds the child out as his natural child, or if the father files a written acknowledgement of paternity with the appropriate court or administrative agency. If neither of these requirements is satisfied, the child...
has the burden of proving a parent-child relationship.\textsuperscript{308}

2. Adoptive Parents

UPC Sections 2-118 and 2-119 focus on adopted children.\textsuperscript{309} Under the UPC, an adoptive child is the child of the adopting parents and not of the child's biological parents.\textsuperscript{310} For intestacy purposes, adoption cuts off the right of inheritance as between the adopted child and the biological relatives, thereby effectuating the "fresh start" policy.\textsuperscript{311} This policy manifests the belief that it is in the best interest of a child to sever emotional and financial ties with the biological parents to facilitate the creation of new ties with the adoptive parents.\textsuperscript{312}

The UPC 2008 Amendments, however, provide exceptions to the fresh

\textsuperscript{308} See, e.g., \textit{Unif. Parentage Act} § 201(b) (2000).

The father-child relationship is established between a man and a child by: (1) an unrebutted presumption of the man's paternity of the child unless Section 204; (2) an effective acknowledgement of the child by the man under [Article] 3, unless the acknowledgement has been rescinded or successfully challenged; (3) a judicial determination of the man's paternity; (4) adoption of the child by the man; (or) (5) the man's having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child; (or) (6) an adjudication conferring the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law.

\textsuperscript{309} The recent UPC amendments 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 adopt from their genetic parents. The previous UPC rule merely prohibited adopted children from inheriting from their natural parents. See UPC 2-118 Comment. The new rules, codified at § 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 gay marriage is not recognized, the UPC amendment would seem to limit the child from adopting 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 2-119 (a) severing the parent-child relationship between the adoptee and the adoptee's genetic parents. The 2008 UPC amendments rely on each particular state's definition of "spouse" to determine intestacy and inheritance rights. This latent consequence is characteristic of rules that needlessly add complexity to spell out every possible adoption scenario rather than looking instead at who functioned as a parent to the child. Adopting the functionally based approach would resolve this issue by avoiding use of state marriage laws to determine the inheritance rights of adopted children where the state marriage laws would likely frustrate the intent of the second (non-genetic) parent.

\textsuperscript{310} \textit{Unif. Probate Code} §§ 2-118(a) and 2-119(a) (proposed 2008 Amendments).

\textsuperscript{311} \textit{See In re} Estates of Donnelly, 502 P.2d 1163, 1166-67 (Wash. 1978) (stating that the broad objective of the "overlapping adoption and inheritance statutes" as "giving the adopted child a 'fresh start' by treating him as the natural child of the adoptive parent, and severing all ties with the past").

\textsuperscript{312} \textit{See Rein, supra} note 77, at 717 ("[S]ociety generally deems it in the adoptee's best interests to make him a full-fledged member of his adoptive family. This assimilation can occur only if the adopting family treats the adoptee in all respects, including matters of succession, as though he had been born into his adoptive family. Furthermore, it is apparent that an adoptee's retention of ties with his biological family can undermine the psychological aspect of this assimilation.").
start policy by allowing a child adopted by a step-parent,313 adopted by a relative or spouse or surviving spouse of a relative,314 or adopted after the death of both genetic parents,315 to inherit from or through a biological parent who either is deceased or has given up parental rights.316 The child will inherit from or through that genetic parent even if the parent terminated legal parentage, had no relationship with the child, or had a new family. Therefore, under this statute, an adopted child has the possibility of inheriting from more than two parents. The fresh start exceptions are not, however, extended to second parent adoptions.317 For instance, a genetic parent will cease to be a parent for intestacy purposes if his or her unmarried partner adopts the child.

In addition, the 2000 UPC Amendments create a parent-child relationship between an individual and child that is in the process of being adopted by the individual. This relationship is created in two circumstances: (i) when a child is in the process of being adopted by a married couple when one of the spouses dies and if the adoption is subsequently granted to the decedent’s surviving spouse; and (ii) if a stepparent is in the process of adopting the child when the stepparent dies and the stepparent’s spouse survived the deceased stepparent by 120 hours.318 The UPC however, does not define what “in the process” constitutes. Note that there could be a situation where a parent-child relationship exists for inheritance purposes but not for legal purposes.

3. Children Conceived by ART

The 2008 UPC Amendments create new sections that redefine a parent-child relationship concerning children conceived by ART.319 The text is complex, filled with exceptions, and cloaked in language only a lawyer could love. When taken together, these additions recognize parentage based upon intent. That is, the individuals who, at the time of conception, intended to raise the child will be deemed to be the child’s parents. These sections are gender neutral and generally marital status neutral, therefore adding protections to same-sex and opposite sex unmarried couples.

313. Unif. Probate Code § 2-119(b) (proposed 2008 Amendments). 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.

314. Unif. Probate Code § 2-119(e) (proposed 2008 Amendments). Relative is defined as a grandparent or descendant of a grandparent of the child. Id.

315. Unif. Probate Code § 2-119(d) (proposed 2008 Amendments). This statute applies regardless of whether the genetic parent’s family has any relationship with the child.

316. 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.

317. A second parent adoption is when a person not married to the genetic parent adopts the genetic parent’s child without terminating the legal relationship between the genetic parent and the child. See Gary, supra note 52, at 659.


