

“Put Bluntly”, We Need to Contemplate Polyamory

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Introduction

Family law in Canada is currently founded on a dyadic and monogamous model of spousal relationships. However, family arrangements consisting of more than two adults in intimate, sexual, or romantic relationships, including polyamorous families, are becoming increasingly common.² These relationships are overlooked under existing Canadian family law legislation. Family law and family law practitioners in Canada must adjust to changing definitions of family as the failure to do so leaves a segment of the population with inadequate legal protections in both the formation and breakdown of their families.

This paper addresses consensual non-monogamous relationships in the family law context. The term “consensual non-monogamy” includes any intimate, sexual, or romantic adult relationship that, with the consent of all parties involved, is not exclusively limited to two people.³ Thus, cheating or infidelity does not fall under the umbrella of consensual non-monogamy, but relationships labelled as open or polyamorous relationships generally do. For the purpose of this paper, an “open relationship” refers to a relationship that is not sexually and/or romantically exclusive to two people, and may include a relationship between partners who have sexual or romantic interactions with others outside the primary relationship that are short-term or

¹ The authors thank Kimberley Santerre and Eira Glover for their comments on the draft of this paper.

² While we primarily discuss romantic and sexual relationships in this paper, we also wish to acknowledge that not all intimate, familial relationships are necessarily identified by the people in them as romantic or sexual.

³ See, for example, Terri D. Conley, et al, “A Critical Examination of Popular Assumptions About the Benefits and Outcomes of Monogamous Relationships” (2012) 17:2 *Personality & Social Psychology Rev* 124 at 126, DOI: <10.1177/1088868312467087>; Amy C. Moors, Ashley Ramos, and Heath Schechinger, “Bridging the Science Communication Gap: The Development of a Fact Sheet for Clinicians and Researchers About Consensually Nonmonogamous Relationships” (2021, August 26) *Psychology Sexual Orientation & Gender Diversity* (advance online publication), DOI: <10.1037/sgd0000487>.

exclusively sexual in nature. “Polyamory” refers to relationships that are not sexually and/or romantically exclusive to two people, and may imply a greater emphasis on the formation of lasting romantic and family relationships.⁴ Other relationship labels may be used by individuals in consensual non-monogamous relationships, such as “swinging”, “relationship anarchy”, and “ethical non-monogamy”.⁵ All of the aforementioned labels are socio-historically situated, evolving, and non-universal. Additionally, different individuals or groups may have alternate definitions or use for the relationship labels utilized in this paper. The relationship labels applied to specific individuals in this paper have been selected in an effort to reflect definitions used by those individuals at the material time.

Part I of this paper discusses the prevalence and increasing awareness of consensual non-monogamy (including polyamory and open relationships) in Canada and the United States. In this section, stigma of these relationships is also explored. Part II reviews four Canadian family law decisions from the past 10 years involving consensual non-monogamous relationships where the issue of non-monogamy was relevant, or was argued to be relevant, to the best interests of the children analysis. Part III reviews two judicial decisions out of Alberta that illustrate an existing gap in the *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 (“AIRA”), which raises questions about how such gaps in legislative frameworks could impact individuals in consensual non-monogamous relationships.⁶ Part IV identifies some of the questions that are unanswered by our current legislative frameworks and case law and poses hypothetical fact patterns for consideration. Lastly, Part V offers practical suggestions for family law practitioners that may assist in providing people in consensual non-monogamous relationships greater access to appropriate legal advice and the same legal protections as monogamous dyadic relationships.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ For greater discussion of the legislative frameworks across Canada and their impact on polyamorous relationships, see John-Paul E. Boyd, *Polyamorous Relationships and Family Law in Canada* (Calgary, AB: Canadian Research Institute for Law and the Family, April 2017), DOI: <10.11575/PRISM/34641>.

PART I: Prevalence, Awareness, and Stigma of Consensual Non-Monogamy

There is limited research regarding the prevalence of consensual non-monogamous relationships broadly, polyamorous relationships specifically, or people who identify as polyamorous. To date, the Canadian census has failed to provide insight into this issue. However, the research available does indicate that these families exist and that public interest and acceptance of such relationships is growing.

In a survey conducted in 2017 of 2,003 Canadians aged 18 and older who were recruited by random sampling of the Ipsos⁷ National Household Panel, an “open relationship” was defined to include all forms of consensual non-monogamous relationships. 11.9% of respondents to the survey reported that an open relationship was their ideal relationship type.⁸ Of the participants who were currently in a romantic relationship, 4.0% indicated they were currently in an open relationship. Further, 19.6% of all participants stated they had participated in an open relationship at some point during their lifetime.⁹

In the American context, analysis of two United States Census-based quota samples of single adults taken in 2013 and 2014 via the annual Singles in America survey, showed that 21.2% of 3,905 respondents to the 2013 survey and 21.9% of 4,813 respondents to the 2014 survey stated that they had previously engaged in an open sexual relationship.¹⁰ An “open sexual relationship” was defined in the 2013 and 2014 surveys as “an agreed-upon, sexually non-exclusive relationship”.¹¹ A more recent Singles in America survey, with a sample size of 3,438, asked

⁷ Ipsos is a global market research and consulting firm.

⁸ Nichole Fairbrother, Trevor A. Hart & Malcolm Fairbrother, “Open Relationship Prevalence, Characteristics, and Correlates in a Nationally Representative Sample of Canadian Adults” (2019) 56:6 J Sex Research 695 at 695, 697, 699, DOI: <10.1080/00224499.2019.1580667>.

⁹ *Ibid* at 698.

¹⁰ M.L. Hauptert, et al, “Prevalence of Experiences With Consensual Nonmonogamous Relationships: Findings From Two National Samples of Single Americans” (2017) 43:5 J Sex & Marital Therapy 424 at 431, DOI: <10.1080/0092623X.2016.1178675>..

