Comment, Family Law Gaps and Inheritance Rights in Nontraditional Families

I. Introduction

American families have shape-shifted dramatically over recent decades[1]—unmarried partners, same-sex couples, blended households, and families built through assisted reproduction are now the norm, not the exception—yet state inheritance laws are still cosplaying like it's 1950, clutching their pearls at anyone who did not marry into a heterosexual union. The legal code received the cultural memo about modern families, crumpled it up, and tossed it in the recycling bin. What emerges is a dangerous crater between the actual families of today, and the ones lawmakers deign to acknowledge, creating vulnerabilities that are not bureaucratic nuisances but substantial threats to property rights, decision-making authority, and financial survival.

The consequences play out in brutal specificity: a partner of two decades inherits precisely nothing when their loved one dies intestate; a parent who changed diapers and attended every soccer game loses all rights because they lack biological connection; children conceived through sperm donors become legal orphans battling distant relatives in probate court. For millions living outside the law's narrow imagination of what counts as "real family," these are not cautionary tales—they are inheritance landmines with your name on them.

The American inheritance system, a fifty-state Frankenstein's monster, leaves nontraditional families with a greater amount of pressure. Those who marry are treated as though they have adhered to the nation's most sacred directive, whereas all others are treated as outcasts. Without explicit documentation, the law hands your life's assets to that cousin you have not spoken to since 2003

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[1] *The Modern American Family*, Pew Rsch. Ctr. (Sept. 14, 2023), https://www.pewresearch.org/social-trends/2023/09/14/the-modern-american-family/.

while ignoring the partner who held your hand through chemo. Traditional families get ironclad protections with one courthouse visit and a celebratory brunch; everyone else needs a law degree, a small fortune, and the foresight of Nostradamus to achieve the same security. This is not just administratively annoying—it is a fundamental equity crisis where the price of love comes with a mandatory estate planning surcharge, and the penalty for imperfect paperwork is not a deviation from the decedent's wishes but complete disinheritance. The message could not be clearer: marry or lawyer up because intestacy statutes were not written with all families in mind.

This Comment traces the landscape of legal gaps facing nontraditional families—unmarried cohabitants, LGBTQ+ families, and those created through assisted reproduction—examining how recognition varies wildly depending on whether a family resides in progressive California or in a jurisdiction still functioning in the 1950's. Next discussed are the concrete inheritance vulnerabilities that emerge when the law refuses to acknowledge a family exists, from intestacy statutes that treat life partners like strangers to probate procedures that hand authority to distant relatives. This Comment is not just a catalog of outdated laws—the final section explains the arsenal of estate planning tools that can actually protect nontraditional families, surveys the massive legal developments from *Obergefell* forward, and offers concrete recommendations for practitioners and families navigating this minefield, before concluding with a call for even greater systemic reform that would make all this elaborate planning unnecessary.

II. Legal Recognition Gaps: Understanding the Landscape

A. *Unmarried Cohabiting Partners*

1. *Historical Presumption Against Cohabitation Rights*

American inheritance law historically presumed that cohabitation outside marriage was morally suspect and unworthy of legal protection.[2] For most of American history, intestacy statutes

[2] Adam J. Hirsch, *American History of Inheritance Law*, *in* 3 Oxford International Encyclopedia of Legal History 235 (Apr. 26, 2007); Stanley N.

simply did not contemplate unmarried partners—the surviving spouse was the natural heir, and succession was organized around biological and marital kinship.[3] Unmarried partners appeared nowhere in this scheme, and that presumption continues to structure modern intestacy law in most states.[4]

2. *Absence of Intestacy Protections in Most Jurisdictions*

In the vast majority of states, if an unmarried cohabitant dies without a will, the surviving partner receives nothing.[5] Instead, the estate flows to children, parents, siblings, then distant relatives.[6] Only when no heirs exist does property escheat to the state.[7] Consider a long-term unmarried couple who shared finances and raised children together but never married. Upon death, the surviving partner may lose the family home, retirement savings, and life insurance proceeds—all passing to adult children from prior relationships, estranged parents, or relatives the deceased never knew. The survivor loses not only their partner but their economic security and often their means of supporting dependent children.

3. *Common Law Marriage Limited Protections*

Approximately eight states and the District of Columbia recognize common law marriage for couples meeting statutory requirements.[8] However, this provides only limited protection.[9] Proving common law marriage requires demonstrating cohabitation for a specified period, intent to marry, public recognition, and

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Katz, FSU College of Law, Public Law Research Paper No. 258 (Apr. 3, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=982428.

3 Vallera v. Vallera, 21 Cal. 2d 681, 684 (1943).

4 Cordelia S. Munroe, Marvin v. Marvin*: Five Years Later*, 65 Marq. L. Rev. 389 (1982).

5 Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49 (2015).

6 E. Garry Spitko, *Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience*, 103 Iowa L. Rev. 2175 (2018).

7 Waggoner, *supra* note 5, at 68.

8 Kevin O'Flaherty, *Complete Guide to Which States Are Common Law Marriage States*, O'Flaherty Law (Mar. 28, 2024), https://www.oflaherty-law.com/learn-about-law/complete-guide-to-common-law-marriage-states.