The 2008 UPC Amendments divide the definition of a parent-child relationship for children conceived by ART into two sections. Section 2-120 deals with children born other than to a gestational mother (i.e., where the birth mother is either the genetic parent or intended parent).\textsuperscript{320} Section 2-121 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).\textsuperscript{321}

\textbf{a. Child Conceived by ART Other than Child Born to Gestational Carrier}

For a child conceived by ART other than a child born to a gestational mother, a parent-child relationship exists between the child and the child's birth mother.\textsuperscript{322} A parent-child relationship also exists between the child and the husband of the birth mother if the husband provided the sperm and the sperm was used during the husband's lifetime.\textsuperscript{323} There is no parent-child relationship between a third party donor (an individual who produces eggs or sperm used for assisted reproduction, regardless of whether the donation was anonymous or arranged privately or for consideration) and a child unless the donor was: (i) a husband who provides sperm or a wife who provides eggs; (ii) the birth mother of the child; (iii) an individual identified on the birth certificate as a parent; (iv) an individual who consented to assisted reproduction with intent to be treated as the other parent if a signed record evidences the individual's consent; or (v) an individual who functioned\textsuperscript{324} as a parent of the child no later than two years after the child's birth.\textsuperscript{325} In addition, a parent-child relationship can be established by an individual (other than the birth mother) who provided no genetic material if: (i) the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent if a signed record evidences the individual's consent; or (ii) the individual functioned as a parent of the child no later than two years after the child's birth.

\textsuperscript{320} § 2-120.
\textsuperscript{321} § 2-121.
\textsuperscript{322} Unif. Probate Code § 2-120(c) (proposed 2008 Amendments). If the child conceived by ART is adopted, then the adoption sections would govern. See Unif. Probate Code §§ 2-118, 2-119 (proposed 2008 Amendments).
\textsuperscript{323} Unif. Probate Code § 2-120(d) (proposed 2008 Amendments).
\textsuperscript{324} Unif. Probate Code § 2-115(4) (proposed 2008 Amendments) defines "functioned as a parent of the child" as:

- behaving toward the child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, such as fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as regular members of that household.

\textsuperscript{325} Unif. Probate Code § 2-120(a)(3), (e), (f) (proposed 2008 Amendments). Note that there is no time period in which an individual has to function as a parent.
If placement of eggs, sperm, or embryos is undertaken by a married couple and no divorce proceeding is pending, it is presumed that both spouses consented to having a parent-child relationship with the resulting child.\textsuperscript{326} 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, even if the child is born after divorce.\textsuperscript{327}

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,\textsuperscript{328} and (ii) the child is \textit{in utero} no later than thirty-six months after the decedent’s death or born no later than forty-five months after the individual’s death.\textsuperscript{329}

b. Child Conceived by ART Other than Child Born to Gestational Carrier

With respect to children born to a gestational mother, the child will be the child of the intended parents\textsuperscript{330} and not of the gestational mother.\textsuperscript{331} Intent 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.\textsuperscript{332}

4. Behavior

Under the 2008 UPC Amendments, a parent will not inherit from a child if parental rights were terminated.\textsuperscript{333} In addition, a parent is precluded from inheriting from a child if a parent’s parental rights could have been terminated on the basis of nonsupport, abandonment, abuse, neglect, or other actions or inactions towards the child.\textsuperscript{334} Note that there is no behavioral exception for a child to inherit from his or her parent, regardless of how the child treated the parent.

\textsuperscript{326} Unif. Probate Code § 2-120(h) (proposed 2008 Amendments).
\textsuperscript{328} Unif. Probate Code § 2-120(f)(1)(C) (proposed 2008 Amendments).
\textsuperscript{329} Unif. Probate Code § 2-120(k) (proposed 2008 Amendments).
\textsuperscript{330} Unif. Probate Code § 2-120(d). If the child conceived by ART is adopted, then the adoption sections would govern. See Unif. Probate Code §§ 2-118, 2-119 (proposed 2008 Amendments).
\textsuperscript{331} Unif. Probate Code § 2-121(c) (proposed 2008 Amendments). A parent-child relationship, however, can be established by a Gestational Mother if (i) the individual is designated a parent in a court order, or (ii) the individual is also the genetic mother and a parent-child relationship does not exist otherwise. \textit{Id}.
\textsuperscript{332} Unif. Probate Code § 2-121(d) (proposed 2008 Amendments).
\textsuperscript{333} Unif. Probate Code § 2-114 (proposed 2008 Amendments).
\textsuperscript{334} \textit{Id}. 

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5. **Equitable Adoption**

The UPC 2008 Amendments do not affect the doctrine of equitable adoption.\(^{335}\)

**D. 2008 UPC Amendments Approach vs. Unadulterated Functionally Based Approach**

In some ways, the outcomes resulting from application of the unadulterated functionally based approach might seem substantially similar to the outcomes resulting from the kitchen sink approach. However, these two approaches are as different as night and day. Completely breaking the genetic link in determining child status and focusing on the rights of the property owner, rather than the interest of the child, creates a radically different outcome. Therefore, a quick comparison of the two approaches is in order.

1. **Expansion of Class vs. Redefinition of Status**

The most obvious and pertinent difference between the approaches concerns whether succession law should continue its devotion to genetic relationships. The 2008 UPC Amendments are more aligned with the formal approach to defining a parent-child relationship than a true intention-based or functionally based approach because the Amendments continue to treat genetic relationships as special.

Despite all the hyperbole about intent and functionalism, the 2008 UPC Amendments do not seek to redefine parent-child relationships for inheritance purposes, but simply intend to increase the class of potential takers, "squeezing" more children into the child status category.\(^{336}\)

Redefining a parent-child relationship might have the effect of excluding some children currently included in the definition.\(^{337}\) The kitchen sink approach only recognizes parental intent or functionally based relationships to increase the potential pool of takers, but it does not recognize the lack of intent or functionalism as a means of shrinking the pool of potential takers.

2. **Complex and Inconsistent**

The fixation on providing for many children as possible has created a complicated, inconsistent system. The 2008 UPC Amendments lack a coherent ideology of what should constitute a parent-child relationship for property succession purposes. The UPC creates one structure for defining child status that advocates the sanguinary nexus test, and it confusingly relies both on genetics and other structures that disregard genetics.

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\(^{335}\) See Unif. Probate Code § 2-122 (proposed 2008 Amendments).