¹¹ *Ibid*.

participants questions about polyamory specifically, as opposed to open relationships or consensual non-monogamy broadly, where polyamorous relationships were defined as “a committed, sexual and romantic relationship with multiple people at the same time”.¹² Analysis of the responses found that 16.8% of respondents indicated an openness or desire to engage in a polyamorous relationship¹³ and, that 10.7% of respondents stated they had previously engaged in polyamory at some point during their life.¹⁴

These studies suggest that there is growing openness in Canada and the United States to non-monogamous relationships.¹⁵ Likewise, interest in and awareness of consensual non-monogamy is also increasing. For example, a study that used Google Trends to assess Americans’ interest in information related to consensual non-monogamy found that searches for keywords relating to polyamory and open relationships had increased significantly over the 10-year period from 2006-2015.¹⁶ In a 2016 study, 60% of 100 United States residents aged 18 to 63 had heard of the term polyamory, while 30% agreed with the statement “I know people who have had polyamorous relationships”.¹⁷

The number of judicial decisions across Canada referencing polyamory has also been increasing over time. While the terms “polyamory” and “polyamorous” appeared in no judicial decisions prior to 2010, as indexed by the CanLII database, the same terms have appeared in 30 decisions made since 2010, as indexed by CanLII. The frequency of such appearances has increased over the period up to and including May 2022, as shown below:

¹² Amy C. Moors, Amanda N. Gesselman & Justin R. Garcia, “Desire, Familiarity, and Engagement in Polyamory: Results From a National Sample of Single Adults in the United States” (2021) 12:619640 *Frontiers in Psychology* 1 at 5, DOI: <10.3389/fpsyg.2021.619640>.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ For additional discussion of the make-up of polyamorous households and attitudes towards polyamorous relationships in Canada, see John-Paul E. Boyd, *Perceptions of Polyamory in Canada* (Calgary, AB: Canadian Research Institute for Law and the Family, December 2017), DOI: <10.11575/PRISM/34544>.

¹⁶ Amy C. Moors, “Has the American Public’s Interest in Information Related to Relationships Beyond ‘The Couple’ Increased Over Time?” (2017) 54:6 *J Sex Research* 677 at 680, DOI: <10.1080/00224499.2016.1178208>.

¹⁷ Kevin T. Hutzler, Traci A. Giuliano, Jordan R. Herselman & Sarah M. Johnson, “Three’s a crowd: public awareness and (mis)perceptions of polyamory” (2016) 7:2 *Psychology & Sexuality* 69 at 73.

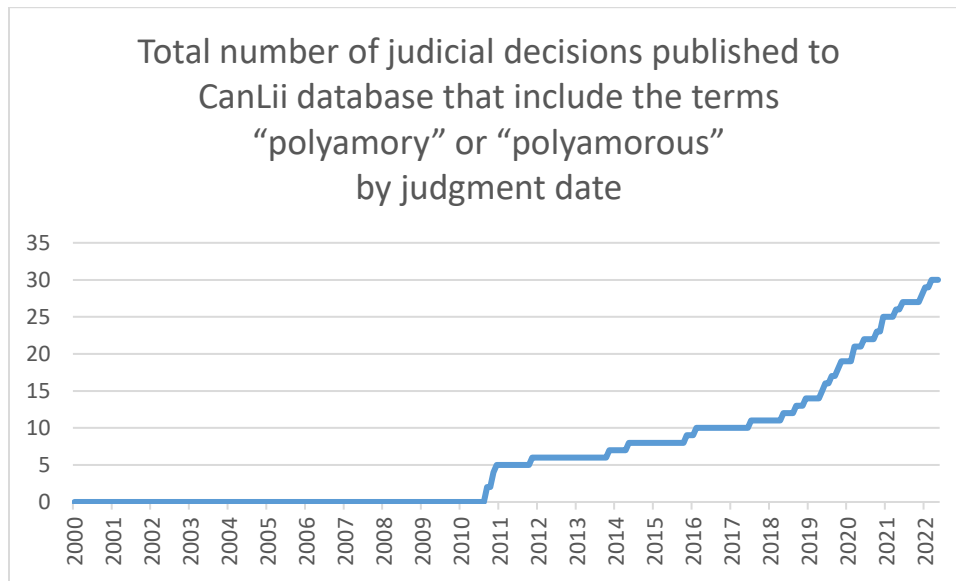


Fig. 1 - Total number of judicial decisions published to CanLII database that include the terms “polyamory” or “polyamorous” by judgment date

Meanwhile consensual non-monogamous relationships, including polyamorous relationships, have been and continue to be stigmatized. In response to a 2012 internet-based survey conducted through a US-based polyamory advocacy organization, of 4,062 people who self-identified as polyamorous, 28.5% reported experiencing some form of discrimination in the past 10 years, compared to 5.5% of the general United States population as a whole.¹⁸ A 2013 article published in *Analyses of Social Issues and Public Policy*, summarized four different methodological approaches applied to assess whether stigma attaches to consensual non-monogamous relationships and whether a halo effect (the reverse of stigmatization) surrounds monogamous relationships. The authors concluded that consensual non-monogamous relationships are stigmatized.¹⁹ They found that study “participants assumed that people in monogamous

¹⁸ Derrell W. Cox II, Jim Fleckenstein, & Curtis R. Bergstrand, “What do polys want? An overview of the 2012 loving more survey” (2013, June 21) Loving More, online: <<https://www.lovingmorenonprofit.org/polyamory-articles/2012-lovingmore-polyamory-survey/>>.

¹⁹ Terri D. Conley, Amy C. Moors, Jes L. Matsick, & Ali Ziegler, “The Fewer the Merrier?: Assessing Stigma Surrounding Consensually Non-monogamous Romantic Relationships” (2013) 13:1 *Analyses Social Issues & Public Policy* 1 at 5, 7, DOI: <10.1111/j.1530-2415.2012.01286.x>.

relationships were happier in their relationships, sexually more satisfied, and simply better citizens [emphasis added] than those in CNM [consensual non-monogamous] relationships.”²⁰ Similarly, a 2019 study that collected and analyzed 482 publicly accessible comments posted online by 224 individuals in response to three articles on the topic of polyamory, considered the question “How do people view polyamory?” and identified the following themes: 1) valid and beneficial; 2) unsustainable; 3) perverse, amoral, and unappealing; 4) acceptable; and 5) deficient.²¹ The author found that the “perverse, amoral, and unappealing” theme was associated with the perceptions that polyamory causes “broken” homes and is detrimental to the children of the adults involved, and with concerns about the erosion of society and defiance of religious views.²² The authors found that the tone and vocabulary used in comments with this theme closely resembled those commonly used in homophobic discourses.²³

The stigma, or the fear of stigma, that folks in consensual non-monogamous relationships face likely impacts the decision of whether to disclose their relationship to others. This may explain why despite the increased frequency of Canadian judicial decisions *referencing* polyamory over the past 12 years, there have been few judicial decisions addressing consensual non-monogamous relationships in the family law context across Canada, particularly where the nature of the relationship is closely tied to the issues in dispute between the parties.

