The New Uniform Parentage Act (2017) and Inheritance Law

Author : Paula Monopoli

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Courtney G. Joslin, Nurturing Parenthood Through the UPA (2017), 127 **Yale L. J. F.** 589 (2018).

Parentage is central to our status-based system of inheritance. Over the past twenty years, we've seen tremendous changes in how courts and legislatures approach the question of just who is a parent. We generally use the same legal definition of parentage for both family law and inheritance law, a definition derived in many states from the Uniform Parentage Act (UPA). Thus, Professor Courtney Joslin's new article, *Nurturing Parenthood Through the UPA (2017)*, is particularly salient for trusts and estates scholars.

In *Obergefell v. Hodges*, the United States Supreme Court held that states must allow same-sex couples to marry.[1] But that decision didn't address the myriad corollary questions that arose from marriage equality. These included questions like whether the marital presumption of parentage granted to "husbands" also applied to female spouses who were not the genetic parent of a child. Or whether such a nongenetic female spouse had the right to have her name automatically listed on a birth certificate. Those issues were largely put to rest in a relatively unheralded case, *Pavan v. Smith*, which was decided after *Obergefell*.[2] Professor Joslin notes that, "In June 2017, the Supreme Court held in *Pavan* that Arkansas's refusal to list a woman on the birth certificate of a child born to her same-sex spouse was inconsistent with its prior declaration in *Obergefell*." And in *McLaughlin v. Jones ex rel. Cty. of Pima*, "the Arizona Supreme Court explained, under Arizona's marital presumption, husbands were recognized as parents even if they were not biological parents.[3] After *Obergefell* and *Pavan*, the court continued, that rule could not 'be restricted only to opposite-sex couples.'"

Professor Joslin serves as the Reporter for the UPA (2017). Promulgated in 1973, the UPA has undergone a series of revisions over the years, the last rounds in 2000 and 2002 evoking significant controversy. Much of the controversy revolved around the unequal treatment of nonmarital children under the UPA. After the 2002 amendments, the UPA included a presumption of parentage for nonmarital children as well as marital children. Professor Joslin notes that the UPA has had a significant impact on state parentage statutes, with laws in over half the states having their origins in the UPA. The UPA (2017) is the Uniform Law Commission's effort to revise the Act to conform to the new constitutional mandates set forth in cases like *Obergefell* and *Pavan*, recognize non-biological parentage, and eliminate gender-based distinctions. Professor Joslin notes that many of the changes in UPA (2017) reflect the work of Professor Douglas NeJaime's extensive scholarship on this issue.

Professor Joslin explains that "a core goal of UPA (2017) is to further a principle that has animated the UPA since its inception—recognizing and protecting actual parent-child bonds" regardless of biology. The premise is that failure to protect such bonds is harmful to the child. The salient changes for those involved in inheritance law include the gender-neutralizing of the holding-out provision, section 204(a)(2), so that either a man or a woman can be presumed to be a parent if they lived in the same household for the first two years and held the child out as his or hers. By including the possibility that the adult holding out the child is a woman who is not connected by biology to the child, Professor Joslin notes that the new UPA makes clear that court decisions which allow the presumption to be rebutted by evidence of a lack of a biological connection are wrongly decided.

The UPA (2017) also includes what Professor Joslin calls "an entirely new method of establishing parentage – the de facto parent provision" noting that "most states today extend some sort of protection to functional, nonbiological parents" under either statutory holding-out provisions or through equitable doctrines. Under section 609, de facto parents who are not biologically related to the child can be given legal parentage status on a par with biological

parents. Like the revisions of the holding-out provision, this provision has been drafted in gender-neutral terms allowing either a man or a woman who develops a relationship with a child after the initial two-year period after birth to achieve legal parentage status.

In addition to these new holding-out and de facto parentage provisions, UPA (2017) expands the category of people who can use Voluntary Acknowledgements of Parentage beyond alleged genetic fathers, to include “intended” and “presumed” parents under the Act. The Acknowledgement of Parentage process facilitates the recognition of such parents’ status by other states without having to go through a costly court process.

Finally, the new revisions give courts clear guidance when exercising their discretion in evaluating competing parentage claims. Professor Joslin notes that this guidance includes such factors as: “the length of time during which each individual assumed the role of parent of the child, the nature of the relationship between the child and each individual, and the harm to the child if the relationship between the child and each individual is not recognized,” with the court having discretion to choose social bonds over biology in making its determination.

These revisions and the gender-neutralizing of many of the other provisions, including the marital presumption, have given us a uniform law that hews much more closely to recent constitutional mandates. It will also have a significant impact on inheritance statutes that incorporate the UPA as the measure of parentage. As the Reporter for the Act, Professor Joslin has given those of us who are inheritance law scholars a very valuable primer on both the revisions and the policy rationales that underlie those revisions. This article is required reading for those teaching and writing in the area of trusts and estates and should inform our law reform work as well.

1. *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015). [?]
2. *Pavan v. Smith*, 137 S. Ct. 2075 (2017). [?]
3. *McLaughlin v. Jones ex rel. Cty. of Pima*, 401 P.3d 492 (Ariz. 2017). [?]

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