\(^{336}\) See Gary, supra note 3, at 60 (opining that the formal approach used in a California statute concerning stepchild "does not attempt to incorporate new family structures, but rather seeks to squeeze the new family structures into existing rules.").

(intent to parent, functional parenting, behavioral parenting, and contractual parenting). If intent to parent is important, why is it ignored in the case of 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 other times it seems to indicate that the greatest number of parents a child could have is two. By avoiding redefining the parent-child relationship, the kitchen sink approach creates a cumbersome and confusing system.

The unadulterated functionally based approach offers a unified, comprehensive, and flexible approach to establishing child status. This approach looks at each potential parent-child relationship and determines whether the parties performed parent-child roles and whether the "parent" in the relationship considered the other to be a "child." By respecting the changing dynamics of family structures, this approach can be applied to all of the parent-child status issues arising from ART and the evolving nature of families. It redefines parent-child relationships and places all families, of whatever structure, on equal footing.

3. Child-Centered Perspective vs. Property Owner Centered Perspective

A critical outcome determinative difference between the two approaches is the perspective from which the parent-child test is to be applied. The scholars advocating kitchen sink type approaches not only adopted concepts of parentage from family law, but also adopted the mantra of family law as well. The 2008 UPC Amendments analyze the parent-child relationship from a child-centered view. Advocates look to a type of fairness doctrine from the point of view of the child in incorporating functionality into the parent-child relationship. Proponents pull at the heartstrings by painting a desperate picture of needy infants being denied inheritance, as opposed to a financially successful adult child.

Succession law is, and should be, focused on the property owner. 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

338. See, e.g., Gary, supra note 3, at 73-80; Robinson, supra note 85, at 983-88.

339. See, e.g., Hirsch, supra note 67, at 1035 (noting that some estates law scholars assert that "formulating intestacy laws should also take into account the pattern of distribution that survivors would consider fair"); Brashier, supra note 6, at 1 n.1 ("Although this Article does examine the adequacy of probate laws from the 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.").

340. This Article does not debate whether child support obligations should survive a parent's death and become a debt of the estate.
traditional goals of inheritance laws—the focus in succession law is on the property owner and not on the expectations of surviving family members.\textsuperscript{341}

Because the drafters of the 2008 UPC Amendments borrowed heavily from the UPA and family law, the 2008 UPC Amendments unnecessarily focus on determining parentage at the date of the child’s birth, or shortly thereafter (except for adoption). For instance, the UPC borrows the UPA’s definition of parentage for ART purposes by looking to parental intent.\textsuperscript{342} Intent to parent for ART purposes is important to family law because date of birth decisions must be made. Property law does not have that concern. Because the test for finding a parent-child relationship seems fixed at a child’s birth, many parent-child relationships will be precluded under the new statutes.

In addition, the kitchen sink approach seems to foster the notion that the traditional two parent family framework is the preferred family unit (although potentially allowing for the recognition of more than two parents for some adopted children). Scholars cringe at the perceived unfairness that a child might inherit from more than two parents—by all means, children from a traditional family can only inherit from two.\textsuperscript{343} From a family law perspective, it might be advantageous to limit the number of adults who take part in making decisions for a minor child. But there is no reason from a property law perspective to advance this two-parent structure. Children born to a single parent inherit under the intestacy statutes from one parent, not two—this doesn’t seem to be unjust. Conversely, some children might inherit from parents and uncles and aunts under the intestacy statutes, while others do not.

Under the unadulterated functionally based approach, there is no presumption that a child must have one mother and one father—it bases child status solely on the relationship of the decedent to the child.\textsuperscript{344} There is no reference to the child’s mother or father, but only to the child’s parents. Under certain circumstances, a child may have only one parent or may have more than two parents. In addition, under the unadulterated functionally based approach, there are no gender restrictions.

\textsuperscript{341} Mahoney, \textit{supra} note 69, at 939.
\textsuperscript{342} \textit{Compare} \textsc{Unif. Probate Code} § 2-115 (proposed 2008 amendments), \textit{with} \textsc{Unif. Parentage Act} § 102.
\textsuperscript{343} Scholars view this type of “double dipping” as inequitable. \textit{See}, \textit{e.g.}, Brashier, \textit{supra} note 6, at 145 (“perhaps inheritance from three or more parents is improper under any circumstances”); Rein, \textit{supra} note 79, at 725 (stating that dual sources of inheritance affords an individual advantages denied biological children).
on defining parentage and, thus, a child could have multiple male or female parents. For instance, if a gay man in a homosexual relationship donated sperm to a married female friend whose husband was infertile with the understanding that all would participate in the child's life, the child could potentially inherit from all four parents.

Also, the 2008 UPC Amendments continue to look to a spouse or partner of the birth mother to define a parent-child relationship. In other words, a father can establish a relationship with a child through the father's relationship with the child's mother. Under the unadulterated functionally based approach, this is unnecessary because each relationship is analyzed independently.

Clearly, shifting the focus from a child-centered view to a property owner centered view will more fully encapsulate true donative intent while removing estates law from the culture wars raging in family law. The questions concerning whether children can, or should, form attachments to one or more parents or whether alternative parents are appropriate role models are irrelevant for succession law purposes. Under this proposed model, an individual may be held to be a legal parent for child support purposes, but that individual and child may not have a parent-child relationship for inheritance purposes. Such a model would re-center the focus back to the property owner, where it belongs, while still recognizing the changing parent-child relationships and furthering established estates law jurisprudence.

4. Equity

While intestacy statutes reflect social norms and values, they also shape the norms and values by recognizing and legitimating relationships. Keeping the definitions of "natural" and "others" fails to adequately address the larger discriminatory message. By keeping the sanguinary nexus test, the kitchen sink approach fosters the idea that genetic children born of sexual intercourse are of superior child status to others and continues to relegate those outside of the genetic family to second-class status. "Even though we recognize that there are, in a literal sense, differences of one kind or another, we suppress these differences or ine-actitudes, because the points of convergence are far more important . . . than the points of divergence."