PART II: Consensual Non-Monogamous Relationships and Best Interests

In preparing this paper, judicial decisions made from May 1, 2012, through April 30, 2022, as indexed by the CanLII and LexisNexis Quicklaw databases, were examined.²⁴ Of the decisions reviewed, 11 were identified as family law decisions made in circumstances where a consensual

²⁰ *Ibid* at 23.

²¹ Léa J Séguin, “The Good, the Bad, and the Ugly: Lay Attitudes and Perceptions of Polyamory” (2019) 22:4 *Sexualities* 669 at 676, DOI: <10.1177/1363460717713382>.

²² *Ibid* at 679.

²³ *Ibid* at 680.

²⁴ For a record of the search criteria engaged, see Appendix “A”.

non-monogamous relationship was in evidence and was either not contradicted or was found by the court to exist. However, of those, only five were decisions in which the existence of a consensual non-monogamous relationship was closely connected with the issues raised by the parties before the court. Four of those decisions addressed the best interest analysis and are discussed in this part of the paper.

More than Two Parents (Parentage without Assisted Reproduction & Unknown Parentage)

In *British Columbia Birth Registration No. 2018-XX-XX5815*, Olivia, Eliza, and Bill (the “Petitioners”) had been living together in a committed polyamorous relationship since 2017.²⁵ To them, this meant that each party had a relationship with one another and each of their relationships with each other was considered equal.²⁶ In early 2018, Bill and Eliza conceived a child through sexual intercourse, without the use of assisted reproduction. During the pregnancy, Olivia, Eliza, and Bill agreed that Olivia would be involved in the child’s life as a “full parent”.²⁷ The child, Clarke, was born in the fall of 2018.²⁸

Olivia’s role in Clarke’s life was the same as Eliza’s and Bill’s. She identified as Clarke’s parent and Clarke saw her as one of his mothers.²⁹ Despite this reality, Olivia, as a second mom, had no legal rights as a parent under the *Family Law Act*, S.B.C. 2011, c 25 (“*FLA*”).³⁰ The *FLA* recognizes that a child may have three or more legal parents if the child is conceived through assisted reproduction, but it does not contemplate a child having more than two parents, through agreement or otherwise, when a child is conceived without the use of assisted reproduction.³¹ Clarke was conceived without the use of assisted reproduction and, as a result, only his biological parents—Bill and Eliza—were recognized on his birth registration.

²⁵ *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767, at para 1 [“*No. 2018-XX-XX5815*”]

²⁶ *Ibid* at para 8.

²⁷ *Ibid* at para 10.

²⁸ *Ibid* at para 1.

²⁹ *Ibid* at para 78.

³⁰ *Ibid* at para 79.

³¹ *Ibid* at para 31.

When Clarke was two and a half years old, Olivia, Eliza, and Bill sought a declaration that Olivia was Clarke's third legal parent and that his birth registration be amended accordingly. The Honourable Madam Justice Wilkinson agreed, declared that Olivia was Clarke's legal parent, and directed the BC Vital Statistics Agency to amend Clarke's birth registration so that Olivia be named as Clarke's third legal parent, alongside Bill and Eliza.³²

Justice Wilkinson affirmed that British Columbia courts are statutorily required to consider the best interests of the child in deciding whether a parentage declaration is warranted.³³ She considered that:

- a) Clarke was being raised in a loving and supportive family by three highly capable parents and it was in Clarke's best interests to have all of his parents legally recognized as such;³⁴
- b) recognition of Olivia as one of Clarke's legal parents would secure Olivia's legal financial obligations to Clarke;³⁵
- c) recognition of Olivia as one of Clarke's legal parents would also mean that neither Olivia nor Clarke would be placed in a position of having to differentiate their relationship from Clarke's relationship with Eliza and Bill. Such a legal distinction between the relationships may create an inequity between their roles in Clarke's life and negatively impact Clarke; and,³⁶
- d) recognition of Olivia as Clarke's legal parent would also allow Olivia to access additional statutory and other benefits for Clarke, which, in turn, would positively impact him (e.g. her employer's extended health plan).³⁷

³² *Ibid* at para 92.

³³ *Ibid* at paras 52-54.

³⁴ *Ibid* at paras 82, 92.

³⁵ *Ibid* at para 80.

³⁶ *Ibid*.

³⁷ *Ibid*.

In the analysis of the issue before her, Justice Wilkinson also considered the decision of the Honorable Justice Fowler in *C.C. (Re)*, 2018 NLSC 71 (“*C.C. (Re)*”), in which the Newfoundland Supreme Court made a declaratory order pursuant to its *parens patriae* jurisdiction that the birth mother of a child and the two men who were the mother’s partners in a polyamorous relationship were the child’s three parents. In that circumstance, the three parents had intentionally chosen not to know which of the two men was the biological father of the child.³⁸ Pursuant to section 10 of the *Children’s Law Act*, RSNL 1990, c 13 (the “*CLA*”), which applied in *C.C. (Re)*, “Where circumstances exist that give rise to a presumption that more than 1 man may be the father, no presumption shall be made as to paternity and no one is recognized in law to be the father unless the court so finds under subsection 7(2) [of the *CLA*]”³⁹. Subsection 7(2) states that, “Where the court finds on the balance of probabilities that a man is or is not the father of a child, the court may make a declaratory order to that effect.”⁴⁰

In *C.C. (Re)*, Justice Fowler found that:

- a) the child’s uncertain biological parentage seemed to be an “adhesive force” that blended the identity of both men as the child’s fathers;
- b) the two men shared an equal likelihood of being the child’s father;
- c) denying the child dual paternal parentage would not be in the child’s best interests; and,
- d) there was “a gap in the *CLA*, which was not intentional but which acts against the best interests of a child born into such a polyamorous relationship”.⁴¹

In *British Columbia Birth Registration No. 2018-XX-XX581*, the Attorney General of British Columbia opposed the relief sought by the Petitioners and argued that Part 3 (Parentage) of the

³⁸ *Ibid* at para 49.