9 Hirsch, *supra* note 2, at 237.

capacity[10]—disputes often arise only after death when one party, the decedent, cannot explain their intent.[11]

4. *State Variations of Domestic Partnership and Civil Union Frameworks*

Apart from recognizing common law marriages, beginning in the 1990s, progressive states started creating statutory alternatives to marriage. Vermont pioneered civil unions in 2000[12]; California expanded the rights of registered domestic partners with its Domestic Partnership Act in 2005.[13] These frameworks significantly improved unmarried couples' legal position, extending intestacy protections and spousal-like benefits. However, the patchwork approach created complications.[14] *Obergefell v. Hodges* rendered many frameworks obsolete,[15] though some states retain them for opposite-sex unmarried couples.[16]

5. Marvin v. Marvin *and Palimony Doctrine Limitations*

In *Marvin v. Marvin* in 1976, the California Supreme Court recognized that unmarried cohabitants could enforce explicit or implicit contracts regarding property division.[17] However, practical limitations proved substantial.[18] *Marvin* applies only to ongoing

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10 Deepti Singh, *Demystifying Common Law Marriage: Requirements You Need to Know and How It Is Different from Live-In Relationships*, Jus Corpus (2024), https://www.juscorpus.com/demystifying-common-law-marriage-requirements-you-need-to-know-and-how-it-is-different-from-live-in-relationships/.

11 Elizabeth Brake, *Marriage and Domestic Partnership*, Stanford Encyclopedia of Philosophy (Winter 2023 ed.), https://plato.stanford.edu/archives/win2023/entries/marriage/.

12 Barbara Cox, *But Why Not Marriage: Some Thoughts on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 Vt. L. Rev. 113-147 (2000).

13 Carol A. Docan & Richard F. Sperling, *California's Domestic Partnership Law: Incremental Progress or Dramatic Social Change?*, 14 Wm. & Mary J. Women & L. 153 (2007).

14 Inga Nelson, *Recognition of Civil Unions and Domestic Partnerships as Marriages in Same-Sex Marriage States*, 98 Minn. L. Rev. 1171 (2014).

15 Obergefell v. Hodges, 576 U.S. 644 (2015).

16 Engram Wilkinson, *Regulating Equality, Unequal Regulation: Life After* Obergefell, Yale J. on Reg. (May 27, 2018), https://www.yalejreg.com/bulletin/regulating-equality-unequal-regulation-life-after-obergefell/.

17 Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122 (1976).

18 Munroe, *supra* note 4.

relationships, requires proof of an agreement (difficult when that agreement is oral or implicit), and not all states embrace the doctrine.[19] Moreover, *Marvin* does not address intestacy—even if partners can prove contractual rights during a lifetime, this does not give surviving partners inheritance rights when the other dies without a will.[20]

B. LGBTQ+ Families*: Post-*Obergefell *Marriage Equality*

Obergefell v. Hodges fundamentally transformed the legal landscape by establishing constitutional marriage equality.[21] Same-sex married couples acquired full spousal inheritance rights, joint tax benefits, and comprehensive legal protections.[22]

However, *Obergefell* did not eliminate all vulnerabilities. Three categories of problems persist: (1) same-sex couples who have not married remain in positions similar to unmarried opposite-sex couples;[23] (2) marriage equality did not create full equality across all aspects of family law;[24] and (3) most significantly, *Obergefell* addressed only married couples, not inheritance and parentage issues facing non-married LGBTQ+ families, particularly involving non-biological parents or children born through assisted reproduction.[25]

C. *Assisted Reproduction Arrangements*

1. *Gestational Surrogacy: Parental Rights Establishment*

Approximately 18,400 infants were born through surrogacy in the United States in 2020, with the prevalence of surrogacy

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19 Anaya Nolan, *When Was Common Law Marriage Abolished?*, Lawshun (June 19, 2025), https://lawshun.com/article/when-was-common-law-marriage-abolished.

20 Patricia A. Cain, Marvin *Claims at Death*, 49 ACTEC L.J. 13 (Sept. 1, 2023).

21 *Obergefell*, 576 U.S. 644.

22 *Id.*

23 Lynn D. Wardle, *The Innocent Victims of* Obergefell, 14 Ave Maria L. Rev. 20 (2016).

24 Gregg Strauss, *What's Wrong with* Obergefell, 40 Cardozo L. Rev. 631 (2018).

25 Raymond C. O'Brien, Obergefell's *Impact on Functional Families*, 66 Cath. U. L. Rev. 363 (2017).

continuing to grow.[26] Gestational surrogacy creates profound legal uncertainties—at birth, the carrier is presumed to be the legal mother, and intended parents have no automatic legal status.[27] They must go through formal legal processes, often involving pre-birth parentage orders or post-birth adoption.[28]

Surrogacy laws vary dramatically across jurisdictions. Some states have comprehensive statutes streamlining intended parent status; others prohibit surrogacy or maintain limited frameworks; still others have no clear guidance.[29] These variations create substantial risks for families pursuing surrogacy in one jurisdiction and then relocating.[30]

2. *Sperm and Egg Donor Agreements: Intended vs. Biological Parents*

In standard practice, donors understand they will have no parental rights or obligations. This is supported by donor agreements and, in many states, statutory provisions.[31] However, protections are not uniform—donor agreements may not be enforceable in all contexts.[32] Questions arise whether donors might later claim parental rights or assert inheritance rights as biological parents. These issues have become more acute with proliferation of direct-to-consumer genetic testing, resulting in thousands of donor-conceived individuals discovering their biological origins.[33]

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26 Justo Aznar & Miriam Martínez Peris, *Gestational Surrogacy: Current View*, 86 Linacre Q. 56 (2019), https://doi.org/10.1177/0024363919830840.

27 Devon Quinn, *Her Belly, Their Baby: A Contract Solution for Surrogacy Agreements*, 26 J. L. & Pol'y 805, 806 (2018).

28 Taylor Paige Mutavdzic, *Legal Challenges Across State Lines: A Look into Surrogacy Law in the United States*, 16 J. Civ. L. Stud. 266, 271 (2024).

29 *Id*. at 266.

30 *Id*. at 267.

31 Maria E. Garcia, *In with New Families, out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements*, 21 Duke J. Gender L. & Pol'y 197 (2013).