345. See, e.g., UNIF. PROBATE CODE §§ 2-115(5), 2-120(c) (proposed 2008 amendments).
346. See DOLGIN, supra note 256, at 98 (distinguishing between the notion that "fathers become fathers because they establish relationships with their children" and the more conservative notion that "fathers become fathers because they are connected to the mothers of their children").
347. Fellows, supra note 57, at 8.
349. Frederick Schauer, Instrumental Commensurability, 146 U. PA. L. REV. 1215, 1218 (1998). Professor Schauer explains that:
When defining parent-child relationships for inheritance purposes, the differences between sexual and ART conception are irrelevant to the values and policy goals that underlie the choice of the standard for defining child status. Inheritance laws regulate property distribution upon the property owner's death, not the mechanics of conception. What matters are the relationships that ultimately result. Because the end result—the parent-child relationship—is the same regardless of the conception technique used, consistency demands similar treatment. Because the same relationship possibilities are available in cases of ART, sexual conception, or family structure, the differences between these methods should not be determinative. There should be no difference in how to determine relationships for ART versus natural conception.

Unless there is a justifiable basis for distinguishing technological conception from these other methods of achieving parentage, fairness demands that status be determined by similar legal standards.

The unadulterated functionally based approach would assimilate technological conception and modern family structures within contemporary estates law. The proposed standards would base child status on actual relationships instead of the circumstances of a child's conception. The unadulterated approach offers the benefit of neutrality. It treats all parents and children equally, without regard to the parent's choice of method of becoming a parent.

5. Child Support vs. Donative Intent

Because of the 2008 UPC Amendments' child-centered focus, child support jurisprudence seems elevated above testamentary freedom. There is a tendency to think of intestate succession as a form of child support, whether the child is a minor or adult, or whether the child is needy or financially successful. Advocating this rationale as the overarching concern of inheritance law, however, is rooted neither in the nature nor the history of inheritance law.

350. Looking for a Family Resemblance, supra note 250, at 1641. A dissatisfaction with solely relying upon blood ties arises from a concern that not all biological families are loving. See T.A. Tucker Ronzetti, Comment, Constituting Family and Death Through the Struggle with State Power: Cruzan v. Director, Missouri Department of Health, 46 U. MIAMI L. REV. 149, 174-75 (1991) (stating that "the family can be—and often is—the locus of violence and sexual abuse, hidden from view all the more effectively because it is deemed private").

351. While I do believe parents have an obligation to support minor or disabled children, I am not convinced that property law is the proper and most efficient venue to implement this obligation.

352. See Gary, supra note 3, at 72 (basing her proposal on two policies: approximation of decedent's intent and support for families, however formed).
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." In fact, the testamentary freedom doctrine values the right of the testator to completely disinherit his or her adult children. In addition, succession law historically has, and continues to, provide limited and narrow support to a decedent's child, and this meager support is only offered to minor children.

As a result of the child-centered focus to intestate succession, current treatment of testate and intestate estates is incongruent from a policy standpoint. This bipolar treatment is evident in the kitchen sink approach, as adopted in the 2008 UPC Amendments. The 2008 UPC Amendments automatically give a child with only a genetic relationship to a decedent an intestate share based upon a support rationale, yet it does not extend this rationale by allowing a child with a genetic relationship to a testator to take a forced share if the testator has executed a will. To be consistent, any statutory scheme would have to either: (i) allow children with only a genetic link to a decedent to take an intestate share in tandem with allowing children with only a genetic link to a testator to take a forced share sufficient to support the child, or (ii) deny a child with solely a genetic link to a decedent an intestate share alongside denial of a forced share to a child with solely a genetic link to a testator.

To illustrate the point, assume father Thorton passes away leaving son Jason, whom Thorton fathered unintentionally. After Thorton dies, a consistent statutory scheme that awarded Jason an intestate share based solely on his genetic connection would also have to allow Jason to take a forced share if Thorton died testate and disinherited Jason. Since Jason's intestate share is based on a support theory, for consistency's sake, he would need to be entitled to similar support via a forced share if Thorton attempted to disinherit Jason. Moreover, a consistent statutory scheme that denied Jason a forced share if Thorton attempted to disinherit him would also need to deny Jason an intestate share based solely on his genetic relationship to Thorton.

In rationalizing support theory, scholars bifurcate succession jurisprudence between testate and intestate estates. Some scholars note that support theory can trump testamentary freedom for intestacy laws because the decedent forfeited his or her rights by not executing a will. For in-

353. See, e.g., DUKEMINIER & JOHANSON, supra note 11, at 62 (stating that the interest of an heir apparent is a "mere expectancy" and is "not a legal 'interest' at all").

354. Hernandez, supra note 1, at 980; Friedman, supra note 9, 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).


356. Compare UNIF. PROBATE CODE § 2-117 (proposed 2008 Amendments) (treating a child with solely a genetic link to an intestate decedent as a child for the purposes of intestate succession) with UNIF. PROBATE CODE § 2-101(b) (2000) (allowing disinheritance of a child with a genetic link to a testate decedent).
stance, 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."\(^{357}\)

Diminishing testamentary freedom for intestacy purposes however, does not seem justified. 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.\(^{358}\) Many individuals might not have 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 more problematic. In addition, it forces individuals to hire lawyers to draft wills, which many individuals might not be able to afford. Denying those without proper knowledge or resources the right to testamentary freedom seems draconian. Before adopting a penalty-incorporating default system for intestacy laws,\(^{359}\) better justifications must be given.

Second, diminishing testamentary freedom for intestacy purposes adversely affects testamentary freedom for testacy purposes because the two structures are interconnected. Intestacy statutes are used for a variety of purposes.\(^{360}\) Most importantly, intestacy statutes define "child" for class gift purposes under dispositive instruments.\(^{361}\) 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.