³⁹ *Children’s Law Act*, RSNL 1990, c 13, s 10(2).

⁴⁰ *Ibid* at s 7(2).

⁴¹ *C.C. (Re)*, 2018 NLSC 71, at para 38.

FLA is a complete code for determining parentage in British Columbia.⁴² However, Justice Wilkinson found that there is a gap in the existing legislation with respect to children conceived through sexual intercourse, without assisted reproduction, who have more than two parents.⁴³ Justice Wilkinson invoked the *parens patriae* jurisdiction to fill this gap.⁴⁴

Although the Attorney General of British Columbia argued that the difference between being a “parent” and being a “guardian” was nominal⁴⁵ and that a parentage declaration would not give Olivia many more, if anymore, substantive rights, Justice Wilkinson held that guardianship was not equivalent to parentage and guardianship would not be a “cure-all” for Olivia. She went on to state that a declaration of parentage is a lifelong immutable declaration of status and there are significant rights and responsibilities that come along with it. It allows the parent to fully participate in the child’s life. Parentage also determines lineage, citizenship, potential access to parental leave and certain financial obligations and ensures that a child will inherit on intestacy. The key difference between parentage and guardianship is that the relationship between a parent and their child cannot be broken.⁴⁶

Justice Wilkinson held that when changes were made to the provincial legislation in 2013, the British Columbia legislature did not consider the possibility a child might be conceived through sexual intercourse and have more than two parents. Whether this oversight was a reflection of changing social conditions and attitudes, or was simply a misstep by the legislature, as Justice Wilkinson said it, “Put bluntly, the BC legislature did not contemplate polyamorous families.”⁴⁷

⁴² *No. 2018-XX-XX5815 supra* note 25 at para 56.

⁴³ *Ibid* at para 68.

⁴⁴ *Ibid* at para 82.

⁴⁵ *Ibid* at para 41.

⁴⁶ *Ibid* at para 46.

⁴⁷ *Ibid* at para 68.

A Child's Relationships with Significant Persons in the Child's Life

In *B.D.G. v. C.M.B.*, 2016 BCPC 97, C.M.B., the mother of two young children, A.Q.G. and S.G. (the “young children”), sought an order allowing her to move the young children from Nanaimo, British Columbia to Edmonton, Alberta. The young children’s father, B.D.G., opposed the relocation. In addition to deciding whether or not to allow the relocation, the Court addressed the matters of parental responsibilities and parenting arrangements.⁴⁸

At the time B.D.G. and C.M.B. commenced their relationship, B.D.G. was involved in a polyamorous relationship with two other women, C.A. and T.S. The three of them, B.D.G., C.A., and T.S., lived together. B.D.G. had a child with each of C.A. and T.S. (the “older children”).⁴⁹ Neither C.A. nor T.S. was aware of the nature of B.D.G.’s involvement with C.M.B. When they learned of the relationship, C.A. and T.S. both moved out of the home they shared with B.D.G. and all three continued to collectively parent the older children.⁵⁰

In or about the fall of 2007, C.M.B., C.A. and B.D.G. commenced a polyamorous relationship, which lasted for five years.⁵¹

In July 2010, B.D.G., C.M.B., C.A., T.S., and the older children all moved from Edmonton to Nanaimo. T.S. moved into a separate residence. B.D.G., C.M.B., C.A. and the older children moved into a house located on a large property together.⁵² The older children spent half their time with T.S. and the other half with B.D.G., C.M.B., and C.A.⁵³ T.S., C.A. and B.D.G. had extended family in the Nanaimo area. C.M.B. did not. Most of her family lived in Edmonton.⁵⁴

⁴⁸ *B.D.G. v. C.M.B.*, 2016 BCPC 97, at para 1 [*B.D.G.* 2016].

⁴⁹ *Ibid* at para 6.

⁵⁰ *Ibid* at para 7.

⁵¹ *Ibid* at para 11.

⁵² *Ibid* at para 12.

⁵³ *Ibid* at para 13.

⁵⁴ *Ibid* at para 14.

B.D.G. suffered from a chronic medical condition and had not worked since the parties moved to British Columbia. After the move, both C.M.B. and C.A. found full-time employment in Nanaimo, which supported the family financially.⁵⁵ Following the birth of the first of the young children, A.Q.G., C.M.B. took a maternity leave from her employment.⁵⁶

In or about early July 2012, prior to S.G.'s birth, C.M.B. told B.D.G. that she wanted to end their relationship and return to Edmonton with A.Q.G.⁵⁷ C.M.B. separated from B.D.G. and C.A. in July 2012 and left the home in August, staying with a friend.⁵⁸ Following the separation, C.M.B. alleged that B.D.G. had been and was financially and otherwise controlling of her.⁵⁹ Post-separation interim orders were made granting interim joint custody and guardianship of A.Q.G. to B.D.G. and C.M.B., as well as dealing with access to A.Q.G., and after S.G.'s birth post-separation, to S.G. also.⁶⁰ The trial judge who first heard the matter decided that C.M.B. could not relocate A.Q.G. and S.G. to Edmonton and imposed an equal and shared parenting schedule for the young children in Nanaimo, British Columbia.

On appeal, the decision was overturned and remitted for a new hearing, based on the trial judge's failure to apprehend or consider important evidence relevant to mandatory factors that must be assessed in determining the young children's best interests.⁶¹ The parents' polyamorous relationship was not part of the basis for the successful appeal. In the course of that appeal decision, the Court held that the finding in *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, which was that there was a reasoned apprehension that polygamy is inherently harmful,⁶² could not be said to necessarily extend to multi-party, unmarried

⁵⁵ *Ibid* at para 15.