32 *Id*. at 217 (illustrating that such agreements may be unenforceable where they conflict with state parentage statutes or public policy regarding child support obligations).

33 Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, 4(3)Laws 352 (2015), https://doi.org/10.3390/laws4030352.

3. *Posthumous Reproduction and Inheritance Rights*

The use of a deceased person's frozen genetic material to create a child after death sparks novel questions regarding parentage and inheritance rights. The law governing posthumous reproduction is underdeveloped—most states have not explicitly addressed whether children born from deceased persons' genetic material are "children" under inheritance statutes, whether they have inheritance rights, and what consent requirements must be met.[34]

The Uniform Parentage Act (2017) includes provisions regarding posthumous reproduction, and several states have adopted them, but many jurisdictions have not addressed the issue, leaving it to case-by-case judicial determination.[35]

4. *Uniform Parentage Act (2017) Adoption Disparities*

The UPA (2017) aims to provide uniform rules regarding parentage, surrogacy, donor-conceived children, and related issues. However, state adoption has been inconsistent—only a handful of states had adopted the 2017 UPA in full as of the cutoff date.[36] This fragmentation perpetuates legal uncertainties and variations, leaving assisted reproduction families vulnerable to jurisdiction-dependent rules.

III. State-by-State Analysis: A Patchwork of Protections

A. *Progressive Jurisdictions*

California has long led in recognizing nontraditional families. The state enacted the first comprehensive domestic partnership statute in 1999, providing significant legal benefits.[37] California has comprehensive statutes addressing gestational surrogacy, donor-conceived children, and second-parent adoption.[38] The Family Code explicitly addresses parentage in surrogacy arrangements,

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34 Cassandra M. Ramey, *Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 Nev. L.J. 773 (2017).

35 *Id*. at 782.

36 *Id*. at 783.

37 Cal. Fam. Code §§ 297 - 299.6 (1999).

38 *Id*. at §§ 7960 – 7962 (2015).

allowing pre-birth parentage orders.[39] California has also moved toward recognizing multi-parent families—allowing children to have more than two legal parents in limited circumstances.[40]

New York has evolved significantly through statutory amendments. The state's adoption of the Domestic Relations Law permitting same-sex marriage in 2011 (pre-*Obergefell*) placed it at the vanguard of marriage equality.[41] More recently, New York has expanded assisted reproduction parentage recognition, adopted surrogacy protections, and broadened adoption law to be more inclusive.[42]

Massachusetts represents advancement through judicial decisions rather than comprehensive legislation. The Massachusetts Supreme Judicial Court pioneered marriage equality through *Goodridge v. Dept. of Public Health*, more than a decade before *Obergefell*.[43] While Massachusetts lacks a comprehensive statutory framework, its courts have consistently interpreted existing law expansively to recognize nontraditional families.[44]

B. *Restrictive Jurisdictions*

As previously stated, most states have constitutional amendments or statutory provisions explicitly limiting family recognition to married couples or biological relatives.[45] These restrictions were often adopted during same-sex marriage debates and framed as protecting traditional family definitions. These states maintain restrictive intestacy statutes providing no recognition for unmarried partners, often lack statutory surrogacy frameworks, and heavily restrict or prohibit second-parent adoption.[46]

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39 *Id*.

40 Kathy Minella, *Expanding Horizons: California Embraces Multi-Parent Families, Minella Law Group* (Aug. 29, 2024), https://minellalawgroup.com/blog/expanding-horizons-california-embraces-multi-parent-families/.

41 N.Y. Assembly Bill A08354, 2011-2012 Regular Session (2011).

42 *New York Passes the Marriage Equality Act, Allowing Same-Sex Couples to Marry*, Abrams Fensterman (June 24, 2011), https://www.abramslaw.com/media/announcements/new-york-passes-the-marriage-equality-act-allowing-same-sex-couples-to-marry/.

43 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

44 E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999), cert. denied, 528 U.S. 1005 (1999).

45 Munroe, *supra* note 4, at 390.

46 Craig Parker, *A Guide to Intestate Succession by State,* Trust & Will, https://trustandwill.com/learn/intestate-succession-by-state (last visited Nov. 20, 2025).

Several states maintain intestacy statutes that narrowly define "heirs" and "relatives" by requiring biological kinship or formal adoption.[47] They do not recognize functional family relationships—unmarried partners who raised children, stepparents who provided care but did not legally adopt, non-biological parents in same-sex relationships absent formal adoption. These jurisdictions typically lack statutory recognition of common law marriage, domestic partnerships, or civil unions.[48] These structural barriers in intestacy law create cascading practical problems for nontraditional families attempting to navigate probate administration and assert legal claims after a loved one's death.

IV. Inheritance Vulnerabilities in Nontraditional Families

A. *Intestate Succession Failures*

A significant gap in inheritance law involves the complete exclusion of unmarried partners from intestacy schemes. When an unmarried person dies without a will, the surviving partner receives nothing, regardless of relationship length or dependence.[49] A partner of twenty, thirty, or forty years has no greater inheritance right than a stranger.

Another critical vulnerability arises when non-biological parents lose custody and inheritance rights upon the death of their partner. If the biological parent dies without a will establishing the non-biological parent's rights, the non-biological parent may lose custody and have no inheritance rights. The child may be transferred to biological relatives, and the non-biological parent may have no legal standing to object.[50]

Children born through assisted reproductive technology face additional legal uncertainties regarding legitimacy and inheritance. Children born through assisted reproduction may face challenges to legitimacy or inheritance rights if parentage is not

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47 *Id.*

48 *Id.*

49 *Id.*

50 *See, e.g.,* Ray v. Ray, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001).

clearly established.[51] Without clear statutory protection, children's inheritance rights remain vulnerable to challenge.