6. No Surprises

Currently, an individual can bring a claim against his or her alleged father's estate in the absence of any acknowledgement or adjudication of paternity during the decedent's lifetime, even when the decedent did not know he may have fathered a child.\(^{362}\) Allowing these claims causes delays in the probate process and confusion, undue grief, and surprise to a surviving family.

Consider for example, the following situation. Marty, a man, and Wanda, a woman, have a very brief relationship. After the relationship is over, and unbeknownst to Marty, Wanda has a child, Chuck, born of the relationship. Marty later marries and has children from the marriage. Chuck grows to adulthood with his mother and his mother's family never knowing of his father's identity. Chuck becomes quite successful. Marty

\(^{357}\) Gary, supra note 3, at 10.

\(^{358}\) Fellows, supra note 57, at 323-24 (stating that if the intestacy statutes did not conform to the likely wishes of a person who dies without a will, it would create a trap for the ignorant or misinformed).

\(^{359}\) Hirsch, supra note 67, at 1058.

\(^{360}\) See supra notes 60, 61, 62 and accompanying text.

\(^{361}\) See supra note 62 and accompanying text.

\(^{362}\) Gary, supra note 52, at 654.
dies, at which time Wanda tells Chuck of his father's identity. Marty died intestate. If Chuck could establish that he was Marty's genetic child by DNA evidence, Chuck could claim a share of Marty's estate. Even though Marty did not even know of Chuck’s existence (and, prior to Marty's death, vice-versa), Chuck could take some of Marty’s estate.

DNA testing invites the potentially disruptive consequences of such a sequence of events. Grieving family members may be shocked by these types of claims. In addition, it slows and confuses the probate process. Grieving family members might also resist the plaintiff’s efforts seeking to establish paternity by exhuming the decedent’s body or compelling the decedent’s other family members to submit samples for genetic testing. It seems troubling that a non-marital child of whose existence the decedent was unaware may take to the exclusion of those the decedent loved and considered family but were not genetically related to the decedent, and further, that such a claim may cause serious disruption and turmoil to the decedent’s grieving family.

As noted in In the Interest of TSS, a Texas case involving a man who served as a social father to a child for ten years before realizing that he was not the genetic father, “[a]lthough DNA testing may provide a bright line for determining the biological relationship between a man and a child, it does not and cannot define the human relationship between a father and child.”

7. Already Outdated and Inflexible

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.

365. 61 S.W.3d 481 (Tex. 2002).
366. Id. at 485 n.4 (quoting Stithain v. Henderson, 768 A.2d 598, 605 (Me. 2001).
367. These individuals might be more likely than others to die intestate, but are overlooked in intestacy statutes.
368. 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).
In addition to ignoring some common parent-child relationships, because the 2008 Amendments are so tightly drafted and state legislatures are so slow to enact legislation, the new UPC may become more outdated before it even becomes law. The more factors added to any legal rubric dealing with an area of law involving frequent and rapid technological advancement, the more brittle the rubric becomes. Specific and explicit multi-faceted tests in a field involving ever-shifting technological variables break easily when technology evolves. A brittle rubric is doomed to quickly shatter and to become obsolete.

The corollary to this is that the simpler the legal rubric used to deal with an area of the law involving quickly evolving technology, the more flexible the rubric is. A flexible rubric is easily adaptable to changing technology and can withstand the test of time.

The kitchen sink approach adopted by the 2008 UPC Amendments is as brittle as a glass swizzle stick. It involves a complicated and lengthy analysis to determine who is a child of whom and includes many codified variables that are inextricably linked to the development of ART. As ART is constantly evolving, the codified variables will fast become antiquated. 369

The unadulterated functionally based approach is as flexible as a reed. It involves a simple and workable test that, if adopted tomorrow, would continue to fulfill its purpose regardless of advances in ART or the changing nature of family structures.

E. GENETIC MAPPING AND THE DUTY TO TEST

Because sophisticated DNA tests now make it possible to prove or disprove paternity with a very high degree of reliability, 370 the sanguinary nexus test may produce disharmonious outcomes for surviving family members. In light of the fact that four percent of men are raising children that they mistakenly believe to be their own but that they did not in fact genetically father, 371 strict adherence to the sanguinary nexus test could produce harsh results for some surviving family members. The offshoot is that by continuing with a blood-based approach to intestacy, it becomes hard to argue that there is not a fiduciary duty to perform DNA testing prior to distribution, especially as a DNA test can be performed quickly and cheaply. The test could be as simple as a cotton-swab rubbed on the inside of the supposed father’s cheek.

369. See Knaplund, supra note 294, at 99 (discussing technology, such as artificial wombs and frozen stem cells, that can be used to produce eggs or sperms and cloning).
If succession law is supposed to further donative intent and succession law relies upon blood to define child status, it can be assumed that only distributions to blood relatives fulfills donative intent. Therefore, if the decedent’s general intent, whether in a will or through an intestacy statute, is that the decedent’s property pass to his or her genetic children, then there might be a fiduciary duty to DNA test before a child takes his or her share of the decedent’s estate. Indeed, in the face of the new technology and the data it reveals, any argument against requiring DNA testing in a blood-based approach (either because of fear of what it might show or because of a rejection of its importance) would implicitly adopt this Article’s hypothesis—the reason testing is unnecessary is because a functionally based relationship trumps.

VII. POTENTIAL CRITICISMS OF UNADULTERATED FUNCTIONALLY BASED APPROACH

The strengths that make an unadulterated functionally based analysis so appealing may also cause some concern. Because each relationship is analyzed individually, the approach may be too administratively inefficient to be implemented. In addition, individuals will be subject to the discretionary decision making of judges, who can never be free of their own biases. Finally, because some illegitimate children would not inherit from their genetic parents, an equal protection issue potentially exists. Because these concerns affect whether the unadulterated functionally based approach may actually be feasible to implement, they deserve to be explored.