⁵⁶ *Ibid* at para 16.

⁵⁷ *Ibid* at para 19.

⁵⁸ *Ibid* at para 20.

⁵⁹ *Ibid* at para 21.

⁶⁰ *Ibid* at paras 22-28.

⁶¹ *C.M.B. v. B.D.G.*, 2014 BCSC 780 at para 150 [*C.M.B.* 2014].

⁶² *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, at para 1182.

relationships or common-law cohabitation.⁶³ The issue of whether or not the parties' polyamorous relationship and the young children's ongoing exposure to their father's polyamorous lifestyle may impact the young children's best interests was one to be decided on the evidence. The Court of Appeal acknowledged that, while a more sensitive inquiry into that impact may have been warranted by the trial judge, it could not be concluded that the absence of such an inquiry was a reversible error.⁶⁴

On the second hearing of the matter, the Honorable Judge Lamperson considered the following 4 scenarios in its analysis that were set out in *S.S.L. v. J.W.W.*, 2010 BCCA 55 (“*SSL*”):

- a) primary residence with mother, C.M.B., in Edmonton, Alberta;
- b) primary residence with father, B.D.G., in Nanaimo, BC;
- c) shared parenting in Nanaimo; and
- d) shared parenting in Edmonton.⁶⁵

Judge Lamperson also considered *Fotsch v Begin*, 2015 BCCA 403 (“*Fotsch*”), where the British Columbia Court of Appeal considered whether the *FLA* requires the trial judge to apply the four scenario analysis mandated in *S.S.L.* Judge Lamperson held that, given the *Fotsch* decision, the Court was no longer required to apply the four scenario analysis. The reality, however, was that in this case, as in all relocation cases, there were four possible outcomes.⁶⁶

Judge Lamperson found that the question of primary residence was evenly balanced between C.M.B. and B.D.G. Therefore, the ultimate decision would come down to whether Judge Lamperson determined that it was in A.Q.G. and S.G.'s best interests to live in Nanaimo or in Edmonton.⁶⁷

⁶³ *C.M.B.* 2014 *supra* note 61 at para 121.

⁶⁴ *Ibid* at para 122.

⁶⁵ *B.D.G.* 2016, *supra* note 48, at para 65.

⁶⁶ *Ibid* at para 78.

⁶⁷ *Ibid* at para 94.

In assessing the evidence of family violence, Judge Lamperson found that B.D.G.'s account of the incidents was more detailed and more plausible and considered there was no reason to believe that there would be any further problems with family violence. In all of the circumstances, the violent incidents were a neutral factor in the consideration of primary residence.⁶⁸

Judge Lamperson confirmed that there was no evidence to support a concern that being raised in a polyamorous family would have negative consequences for the young children and there was no evidence that they had been negatively affected by spending half their time for the past two and one half years in a polyamorous household.⁶⁹

Among the considerations in the best interests of the child analysis under section 37 of the *FLA*, Judge Lamperson considered that if C.M.B. relocated to Edmonton, the young children may well lose the benefit of having the very close relationship they currently maintained with their father and would almost certainly lose the close relationship they had with their step-mothers and half-brothers.⁷⁰ Judge Lamperson found that the young children's need for stability, given their age and stage of development, would be best served if they were able to maintain a close bond with all of the most significant people in their lives, which included their father, stepmothers, and half-brothers.⁷¹ It would not be in the young children's best interests to relocate them from Nanaimo to Edmonton.⁷²

⁶⁸ *Ibid* at paras 115-119.

⁶⁹ *Ibid* at paras 124-125.

⁷⁰ *Ibid* at para 169.

⁷¹ *Ibid* at para 208.

⁷² *Ibid* at para 220.

COVID-19, Introducing Children to Polyamory, & Jurisdiction of Parenting Coordinator

In *Buckman v. Wyckham*, 2020 BCSC 2076, the parties had two children.⁷³ The parties reached a settlement agreement on September 17, 2020, and a Final Order was made on December 3, 2020, which provided that the parties would share custody of the children under the *Divorce Act*, R.S.C. 1985, c 3 (2nd Supp.) (the “*Divorce Act*”) and parental responsibilities for the children under the *FLA*.⁷⁴ In November 2019, the children’s father entered into a polyamorous relationship with a married woman, after meeting the woman and her husband through a local polyamory group.⁷⁵ The father took the position that the children’s mother became aware of the polyamorous relationship in March 2020, prior to the settlement.⁷⁶ The mother said that it was only during the course of the applications before the Court, that the father had clarified that he was not currently dating anyone other than his new partner and that neither his new partner nor her husband were currently dating anyone else.⁷⁷

In the parties’ cross-applications, the mother raised concerns about the potential for increased exposure to COVID-19 due to the father’s polyamorous relationship. In particular, she argued that the father’s new partner was not an “occupant” of his apartment within the meaning of the Public Health Orders in effect in British Columbia and that by having in-person, in-home visits with a person who was not an “occupant” of his apartment the father was in breach of those orders.⁷⁸ Due to these concerns, the mother withheld the children from their regular parenting time with the father and sought a variation of the parties’ Final Order.⁷⁹ The mother also sought an order restraining the father from introducing the children to either his new partner or to “the concept of polyamory” until the parties had followed the dispute resolution mechanisms set out

⁷³ *Buckman v. Wyckham*, 2020 BCSC 2076, at para 6.

⁷⁴ *Ibid* at paras 7, 52.

⁷⁵ *Ibid* at para 10.

⁷⁶ *Ibid* at para 11.

⁷⁷ *Ibid* at para 15.

⁷⁸ *Ibid* at para 15.