The intersection of posthumous conception and pretermitted heir statutes creates further complications for modern families. Most states have pretermitted heir statutes for children born after will execution.[52] However, these typically apply only to children born to surviving parents—not children born through posthumous reproduction using deceased parents' genetic material.[53]

B. *Probate and Administration Complications*

State laws governing the priority of appointment for personal representatives create additional barriers for nontraditional families. If the deceased fails to name an executor, state law provides a priority list: spouse first, then children, parents, and lastly, siblings.[54] For nontraditional families, courts may appoint someone the deceased barely knew instead of the intended unmarried partner or non-biological family member.[55]

Unmarried partners and non-biological family members face further disadvantages in claims against estates, wrongful death actions, and survivor benefit eligibility. Spouses, children, parents, and siblings typically have standing to assert claims against estates.[56] However, unmarried partners and non-biological family members typically lack this standing, creating an imbalance.[57]

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51 Heather LaCount, *Dead Money: A Posthumously Conceived Child's Inheritance Rights Under the Social Security Act & State Intestacy Law*, 20 Suffolk J. Trial & App. Advoc. 11 (2015), https://dc.suffolk.edu/cgi/viewcontent.cgi?article=1362&context=jtaa-suffolk.

52 *See, e.g.,* N.H. Rev. Stat. § 551:10; 84 Okla. St. § 132; Tenn. Code Ann. § 32-3-103.

53 Kimberly E. Naguit, *Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children*, 74 Mo. L. Rev. (2009).

54 Mary Louise Fellows & Thomas P. Gallanis, *The Uniform Probate Code's New Intestacy and Class Gift Provisions*, 46 ACTEC L.J. 127 (2021).

55 *Who Has Priority in Appointment as Personal Representative if a Person Dies Without a Will?*, Bach, Jacobs & Byrne (Apr. 16, 2019), https://bach-elder-law.com/priority-appointment-personal-representative-person-dies-without-will/.

56 Marissa J. Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 84 Cornell L. Rev. 1492 (1999).

57 *Id*. at 1505.

Similarly, workers' compensation death benefits typically apply only to spouses and children, leaving unmarried partners without recourse.[58]

V. Estate Planning Solutions: Mitigating Legal Risks

A. *Wills as Foundational Documents*

One of the primary advantages of a will is the ability to provide explicit identification of beneficiaries. A properly drafted will explicitly designates who will inherit and who will serve as executor.[59] For nontraditional families, wills should clearly identify intended beneficiaries and explain relationships—eliminating ambiguity, educating heirs and courts, and demonstrating knowledge and intention that helps defeat potential contests.[60]

Wills can also incorporate in terrorem, or no-contest, clauses as a deterrent against frivolous challenges. These provide that anyone challenging the will forfeits their inheritance.[61] While enforcement varies by state, properly drafted no-contest clauses can deter speculative challenges by disappointed heirs.[62]

Including explanation clauses within a will can further strengthen its validity against potential contests. Utilizing clauses that explicitly acknowledge a nontraditional family structure and explain testator choices demonstrate deliberate decision-making and provide powerful evidence supporting will validity in contests.[63]

Despite these advantages, wills have significant limitations that testators should understand. Although wills offer utility, they

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58 *Who Has Priority in Appointment as Personal Representative if a Person Dies Without a Will?*, *supra* note 55.

59 Stephen L. Ferszt, *Courts Reiterate: Beneficiary Designation Review Is Critical for Estate and Retirement Planning*, Olshan Frome Wolosky (Aug. 20, 2024), https://www.olshanlaw.com/media/news/1111_NYLJ%20-%20Courts%20Reiterate%20-%20Beneficiary%20Designation%20Review.pdf.

60 *Id*.

61 W. Harry Jack, *No-Contest or in Terrorem Clauses in Wills - Construction and Enforcement*, 19 Sw. L.J. 722 (1965).

62 Elizabeth Marcuccio, *In Terrorem Clauses: Under What Circumstances Are They Triggered*, 43 N.E. J. Legal Stud. 118, 123 (Aug. 1, 2023).

63 Karen J. Sneddon, *Dead Men (and Women) Should Tell Tales: Narrative, Intent, and the Construction of Wills*, 46 ACTEC L.J. 239, 254 (2021).

have significant limitations. They are subject to probate (expenses, time, and public viewing) and contest by interested persons, and provide no protection during the testator's lifetime or decision-making authority during incapacity.[64]

B. *Revocable Living Trusts*

Revocable trusts offer significant advantages in probate avoidance and enhanced privacy for estate planning. Revocable trusts avoid probate because property is held in trust at death and does not pass through probate.[65] The successor trustee takes control and distributes according to trust terms, dramatically reducing expenses and delays.[66] Additionally, trusts provide privacy—the document is not filed with courts or made public.[67]

Revocable trusts also serve as powerful tools for incapacity planning, particularly for nontraditional families. If the settlor becomes incapacitated, the successor trustee can immediately take control without need for conservatorship proceedings.[68] For nontraditional families, unmarried partners can be designated as successor trustees and immediately assume management without court proceedings or biological relatives' approval.[69]

Despite these advantages, revocable trusts are subject to critical funding requirements that settlors must understand. Trusts are effective only for property transferred into them.[70] Settlors must "fund" the trust by transferring property (real estate, bank accounts, brokerage accounts, etc.) into the trust's name.[71] Failure

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64 Robert Whitman, *Providing Information to Beneficiaries (with Sample Forms)*, Faculty Articles & Papers 55 (2009), https://opencommons.uconn.edu/law_papers/55.

65 David Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*. 24 Elder L.J. 1, 31 (2016).

66 *Id*. at 10.

67 *Id*. at 16.

68 *Id*. at 27.

69 Richard Ausness, *Keeping It in the Family: The Pitfalls of Naming a Family Member as a Trustee*, 34 J. Am. Acad. Matrim. Law. 1, 32 (2021).