A. INEFFICIENCY

One potential criticism of this Article’s proposal is the administrative difficulty inherent in an individualized functionally based approach to parenthood for inheritance purposes. To be fair, there is some validity in this sentiment: as a default approximation, it is important for intestacy law to be predictable and administratively simple. An unadulterated

372. In some jurisdictions, inefficiencies of the current probate court system make a functional-based test administratively difficult and cause less-predictable outcomes. In fact, probate judges in some jurisdictions are elected to their offices and may not have prior legal experience or training. See, e.g., Prof. John H. Langbein, Statement to the Connecticut Legislature Committee: “The Scandal of Connecticut’s Probate Courts” (Oct. 11, 2005), http://www.law.yale.edu/faculty/1766.htm (noting that Connecticut probate judges often lack legal experience and have not been trained to serve as judges); Thomas E. Gaffey, Probate Reform in Connecticut: A Historical Perspective, 78 CONN. BAR J. 65, 87 (2004) (criticizing the efficiency of the Connecticut probate court system). In scenarios such as this, probate courts may well be unequipped to impartially and efficiently analyze estates using a functional-based approach. Perusing the academic literature, however, the problem of elected, non-lawyer judges seems to be limited to only a few states. Assuming arguendo that some probate judges lack the training to apply tests other than the sanguinary-nexus test, the newest UPC amendments present an identical problem of redefining family relationships for inheritance purposes, albeit using an even more complex set of new rules.

functionally based approach could introduce some uncertainty into succession law because of the discretion such an approach affords to the court to determine who is and who is not a child.

For efficiency purposes, and because most children would fall into the blood or adopted category, I would propose a rebuttable presumption of a parent-child relationship in cases of genetic children and adopted children. This presumption could be overcome where there is no functional relationship. Potential exclusion for lack of a genetic tie or adoption could be overcome by a functional showing.

Still, there are reasons why an efficiency concern is not prohibitive to this Article’s proposal. First, the 2008 UPC Amendments incorporate functionalism, and courts will already have to decide these matters. Unadulterated functionalism would simply expand this class.

Another reason not to overemphasize the administrative difficulty in a functionally based test for parenthood is that such a test is not much different from the factor-driven analysis courts already routinely use in the equitable adoption context. Although the contract-based equitable adoption analysis is in many respects quite different from the proposal espoused in this Article, the two contexts are similar in one critical respect: both look to a series of factors that extend beyond mere love and affection for the purpose of determining parenthood for distribution through intestacy. Indeed, while courts have recognized the administrative task of using a series of factors to determine parenthood by equitable adoption and for that very reason they have been reluctant to extend the concept of equitable adoption beyond its intestacy roots, they have continually been willing to undertake the individualized analysis inherent in the equitable adoption issue with respect to intestacy.

In addition, even to the extent that a functionally based approach is more administratively complex than the current approach, it nonetheless remains more administratively simple than a proper blood-based approach. As noted, progressing technology has had a profound effect on the prevalence and accuracy of genetic testing. To the extent that a continuing blood-based approach would require at least some level of DNA testing, the functionally based approach in this Article is not only

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374. See generally Robinson, supra note 85 (discussing the concept and application of equitable adoption).
376. For a discussion on the doctrine of equitable adoption, see supra Part III.C.
377. See Chavez v. Shea, 525 P.2d 1148, 1149, 1151 (Colo. 1974) (acknowledging a recognition of equitable estoppel in the context of estate succession, but declining to extend the concept to the context of a statute providing economic assistance based on the presence of dependent children because a bright-line rule was administratively easier insofar as “[t]o extend payments further would require individual case determinations as to whether the applicant had assumed . . . some or all of the responsibilities of raising the child” and “such determinations would have to be in accordance with a set of standards which would assure uniformity in defining eligibility”).
378. Shapiro, supra note 115, at 86-87.
more closely aligned with approximation of testator intent, but it is also more administratively simple and predictable. For instance, the intent-based approach is more consistent with intestacy's goal of predictability. While it is possible to objectively observe a relationship and apply a number of factors to determine who is or is not functioning in a parent-child relationship, it is generally impossible to look at a relationship and determine if there is a genetic link (a fact confirmed by the percentages above, detailing the overwhelming number of mistaken fathers). Thus, because functionalism is more transparent than a blood approach, its results are more predictable. This is important to the extent it allows individuals to rely on intestacy as a primary or backup plan for estate distribution.

Finally, although no empirical evidence suggests this, I believe that for the majority of cases there will be no dispute. Any person who would qualify as a child under the unadulterated functionally based approach would likewise already contest his or her status under the sanguinary nexus test. Thus, application of the unadulterated functionally based approach should not appreciably increase the number of persons contesting whether they qualify for child status.

B. JUDICIAL BIAS

Although the functionally based approach necessarily relies on the court's judgment concerning the nature of the decedent's relationship, such discretion can be cabined so that a high degree of predictability is achieved. Adhering to the proposed factor test will narrow a court's discretion. Professor Mary Ann Glendson has discussed how discretion operates in family law and succession law. 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.

In addition, courts have been and are capable of recognizing non-traditional child status. In V.C. v. M.J.B., a custody dispute between former lesbian partners, the Supreme Court of New Jersey noted that the judicial system is capable of determining issues regarding parent-child relationships. The court stated that:

379. See supra note 324 and accompanying text.
380. See Gary, supra note 52, at 653.
381. Spitko, supra note 348, at 1088.
382. Id. (citing Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165 (1986)).
385. Id. at 557.
We 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. ... The nuclear family of husband and wife and their offspring is not the only method by which a parent-child relationship can be created.

The remaining level of uncertainty is fine in pursuit of the higher goal of testamentary freedom. In fact, some commentators have noted that the UPC should subordinate simplicity and certainty in favor of promoting testamentary freedom.