⁷⁹ *Ibid* at paras 4, 15.

in the Final Order or, failing resolution, until the court determined the matter.⁸⁰ The father sought a declaration that his parenting time had been wrongfully denied by the mother and an order for compensatory parenting time.⁸¹

The Honourable Justice Kent found that the father and his new partner were in a genuine long-term relationship and that the new partner was living in the father's apartment when she was not living at the home in Vancouver that she shared with her husband; thus concluding that she was an “occupant” of the father’s apartment.⁸² The evidence indicated that the father, his new partner, and his new partner’s husband were not behaving recklessly, were free of any COVID-19 symptoms, and were participating in COVID-19 safety measures.⁸³ The Court found there was little, if any, increased risk to the physical safety of the children arising from their introduction to the father's new partner and that there were no grounds for varying the parenting arrangements in place under the Final Order. Justice Kent ordered that those arrangements must immediately resume, with compensatory parenting time being provided to the father for his parenting time missed from December 2020 to the date of judgment.⁸⁴

The Court also declined to grant the restraining order sought by the mother.⁸⁵ However, the Court noted, among other things, that the parties’ Final Order identified the “introduction of a significant other to the children” as a matter sufficiently significant that it required “consultation” with the parties’ co-parenting counsellor or parenting coordinator.⁸⁶ The father argued that the introduction of his new partner and the concept of polyamory to the children was an ordinary decision to be determined without reference to the mother’s preferences and without recourse to the parties’ parenting coordinator and that such determinations may be proscribed by section 6(4)(b) of the *Family Law Act Regulation*, B.C. Reg. 84/2019, which deals with the

⁸⁰ *Ibid* at para 4.

⁸¹ *Ibid* at para 3.

⁸² *Ibid* at para 39.

⁸³ *Ibid* at para 49.

⁸⁴ *Ibid* at paras 49-50.

⁸⁵ *Ibid* at para 57.

⁸⁶ *Ibid* at para 55.

jurisdiction of parenting coordinators.⁸⁷ Nonetheless, the Court found that “the introduction to the children of both the father's new partner and the concept of polyamory generally are sufficiently significant and important decisions that warrant discussion with the mother beforehand and, if necessary, the involvement of the co-parenting counsellor for advice and the parenting coordinator for determination.”⁸⁸ The Court also held that the parties’ parenting coordinator would have jurisdiction to make a determination with respect to the manner in which introduction to the children of the father's new partner should be effected. Such a determination would not involve granting parenting time or contact to the father’s new partner, which would otherwise be outside the scope of the parenting coordinator’s jurisdiction.⁸⁹

In the aforementioned cases, the polyamorous nature of the parties’ relationship was closely connected to the issues in dispute. In those cases, which all required a best interest analysis, the Court did not conclude that the consensual non-monogamous character of the parents’ relationship negatively impacted the children’s best interests. Arguably, the Court was able to arrive at the decisions it did because of the nature of the best interest test, which provides flexibility in the results that can be reached. However, the same cannot be said for the legal analysis under some other areas of dispute in family law. In the next section of the paper, two Alberta cases dealing with spousal support are reviewed. These cases illustrate the ways in which a failure to explicitly recognize consensual non-monogamous relationships in legislation could leave individuals in these relationships without legal obligations or protections.

PART III – Relationship Exclusivity Under the AIRA

Mitchell v. Reykdal, 2021 ABQB 301, rev’d 2022 ABCA 105 (“*Mitchell*”), involved three individuals, Gwen and David, the parties to the matter, and Diane, who was David’s wife. These

⁸⁷ *Ibid* at para 54.

⁸⁸ *Ibid* at para 55.

⁸⁹ *Ibid* at para 56.

individuals were not in a consensual non-monogamous relationship. However, there were concurrent relationships between David and Gwen and between David and Diane.

Gwen and David had been in a relationship for over 17 years. Gwen lived in homes that David purchased or rented during that time.⁹⁰ She had given up her full time job to be a homemaker early in her relationship with David and she was never asked by David to pay rent or contribute much to household expenses.⁹¹ However, during the entirety of the relationship between David and Gwen, David remained married to his wife, Diane, and returned periodically to the matrimonial home he shared with her and their three sons.⁹² Gwen's understanding was that David was separated from his wife but he returned back to their home every second weekend as part of the family's parenting arrangements.⁹³ David worked in the oil and gas industry so he was away from Diane for extended periods, which assisted in keeping his relationship to Gwen a secret from Diane.⁹⁴

The Honorable Justice Loparco described *Mitchell* as “a novel case with little precedential guidance”⁹⁵. She emphasized that, when the legislation governing interdependent partner obligations was enacted, the intent was to ensure a dependent was properly supported after the termination of the relationship. However, Justice Loparco stated that the legislators appeared not to have contemplated that certain married people might be in a legitimate relationship of interdependence with another person without being truthful about the extent of their relationship with their spouse.⁹⁶ Justice Loparco framed the issue as, “whether, despite the deceit, the legislation is a complete bar that would prohibit support to the unmarried partner”.⁹⁷

⁹⁰ *Mitchell v. Reykdal*, 2021 ABQB 301 at para 3.

⁹¹ *Ibid* at para 5.

⁹² *Ibid* at paras 3, 6.

⁹³ *Ibid* at para 6.

⁹⁴ *Ibid* at para 7.

⁹⁵ *Ibid* at para 9.

⁹⁶ *Ibid*.

⁹⁷ *Ibid* at para 10.

In her analysis of the issues before the Court, Justice Loparco reviewed the relevant portions of the *Adult Interdependent Relationships Act* SA 2002, c A-4.5 (“*AIRA*”). Section 5(1) of *AIRA* specifically includes a restriction that, “A person cannot at any one time have more than one adult interdependent partner”.⁹⁸ Section 5(2) of *AIRA* states, “a married person cannot become an adult interdependent partner while living with his or her spouse.” Justice Loparco said that legislative interpretation of s. 5(2) was required to determine what was meant by “living with” a spouse and whether, when interpreting the purpose of *AIRA* as a whole, a finding that an interdependent partner continued to live with their spouse was a complete bar to adult support regardless of the nature of the interdependency.⁹⁹ Justice Loparco determined, interpreting the language of the *AIRA* “remedially”, that Gwen did have standing as an adult interdependent partner. This determination was premised on the fact that David was not “living with” Diane during the 17-year period that he was in a relationship with Gwen and as a result Gwen was entitled to support. Thus, the Court found that being married did not prohibit a finding that an individual also had an adult interdependent partnership with another person.