70 Jennifer Zelvin McCloskey, *A Trust Without Funding Is Just Paper: Avoid These Common Mistakes*, Univ. of Del. (2025), https://www.udel.edu/alumni-friends/stories/2025/pitfalls-of-not-funding-trust/.

71 *Id*.

to fund defeats the purpose. "Pour-over wills" ensure overlooked or acquired property passes according to trust terms.[72]

C. *Beneficiary Designations*

Life insurance policies serve as valuable inheritance vehicles that can benefit nontraditional families. Life insurance passes directly to named beneficiaries outside probate.[73] Unmarried partners can be named as beneficiaries, ensuring they receive substantial assets even if intestacy would provide nothing.[74]

Retirement accounts offer similar benefits but require careful consideration of recent legislative changes and their tax implications. Retirement accounts pass directly to named beneficiaries.[75] However, the SECURE Act of 2020 significantly altered tax treatment for non-spouse beneficiaries—most must now distribute the entire account within ten years, losing tax benefits spousal beneficiaries retain.[76]

Transfer-on-death and payable-on-death accounts provide another mechanism for passing assets outside of probate to chosen beneficiaries. TOD and POD designations allow beneficiaries to receive accounts upon death without probate, providing surviving partners immediate access to liquid assets.[77] However, these designations must comply with formalities such as recording prior to death and naming beneficiaries explicitly.[78] Also, beneficiary designations supersede anything stated in a will; if there is inconsistency,

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72 Feder & Sitkoff, *supra* note 65, at 18.

73 Jill M. Bisco, Suzanne Gradisher & Jinjing Wang, *Life Insurance Beneficiaries – Per Capita vs. Per Stirpes: Is It Really That Clear?,* 50 J. Ins. Reg. 3, 8 (2023).

74 *Id*.

75 Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. Rev. 165, 203 (2014).

76 Sarah J. Brownlow & Scott W. Masselli, *Federal Tax Update: Final Regulations Bring Clarity and Continued Questions for the SECURE Act and Estate Property Basis Consistency Reporting*, 45 NAEPC J. 1 (Oct. 2024), https://www.naepcjournal.org/issue/45/federal-tax-update-secure-act-and-estate-property-basis-consistency-reporting/.

77 Natalie M. Perry & Rebecca Wallenfelsz, *Pitfalls of Pay on Death (POD) Accounts, ACTEC Estate Planning Essentials* (video)(2026), https://www.actec.org/resource-center/video/pitfalls-of-pay-on-death-accounts-pod/.

78 *Id*.

the named beneficiary on the TOD/POD will receive the property, even if it is not what the testator ultimately wanted.[79]

To maximize effectiveness, all beneficiary designation tools must be carefully coordinated with the overall estate plan. Beneficiary designation tools are most effective when coordinated with overall estate plans to ensure internal consistency and rational asset distribution.[80]

D. *Joint Ownership Strategies*

1. *Joint Tenancy with Right of Survivorship*

Joint tenancy with right of survivorship is a form of property ownership in which two or more people own property together, and when one owner dies, the other owner(s) automatically inherit(s) the deceased owner's share.[81] This occurs outside the probate process and overrides any contrary provisions in the deceased owner's will.[82]

Joint tenancy can be a valuable tool for ensuring that an unmarried partner inherits property.[83] For example, a real estate property can be titled in "Jo and Taylor as joint tenants with right of survivorship," ensuring that upon Jo's death, Taylor automatically owns the entire property.

However, joint tenancy has several disadvantages and risks. First, it creates gift tax implications—transferring property into joint tenancy is a taxable gift (though it may fall within annual gift tax exclusions).[84] Second, joint tenancy creates creditor exposure—creditors of either joint tenant can potentially attach or levy against jointly held property, even if the creditor's claim is against

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79 *Id*.

80 *Id*.

81 Jennifer Hendry, *'Leaving Nothing to Chance'?: Joint Tenancies, the 'Right' of Survivorship and Unilateral Severance,* 8 Oxford U. Commw. L.J. 45 (2008).

82 Timothy P. O'Sullivan, *Avoiding Probate*, CPA J. Online (Dec. 1994), http://archives.cpajournal.com/old/16531680.htm.

83 *Id*.

84 Sandra Sickler, *Use Joint Tenancy Only with Extreme Caution*, 1 Marquette Elder's Advisor 35 (2012), https://scholarship.law.marquette.edu/elders/vol1/iss2/8.

only one tenant.[85] Third, joint tenancy does not provide estate tax advantages—the deceased joint tenant's interest is included in the estate for federal and state estate tax purposes.[86] Lastly, joint ownership can create complications for Medicaid planning.[87] If an elderly or ill person is attempting to preserve assets for Medicaid eligibility (which has asset limits such as the five-year look back period),[88] placing assets in joint tenancy with a family member can disqualify the person from benefits because the joint tenant's presence makes the assets appear to be available to the Medicaid applicant.[89]

2. *Tenancy by the Entirety Alternatives for Unmarried Partners*

"Tenancy by the entirety" is a form of joint ownership available *only* to married couples in many states.[90] Tenancy by the entirety provides greater creditor protection and other benefits than joint tenancy.[91]

However, because tenancy by the entirety is generally limited to married couples, unmarried partners cannot use this form of ownership.[92] Some progressive states have created alternatives—such as "registered domestic partnership with tenancy by the entirety" rights—but these are available only in limited jurisdictions.[93]

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85 *Id*. at 36.

86 *Id*.

87 *Be Aware: Joint Tenancy Holds Risks and Medicaid Disadvantages*, Iowa Prob. Litig. (May 31, 2022), https://iowaprobatelitigation.com/be-aware-joint-tenancy-holds-risks-and-medicaid-disadvantages/.