C. UNCONSTITUTIONALITY OF APPROACH

One issue raised by moving to a parentage framework is the potential discrimination against illegitimate issue in violation of the Equal Protection Clause of the Constitution. In a line of cases beginning with Levy v. Louisiana, the Supreme Court has invalidated statutes that treat illegitimate children differently than those born in wedlock. In Levy, the Court considered whether Louisiana could exclude illegitimate children from recovering under its wrongful death statute. Applying the rational basis test, the Court held that the Louisiana court's construction of the wrongful death statute as denying recovery to illegitimate children invidiously discriminated against these children for no rational reason.

386. Id. at 556.
388. Id. at 640 (Upon his review of the 1990 revisions, Professor Asher concluded that "effectuation of a decedent's intent seems to have served as the revisers primary compass." In furtherance of Article II's "need better to effectuate a decedent's intent," the 1990 Code "frequently specifies outcomes that depend explicitly upon the decedent's intention (as opposed to what the controlling document says), which, in turn, is ascertainable (if at all) only upon analysis of all the facts and circumstances.").
389. The Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
390. 391 U.S. 68 (1968). Justice Douglas delivered the opinion of the Court. Id. For a thorough explication of the Court's decisions in this line of cases, see generally Discrimination Against Illegitimate Children, 90 HARV. L. REV. 123 (1976).
391. Levy, 391 U.S. at 69.
392. Id. at 69-70.
393. Id. at 72. The Court bolstered its holding with several forceful rhetorical questions:

When the child's claim of damage for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?
In reaching its holding, the Court noted that the mother... gave birth to [the] five illegitimate children and... they lived with her; that she treated them as a parent would treat any other child; that she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense, in a parochial school. 394

The Court concluded by observing that the mother "cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would." 395

By contrast, Labine v. Vincent, 396 decided three years later, passed once again on Louisiana law concerning illegitimate children. 397 In Labine, an illegitimate, unacknowledged child sought a portion of her father's property after he died intestate. 398 Distinguishing Levy, the Court held that Louisiana's statutory scheme, which did not permit unacknowledged, illegitimate children to inherit through intestate succession, did not violate the Due Process or Equal Protection Clauses. 399 In reaching this decision, the Court accepted Louisiana's interest in the orderly administration of intestate succession as a rational basis for the discriminatory treatment. 400 The Court noted that if the decedent had acknowledged his illegitimate daughter during his lifetime, then she would have been a "natural child" under the state's intestacy scheme and would have inherited from his estate. 401

To further complicate matters, Weber v. Aetna Casualty & Surety Co. 402 reached a conclusion similar to Levy with regard to workers' compensation claims. 403 Addressing the question of whether "dependent unacknowledged, illegitimate children" could recover "on an equal footing" with dependent legitimate children, the Court held that a "denial of equal

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I. 394. Id. at 70.
     395. Id. at 72.
     396. 401 U.S. 532 (1971).
     397. Id. at 533.
     398. Id. at 533-34.
     399. Id. at 535-36.
     400. Id. at 536-37.
     401. Id. at 537. At the close of its opinion, the Court explained:
We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate from inheriting from her father. Ezra Vincent could have left one-third of his property to his illegitimate daughter had he bothered to follow the simple formalities of executing a will. He could, of course, have legitimated the child by marrying her mother in which case the child could have inherited his property either by intestate succession or by will as any other legitimate child. Finally, he could have awarded his child the benefit of Louisiana's intestate succession statute on the same terms as legitimate children simply by stating in his acknowledgment of paternity his desire to legitimize the little girl.
     403. Id. at 176.
recovery rights to dependent unacknowledged illegitimate” children violated the equal protection guaranty of the Fourteenth Amendment.\textsuperscript{404} Employing an intermediate level of scrutiny,\textsuperscript{405} the Court did not find a “significant relationship” between Louisiana's avowed interests in encouraging “legitimate family relationships” and the “recognized purposes of recovery which work[ers'] compensation statutes commendably serve” with discrimination against illegitimate children in the payment of workers' compensation benefits.\textsuperscript{406} In outlining the facts, Justice Powell commented on the close parent-child relationship between the deceased father and the illegitimate children:

\[\text{[T]he dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana has allowed to recover. The legitimate children and the illegitimate children all lived in the home of the deceased and were equally dependent upon him for maintenance and support.}\textsuperscript{407}

A pattern emerges in the Court's characterization of the parent-child relationship in \textit{Levy} and \textit{Weber}—the closeness of the illegitimate children to the parent and the equal footing that these children enjoyed with their legitimate siblings was important enough for the Court to consider in support of its decisions.

Finally, one further case illustrates this pattern. In \textit{Trimble v. Gordon},\textsuperscript{408} the Court invalidated an Illinois intestacy statute limiting inheritance by intestate succession to illegitimate children of the mother.\textsuperscript{409} Once again, the Court noted the irrationality of any scheme that treated illegitimate and legitimate dependents differently:

\[\text{It may perhaps be said that statutory distinctions between the legitimate and illegitimate reflect closer family relationships in that the illegitimate is more often not under care in the home of the father nor even supported by him. The illegitimate, so this argument runs, may thus be made less eligible for the statutory recoveries and inheritances reserved for those more likely to be within the ambit of familial care and affection. Whatever the merits elsewhere of this contention, it is not compelling in a statutory compensation scheme where dependency on the deceased is a prerequisite to anyone's re-}