On appeal, the Court was satisfied that Justice Loparco had reasonably concluded David was living with Gwen.¹⁰⁰ However, it also determined that David had been living with Diane at the same time¹⁰¹. Gwen would have qualified as David’s adult interdependent partner, but for the operation of s. 5 of the *AIRA*.¹⁰² The Court of Appeal stated, “One can well understand having sympathy for both [Gwen and Diane], but the *Act* does not provide a remedy.”¹⁰³ The Court of Appeal determined that Justice Loparco had attempted to extend the reach of s. 5 of *AIRA* inappropriately and arrived at the incorrect result.¹⁰⁴

⁹⁸ *Adult Interdependent Relationships Act*, SA 2002, c A-4.5 [“*AIRA*”].

⁹⁹ *Mitchell v Reykdal*, 2022 ABCA 105 at para 27.

¹⁰⁰ *Ibid* at para 18.

¹⁰¹ *Ibid* at para 26.

¹⁰² *Ibid*.

¹⁰³ *Ibid* at para

¹⁰⁴ *Ibid* at para 21.

In an earlier Alberta decision, *MacDonald v Neilson*, 2018 ABPC 302 (“*MacDonald*”), the Court also considered s. 5 of the *AIRA*, but in a situation where the parties agreed that they had been in a polyamorous relationship. In *MacDonald*, the parties had lived together since 2006, had a child together in 2008 and described their relationship as “common-law”.¹⁰⁵ They also described their relationship as having become polyamorous in 2014, meaning they would be open to other sexual relationships while remaining together.¹⁰⁶ Also in 2014, Mr. Neilson’s other partner, Jessica, moved into the parties’ home, which was in military housing. Jessica was described as “an alternate sexual partner for Mr. Neilson and also provided support for Ms. MacDonald in caring for [the child]. There was evidence that at one point Jessica was compensated \$400.00/month for cellphone expenses and possibly for monies expended for [the child].”¹⁰⁷ Ms. MacDonald and Mr. Neilson separated in May 2018.¹⁰⁸ Ms. MacDonald, Jessica, and the child all left the military housing in June 2018 and moved together to a 4-bedroom duplex, where they continued to reside together at the time of the parties’ interim hearing.¹⁰⁹

The Honorable Judge D.G. Hancock was required to consider whether the parties were in an adult interdependent relationship, and in particular whether the fact that Ms. MacDonald and Mr. Neilson’s relationship became polyamorous in 2014 terminated the adult interdependent relationship between them. The Court also considered whether Jessica’s income should be taken into account with respect to any obligation that Mr. Neilson pay spousal support to Ms. MacDonald, when determining the parties’ standard of living and income disparity.¹¹⁰ In the analysis, the Court acknowledged that s. 5(1) of the *AIRA* provides that a person can only have one adult interdependent partner at a time.¹¹¹ Nonetheless, the Court determined that Ms. MacDonald and Mr. Neilson were adult interdependent partners¹¹² resolving the issue by finding that, “There

¹⁰⁵ *MacDonald v Neilson*, 2018 ABPC 302, at para 8.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* at para 10.

¹⁰⁸ *Ibid* at para 9.

¹⁰⁹ *Ibid* at para 15.

¹¹⁰ *Ibid* at para 17.

¹¹¹ *Ibid* at paras 32, 35.

¹¹² *Ibid* at para 36.

is no evidence or indication that Mr. Neilson intended to or did terminate his relationship with Ms. MacDonald and entered into a new relationship with Jessica.”¹¹³ In other words, despite the clear evidence before it, the Court disregarded the fact that the parties had entered into a polyamorous relationship for a portion of their relationship.

Judge Hancock also found that the relationship between Jessica and Ms. MacDonald was nothing more than “a house sharing relationship”. However, the Court also acknowledged that Jessica continued to support Ms. MacDonald in providing care for the child and was described as having a strong relationship with the child.¹¹⁴ Judge Hancock found no evidence to suggest Jessica had any legal responsibility for Ms. MacDonald or the child.¹¹⁵ Judge Hancock gave no further reference to Jessica or her income, except to say that “without the fact of a roommate sharing expenses Ms. Macdonald would not be in a financial position to afford to maintain her standard of living at an equivalent level to what she and Mr. Neilson shared, nor to what Mr. Neilson currently enjoys”, and held that Ms. MacDonald was entitled to support from Mr. Neilson.¹¹⁶

What the cases in Part II and Part III of the paper suggest is that presently, a person engaged in a committed intimate relationship with more than one person concurrently and with the knowledge and consent of all parties involved, will likely be confused about how family law legislation in their jurisdiction will impact them. Similarly, family law practitioners trying to assist and advise such parties on their rights and obligations upon the breakdown of these relationships can in many instances provide limited definitive guidance.

¹¹³ *Ibid.*

¹¹⁴ *Ibid* at para 15.

¹¹⁵ *Ibid* at para 17.

¹¹⁶ *Ibid* at paras 51, 53-54.

PART IV: Unanswered Questions for People in Marriage-Like Consensual Non-Monogamous Relationships

Provincial and federal family law legislation across Canada does not acknowledge or explicitly provide for consensual non-monogamous spouses, although under only a few statutes is the possibility completely foreclosed. At the federal level, the *Civil Marriage Act*, SC 2005, c 33, defines marriage, for civil purposes, as the lawful union of two persons to the exclusion of all others.¹¹⁷ At the provincial level, there is some legislation, namely the Alberta *AIRA*, which specifically provides that a person cannot at any one time have more than one adult interdependent partner and a married person cannot become an adult interdependent partner while living with his or her spouse.¹¹⁸ Meanwhile, in some provincial jurisdictions, there are less uniform frameworks under which certain rights or responsibilities that might otherwise arise upon separation for unmarried partners in marriage-like or interdependent relationships in other jurisdictions, are limited to married spouses, which, in most circumstances, has the effect of limiting the number of relationships that can concurrently attract such rights and responsibilities. Property division under the Ontario, *Family Law Act*, RSO 1990, c F.3, is an example of this.¹¹⁹

While courts in several instances have acknowledged the existence and significance of consensual non-monogamous relationships, there remain cavernous gaps in existing legislative frameworks that have not been resolved by the limited body of Canadian case law that exists. The result leaves uncertainty and questions for people in marriage-like consensual non-monogamous relationships. The following are a few examples of such questions:¹²⁰

¹¹⁷ *Civil Marriage Act*, SC 2005, c 33, s 2.