88 *Understanding Look-Back Period for Medicaid*, Paying for Senior Care, https://www.payingforseniorcare.com/medicaid/look-back-period (last visited Nov. 30, 2025).

89 *Id*.

90 Julie M. Cheslik, *Tenancy by the Entirety Property and Transfers to Trusts*, 36 J. Am. Acad. Matrim. Law. 33, 36 (2023).

91 *Id*. at 37.

92 Damaris Rosich-Schwartz, *Tenancy by the Entirety: The Traditional Version of the Tenancy Is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships*, 84 N.D. L. Rev. 23 (2008).

93 *Tenancy by the Entirety States*, Asset Protection Planners, https://www.assetprotectionplanners.com/tenancy-entirety-states/ (last visited Nov. 30, 2025).

E. *Advance Directives and Powers of Attorney*

Advance directive tools become essential for unmarried partners so they can make decisions that follow the wishes of their partner in the event they become incapacitated. Such tools include Healthcare Proxy Designations, Financial Powers of Attorney, HIPAA Authorizations, and Disposition of Remains Directives.

Healthcare proxy designations assign someone to make medical decisions if the creator becomes unable.[94] For nontraditional families, healthcare proxies are essential to ensure unmarried partners can make crucial medical decisions.[95] Financial Powers of Attorney grant financial authority to act on the creator's behalf, allowing unmarried partners to manage finances without conservatorship proceedings.[96] HIPAA authorizations explicitly authorize medical providers to disclose medical information to unmarried partners and allow participation in medical decisions.[97] Disposition of remains directives specify funeral arrangements, cremation, and disposition of remains wishes, ensuring unmarried partners can participate in funeral decisions.[98] Some states provide statutory requirements and suggested language to use when creating disposition of remains directives, which can be essential to avoid legal liability.[99]

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94 Sophie Trarieux-Signol, Stéphane Moreau, Marie-Pierre Gourin, Amélie Penot, Geoffroy Edoux de Lafont, Pierre-Marie Preux & Dominique Bordessoule, *Factors Associated with the Designation of a Health Care Proxy and Writing Advance Directives for Patients Suffering from Haematological Malignancies*, 13 BMC Palliative Care 57 (Dec. 11, 2014).

95 *Id*.

96 Anisa Mohanty, Comment, *Medical Rights for Same-Sex Couples and Rainbow Families*, 13 Rich. J. L. & Pub. Int. 367, 371 (2010).

97 *Id*. at 372.

98 Catherine Read, *How and Why to Direct Disposition of Your Last Remains*, EAELS Blog, https://www.eaels.com/blog/how-and-why-to-direct-disposition-of-your-last-remains (last visited Nov. 20, 2025).

99 *Id*. *See also* Paloma Holloman, *Overlooked but Inevitable: Thoroughly Planning for the Disposition of Remains*, Dallas County Bar Association, https://www.dcba.org/mpage/v38-Paloma-Holloman (last visited Nov. 20, 2025); Lawrence Kamin, LLC, *Over My Dead Body: The Role of the Illinois Disposition of Remains Act in Disputes over a Decedent's Remains* (2019), https://www.lawrencekaminlaw.com/wp-content/uploads/2019/11/Over-My-Dead-Body-Illinois-Disposition-of-Remains-Act.pdf.

VI. Recent Legal Developments and Their Impact

A. *Landmark Judicial Decisions (2015-2025)*

1. Obergefell v. Hodges *(2015): Marriage Equality Foundations*

Obergefell v. Hodges stands as the holy grail moment for LGBTQ+ families. The U.S. Supreme Court held that the constitutional right to liberty and due process includes the right to marry, and that states cannot deny this right based on the couple's sexual orientation.[100] As a result, same-sex marriage became legal nationwide.

The immediate impact was transformative. Millions of same-sex couples who had lived without the legal right to marry suddenly gained the ability to access to full marital status.[101] The inheritance implications were profound: unmarried same-sex couples could become married couples with all spousal rights, including intestacy protections, spousal elective share rights, and the bundle of tax and financial benefits that accompany marital status.[102]

However, *Obergefell*'s impact was not unlimited. The decision addressed the right to marry but did not address all family law questions.[103] Non-married LGBTQ+ families, families using assisted reproduction, and other nontraditional family forms continued to face vulnerabilities not addressed by Obergefell.[104]

Additionally, the Supreme Court recently declined to hear Kim Davis's petition asking the justices to overturn the 2015 *Obergefell v. Hodges* ruling, effectively disallowing clerks from undermining marriage equality by refusing to issue marriage licenses based on the clerk's personal religious beliefs.[105]

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100 *Obergefell*, 576 U.S. 681.

101 Angela K. Perone, *Health Implications of the Supreme Court's* Obergefell vs. Hodges *Marriage Equality Decision*, 2 LGBT Health 196 (2015).

102 *Id*.

103 Marisa S. Fein, *An Inequitable Means to an Equitable End: Why Current Legal Processes Available to Non-Biological, LGBTQ+ Parents Fail to Live up to* Obergefell v. Hodges, 14 Drexel L. Rev. 165, 175 (2022).

104 *Id*. at 168.

105 Evrim Ağaci, *Supreme Court Leaves Same-Sex Marriage Rights Intact*, (Nov. 10, 2025), https://evrimagaci.org/gpt/supreme-court-leaves-same-sex-marriage-rights-intact-515942.