\textsuperscript{404} \textit{Id.} at 165.
\textsuperscript{405} \textit{Id.} at 172-73. For a discussion of the contours of this intermediate level of scrutiny, see generally \textit{Intermediate Standard of Review}, 91 \textit{Harv. L. Rev.} 177 (1977). In \textit{Weber}, Justice Rehnquist dissented, criticizing the majority for “expand[ing] the traditional ‘reasonable basis’ standard... into a search for ‘legitimate’ state interests that the legislation may ‘promote’... [and thus] doing nothing less than passing policy judgments upon the acts of every state legislature in the country.” \textit{Weber}, 406 U.S. at 185 (Rehnquist, J., dissenting).
\textsuperscript{406} \textit{Id.} at 175 (majority opinion).
\textsuperscript{407} \textit{Id.} at 169-70 (footnote omitted).
\textsuperscript{408} 430 U.S. 762 (1977). Justice Powell also authored the majority opinion in \textit{Trimble}. \textit{Id.}
\textsuperscript{409} \textit{Id.} at 776. Justice Rehnquist also dissented for similar reasons in \textit{Trimble}. See \textit{Id.} at 777 (Rehnquist, J., dissenting).
covery, and where the acknowledgment so necessary to equal recovery rights may be unlikely to occur or legally impossible to effectuate even where the illegitimate child may be nourished and loved.\textsuperscript{410}

The Court also expressed its disapproval of meting out "society's condemnation of irresponsible liaisons beyond the bonds of marriage" on "the head of an infant."\textsuperscript{411} The Court concluded that such an approach was not justified "by a legitimate state interest, compelling or otherwise."\textsuperscript{412}

In its next term, in \textit{Lalli v. Lalli},\textsuperscript{413} a plurality of the Court receded somewhat from \textit{Trimble}. Confronted with a New York statute that required the entry of a court order during a father's lifetime in order for illegitimate children of the father to inherit by intestacy, the Court held that such a statute did not violate the Equal Protection Clause.\textsuperscript{414} The Court distinguished its holding in \textit{Trimble} on the grounds that the statute in \textit{Trimble} had required marriage of the parents in order for illegitimate children to inherit property through intestate succession.\textsuperscript{415} Because the New York statute in \textit{Lalli} afforded alternatives to marriage, the plurality opinion found no constitutional violation.\textsuperscript{416}

Almost a decade later, in \textit{Reed v. Campbell},\textsuperscript{417} the Court made clear that the decision in \textit{Trimble} applied to cases pending at the time \textit{Trimble} was decided.\textsuperscript{418} The \textit{Reed} Court reversed a Texas Supreme Court decision that prevented recovery by illegitimate children who brought their claims for a share in the decedent's intestacy proceedings after \textit{Trimble}.\textsuperscript{419} The Court held that the state had no legitimate interest in denying intestate succession after \textit{Trimble} on the basis of when claims were filed.\textsuperscript{420} In reaching this decision, the Court clarified that \textit{Trimble} was still good law.\textsuperscript{421}

\textsuperscript{410.} Weber, 406 U.S. at 173-74.
\textsuperscript{411.} Id. at 175.
\textsuperscript{412.} Id. at 176.
\textsuperscript{413.} 439 U.S. 259 (1978).
\textsuperscript{414.} Id. at 266-67, 276.
\textsuperscript{415.} Id. at 266.
\textsuperscript{416.} Id. at 273, 276.
\textsuperscript{417.} 476 U.S. 852 (1986).
\textsuperscript{418.} Id. at 853.
\textsuperscript{419.} Id. at 855-56.
\textsuperscript{420.} Id.
\textsuperscript{421.} Id. at 854. The Court explained that:

Although the question presented in this case is framed in terms of "retroactivity," its answer is governed by a rather clear distinction that has emerged from our cases considering the constitutionality of statutory provisions that impose special burdens on illegitimate children. In these cases, we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents' misconduct. We have, however, also recognized that there is a permissible basis for some "distinctions made in part on the basis of legitimacy"; specifically, we have upheld statutory provisions that have an evident and substantial relation to the State's interest in providing for the orderly and just distribution of a decedent's property at death.

\textit{Id.} at 854-55 (citations and footnotes omitted).
The lesson from this line of cases is clear—a state may not treat children differently merely on the basis of their legitimacy. Accordingly, adopting a functionally based approach for estates law should not run afoul of the Equal Protection Clause because the legitimacy of children would not be a factor in determining whether a parent-child relationship existed. Under such a model, both legitimate and illegitimate children could be deemed part of a parent-child relationship. Similarly, both legitimate and illegitimate children could fall outside of this relationship. The result under a functionally based approach would turn not on legitimacy, but rather on many of the factors that Justice Powell eloquently articulated in \textit{Levy} and \textit{Weber}, namely the substance of the parent-child relationship.

\textbf{VIII. CONCLUSION}

The diversity of family relationships extant in American life, emerging forms of ART, and advances in genetic testing have influenced the definition of "parentage" in law and society. These influences have dramatically diminished the importance of a genetic link in determining parent-child relationships, yet succession law continues its blind devotion to the sanguinary nexus test. Completely breaking the genetic link is necessary, however, though because it no longer has a function in modern estates law. As Professor Mann has opined, "[w]hen the categories of the past can no longer accommodate the present, they must eventually change or be abandoned."\textsuperscript{422}

The sanguinary nexus test for defining child status should be replaced by an unadulterated functionally based approach, inquiring into the existence, or lack thereof, of a parent-child relationship as the sole means for determining child status for inheritance laws. A shift away from the child-centered theology of family law to the more appropriate property owner centered view of estates law jurisprudence is long overdue. The proposal herein relies heavily on the law governing donative intent, property rights, and some implicit assumptions about parentage. In addition, it promotes coherent rules reliant on consistent, rather than discordant, values. Also, the approach has the additional advantage of comprehensiveness and flexibility—it can currently be applied to the full range of legal issues associated with parentage for inheritance purposes and evolves along with the changing nature of parent-child relationships and the methods of child creation. Finally, the unadulterated functionally based approach would ensure consistency in our treatment of property owners and would focus attention on property rights and the intent of the property owners, rather than family law policy and technological novelty.

\textsuperscript{422} \textit{See} Foster, \textit{supra} note 11, at 240 (quoting Bruce H. Mann, Essay: \textit{Formalities and Formalism in the Uniform Probate Code}, 142 U. PA. L. REV. 1033, 1050 (1994)).