2. Pavan v. Smith *(2017): Birth Certificate Equal Treatment*

Following *Obergefell*, a secondary question arose: must states list both same-sex spouses on birth certificates for children born to the marriage? In *Pavan v. Smith*, the Supreme Court held that the answer was yes.[106] States cannot limit birth certificate listing to opposite-sex parents; both parents in a same-sex marriage must be listed on the birth certificate if they are the legal parents.[107]

The practical implications are significant. Children born to same-sex married couples now have birth certificates that clearly identify both parents, facilitating inheritance rights, tax benefits, and other parentage-based rights.[108] This provides certainty regarding parentage and eliminates questions about whether children born to same-sex couples have the same inheritance status as children born to opposite-sex couples.[109]

3. Bostock v. Clayton County *(2020): Sexual Orientation and Gender Identity Discrimination*

The Supreme Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination on the basis of sexual orientation or gender identity.[110] The Court ruled that an employer who fires an individual merely for being gay or transgender violates Title VII.[111] The Court's reasoning that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" has implications for other civil rights statutes.[112]

The ruling provides federal employment discrimination protection for LGBTQ+ individuals in all fifty states and has had far-reaching effects beyond employment law, with more than 250 cases citing *Bostock* in the two years following the decision.[113] This

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106 Pavan v. Smith, 582 U.S. 563, 564 (2017).

107 *Id*.

108 Brad Aldridge, *A Constellation of Benefits and a Universe of Equal Protection: The Extension of the Right to Marry Under* Pavan v. Smith, 72 Ark. L. Rev. 245 (2019).

109 *Id*.

110 Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020).

111 *Id*. at 644.

112 *Id*. at 660.

113 Evan Parness & Abby Rickeman, *Where Anti-Discrimination Law Stands 4 Years After* Bostock, Covington (June 13, 2024), https://www.cov.com/-/media/

decision highlights how recognition of LGBTQ+ rights under federal employment law may influence closing family law gaps and expanding inheritance protections for nontraditional families by reinforcing broader principles of equality and nondiscrimination.

4. *State Supreme Court Decisions on Parentage and Inheritance*

Beyond the Supreme Court, many state supreme courts have issued important decisions regarding parentage and inheritance for nontraditional families.[114] These decisions have progressively expanded recognition of non-biological parents, children born through assisted reproduction, and other nontraditional family structures.[115]

B. *Statutory Reform: Uniform Parentage Act (2017)*

The Uniform Parentage Act (2017) represents the most comprehensive effort to modernize parentage law across jurisdictions.[116] The Act provides uniform rules regarding presumptions of parentage, assisted reproduction, recognition of multiple parents, parentage proceedings, and registration of parentage orders.[117] The 2017 Act incorporates contemporary family structures and modern reproductive technology in ways that earlier versions did not.[118] However, adoption has been limited. Eight states have adopted the 2017 UPA in full, while some states have applied portions of the Uniform Act, and many states have never adopted it at all.[119] This patchwork causes families to face continued uncertainty

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files/corporate/publications/2024/06/where-anti-discrimination-law-stands-4-years-after-bostock.pdf.

114 Ally Nicol, *The Newclear Family: The Broadening Recognition of Non-Traditional Families and Where to Draw the Line*, 5 J. Inequality Inquiry 1 (2018), https://scholarship.law.umn.edu/jii/5.

115 *Id*. *See also* Allison K. Dudley, *The Legal Stranger: Colorado's Two-Legal-Parent Limit Leaves Nontraditional Families Behind*, 94 Colo. L. Rev. 1 (2023).

116 AAML Legislation Committee, *A Report on the Uniform Parentage Act (UPA 2017): Developments in State Law Regarding the Rights of Children*, 37 J. Am. Acad. Matrim. Law. 1 (2024).

117 *Id*. at 5.

118 *Id*.

119 *Id*. at 4.

regarding parentage determinations, particularly in assisted reproduction cases.[120]

C. *Tax Law Changes: Estate and Gift Tax Exemption Levels*

Federal estate and gift taxes impose significant taxes on large estates.[121] However, a substantial exemption exists: estates smaller than the exemption threshold ($13.99 million for 2023) are not subject to federal estate tax.[122]

This exemption applies to married couples and unmarried partners.[123] However, married couples can benefit from "portability"—the ability to combine both spouses' exemptions, effectively doubling the exemption.[124] Unmarried partners cannot do this; each partner has only a single exemption.[125]

For high-net-worth unmarried couples, this creates a disadvantage.[126] Upon the first partner's death, their unused exemption is lost, not carried forward.[127] This can result in unnecessary estate taxes for surviving partners who inherit a large estate.

D. *Emerging Issues*

1. *Multi-Parent Recognition Statutes (California and Maine)*

California and Maine have enacted statutes permitting more than two legal parents in limited circumstances, representing a radical departure from traditional family law with significant inheritance implications.[128] However, these statutes remain available

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120 *Id*. at 10.

121 Kim D. Fetrow, *Estate and Trust Planning and Basic Death Tax Concepts*, Heckscher, Teillon, Terrill & Sager, P.C. (May 10, 2023), https://pasef.provost.upenn.edu/wp-content/uploads/Estate-Tax-and-Planning-Concepts-2023-outline-02314068-2x9CCE7-1.pdf.

122 *Id*. at 11.

123 Patricia A. Cain, *Taxation of Unmarried Partners*, 99 Wash. U. L. Rev. 1931 (2022).

124 Fetrow, *supra* note 121, at 10.

125 Cain, *supra* note 123, at 11.

126 *Id*. at 5.

127 *Id*. at 13.

128 Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting* 31 J. Am. Acad. Matrim. Law. 175, 180 (2018).

only in the few states that have enacted them, creating continued variation across jurisdictions.[129]

2. *Cryptocurrency and Digital Asset Inheritance*

The rise of cryptocurrency and other digital assets creates novel inheritance questions.[130] How are digital assets transferred at death? How does an executor gain access to cryptocurrency held by the deceased? What if the deceased's private keys are lost?

Almost all states have enacted a version of the Revised Uniform Fiduciary Access to Digital Assets Law, developed by the National Conference of Commissioners on Uniform State Laws,[131] in order to address uncertainties for families with significant digital assets to avoid substantial losses when digital assets cannot be recovered or transferred at death. This uniform law permits executors and trustees to access the decedent's (or an incapacitated person's) digital assets.

3. *Gestational Carrier Compensation and Inheritance Rights*

As gestational surrogacy has become more common, questions have arisen regarding the legal status of gestational carriers and their potential rights or obligations regarding children born through surrogacy.[132] Additionally, questions arise regarding compensation to carriers—whether payments to gestational carriers constitute illegal payment for "lending" their womb or legitimate compensation for services rendered.[133] These questions remain contested in some jurisdictions and continue to evolve as more states address surrogacy law.[134]

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129 Courtney G. Joslin & Douglas NeJaime, *Multiparenthood*, 99 N.Y.U. L. Rev. 1242 (2024).

130 Ágnes Juhász, *Inheriting Digital Assets – A Glimpse into the Future*, 14 Jurid. Tribune – Rev. Comp. & Int'l L. 547 (Dec. 2024), https://www.tribunajuridica.eu/arhiva/y14v4/2.pdf.

131 Victoria J. Haneman, *The Law of Digital Resurrection*, 66 B.C. L. Rev. 1569, 1592–93 (2025).

132 Mutavdzic, *supra* note 28, at 268.

133 Evelina Manvelyan, Abha Rajendra Sathe, David Paul Lindars & Lusine Aghajanova, *Navigating the Gestational Surrogacy Seas: The Legalities and Complexities of Gestational Carrier Services*, J. Assisted Reprod. & Genetics (Oct. 23, 2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11621256/.

134 Mutavdzic, *supra* note 28, at 273.

VII. Best Practices and Recommendations

A. *For Practitioners*

1. *Comprehensive Client Intake Addressing Family Structure*

Estate planning attorneys should implement intake procedures that explicitly address the client's family structure.[135] Rather than assuming traditional family arrangements, the intake should ask:

a. Are you married? If not, are you in a committed partnership?
b. Do you have children? Are they biological children, adopted children, or stepchildren?
c. Have you used assisted reproduction technologies?
d. Who do you consider your "family"—people to whom you wish to leave property or who should make decisions on your behalf?
e. Who are your blood relatives, and do you wish to leave property to them or to exclude them?

This comprehensive intake ensures that the attorney understands the client's actual family structure and can provide appropriate planning.[136]

2. *Other Regular Practices to Implement*

For families with members living in multiple states, it is important to include choice of law provisions and consider the potential for relocation.[137] Estate planning documents should be reviewed every three to five years and after major life events, and collaboration with family law attorneys is essential for matters involving adoption, assisted reproduction parentage, and other complex family issues.[138]

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135 *Planning for Blended Families: From Intake to Administration*, WealthCounsel (Nov. 11, 2025), https://info.wealthcounsel.com/blog/planning-for-blended-families-from-intake-to-administration.

136 *Id.*

137 *Id.*

138 *Id.*

B. *For Nontraditional Families*

Since relationships are not always automatically recognized, marriage can provide many protections. However, marriage is not the preferred option for all nontraditional families, so families should take proactive steps through clear estate planning documents, legal recognition where available, and explicit agreements.

Comprehensive planning involves using multiple instruments such as wills or trusts, healthcare proxies, powers of attorney, disposition directives, beneficiary designations, and other legal recognition documents.[139] Also, open communication with family members can help reduce conflict and misunderstanding after death.[140] Estate plans should also be reviewed regularly—particularly after major life events such as forming or ending a partnership, adopting or having a child, significant financial changes, relocation, or major legal developments.[141]

VIII. Conclusion

Families today are endlessly creative, but the law is stuck clutching their 1950s pearls—shocked by love's bold new forms. Nontraditional families face legal uncertainty, navigating a patchwork of state laws that favor biology and marriage while ignoring bonds built on choice, care, and shared life. Because intestacy laws still echo mid-century ideals, these families must plan carefully to build their own legal protections. Estate planning becomes both practical and rebellious, using wills, trusts, healthcare proxies, and beneficiary designations to secure futures.

But this planning is not without costs. Nontraditional families invest time, money, and emotional energy crafting protections that married couples get automatically. They wrestle with confusing, inconsistent laws and must constantly keep their plans updated as the legal landscape shifts. Still, planning provides stability when

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139 Bill O'Leary, *Planning for Blended Families: From Intake to Administration*, Legacy Planning Law Group (Mar. 13, 2024), https://legacyplanninglawgroup.com/estate-planning-for-non-traditional-families/.

140 Daniel Rodríguez, *Estate Planning for Non-Traditional Families*, Legal Norcal, https://legalnorcal.com/estate-planning-non-traditional-families/" \t "_blank (last visited Feb. 2, 2026).

141 *Id*.

the law falls short, turning uncertainty into security—making sure intentions drive outcomes.

Even the best planning cannot erase structural unfairness. When family legitimacy depends on legal documents instead of recognition, the message is clear: family status remains conditional. True equality requires reforms—laws and court rulings that grant automatic rights to diverse family types. Updated adoption laws, modern intestacy rules, and universal parentage recognition would replace patchwork fixes with consistent justice so families are not forced to prove their worthiness to the system that should protect them.

Right now, nontraditional families face two futures: one of complex legal workarounds and one shaped by meaningful reform. The wisest path is a blend of both—planning while pushing for laws that make those plans unnecessary. After all, family law should protect relationships grounded in love and care, not just those fitting old molds. Until the law drops those pearls and looks ahead, careful planning is both a shield and a statement—a testament to families whose legitimacy lasts, even if the laws do not catch up.

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