¹¹⁸ *AIRA*, supra note 98 at s 5.

¹¹⁹ *Family Law Act*, RSO 1990, c F.3, s 1 and Part 1. However, Ontario also illustrates one exceptional circumstance in which the restriction of certain relief in a family matter to married partners does not necessarily have the effect of restricting that relief to arising in only one concurrent relationship, as Ontario also has a provision that recognizes as “spouses” individuals whose marriage is actually or potentially polygamous, where that marriage was celebrated under a system of law that recognizes it as valid, see s. 1(2).

¹²⁰ This is not intended to provide an exhaustive or authoritative list of issues that arise as a result of the legislative gaps, but rather to highlight some of the considerations and issues at hand.

Spousal Support

Principles relating to spousal support that may be tied to the notion that only strictly dyadic and monogamous relationships give rise to support obligations include the following:

1. The non-compensatory basis for entitlement to spousal support involves a comparison of the standard of living of each spouse after separation to the marital standard of living.¹²¹ How will this be applied in circumstances in which one spouse separates from a household but more than one income-earning spouse, who was a member of the household, remains?
2. The “with child support” formula under the *Spousal Support Advisory Guidelines* (“SSAGs”) provides for a split of the pool of combined net incomes between two spouses after adjustment for the payment of child support, such that the recipient spouse receives between 40 and 46 per cent of the combined individual net disposable incomes (“INDI”) of two spouses.¹²² What additional considerations, if any, apply when there are more than two spouses? Is a split of the INDI to be assessed on an individual or household basis? What is the impact of these different approaches on the standard of living experienced by children when travelling between households?
3. The “with child support” formula under the SSAGs provides for a situation in which a payor has concurrent child and spousal support obligations, payable to the same recipient, and takes into consideration the priority of child support obligations and the payor’s ability to pay. How might the same considerations impact spousal support obligations in

¹²¹ *Chutter v. Chutter*, 2008 BCCA 507 at paras. 57 to 61, reconsideration denied 2009 BCCA 177, leave to appeal refused 2009 CanLII 27232 (SCC).

¹²² Carol J. Rogerson & D.A. Rollie Thompson, *Spousal Support Advisory Guidelines*, (Ottawa: Department of Justice, 2008) at 74-78.

the event that more than one concurrent relationship ends, and the payor is obliged to pay child support to one former partner and spousal support to another?

4. The "first family first" principle provides that a payor's support obligations to their first family take priority over subsequent obligations.¹²³ What happens if support obligations to multiple spouses arise simultaneously?

An example, for consideration:

Consider the situation where three women are in a polyamorous relationship for a period of 10 years. Together the women have raised twin boys who are 10 years old at the date of separation. Spouse A is the highest income earner making \$500,000/year. Spouse B is the second highest income earner making \$100,000/year. Spouse C, after working as a teacher for 5 years, decided to give up her career and be the primary caregiver of the family's children and only earns about \$30,000/year working part time. Spouse B decides to leave the relationship and Spouses A and C remain together.

If the court were to fit this family into the law as it currently stands, is Spouse B a payor or recipient of support, or both? Would Spouse B have entitlement to spousal support from Spouse A based on non-compensatory grounds? Could she also have an obligation to pay spousal support to Spouse C? Should INDI be calculated on an individual or household basis?

What if the same parties above dissolve all of their relationships with each other simultaneously? How is the spousal support obligation to Spouse C apportioned between Spouses A and B? What support obligation, if any, does Spouse A have to Spouse B? What mechanism, if any, would be applied to prioritize the various support obligations between the spouses?

¹²³ See *Fisher v. Fisher*, 2008 ONCA 11, at paras 39-41.

Division of Property

In British Columbia, for property division purposes, spouses are defined as persons who are married or who have lived together in a marriage-like relationship for a continuous period of at least two years.¹²⁴ Upon separation, each spouse is presumptively entitled to an undivided half interest in all family property as a tenant in common, and each spouse is presumptively equally responsible for family debt.¹²⁵ The precise wording of s. 81 of the *FLA* clearly presumes only one relationship between only two spouses, as follows:

Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

(a) spouses are both [emphasis added] entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

(b) on separation, each spouse has a right to an undivided half [emphasis added] interest in all family property as a tenant in common, and is equally responsible for family debt.

Examples for consideration:

What if there were four people who considered themselves to be in equal spousal relationships with each other in British Columbia and two of those spouses separately leave the relationship? On the face of it, each person could meet the definition of “spouse” under the *FLA*. Spouses A and B could be married and could also have lived in a marriage-like relationship with Spouses C

¹²⁴ *Family Law Act*, SBC 2011, c 25, s 3 (“FLA”).

¹²⁵ *Ibid* at s 81.

and D for two years thereby making those individuals spouses as well. What happens if Spouse B and Spouse D leave the household simultaneously?

Section 81 of the *FLA* contemplates that each spouse has an undivided half interest in family property upon separation, which obviously could not apply to four people. In British Columbia it appears, at least, that the parties could make an argument on the face of the existing legislative framework as s.95 of the *FLA* allows parties to make a claim for an unequal division of family property. The same cannot be said for other provinces, such as New Brunswick, where pursuant to ss. 1, 3(1) and 9 of the *Marital Property Act*, SNB 1980, c M-1.1, only married spouses may apply to court for a division of property and debts under the statute, leaving common-law partners in the position that the main path available for partners to bring claims related to the division of property is on the basis of unjust enrichment. In this case, Spouses A and B would presumably be left with clear property claims against one another, but Spouses C and D would not be afforded the same rights, nor obligations against the others. In this particular scenario, relationships that are considered equal by the individuals in them, may be treated unequally by application of the legislative regime.

What if there is a polyamorous relationship in British Columbia involving:

Spouse A, who in their sole name has a net worth of \$200,000,
Spouse B, who in their sole name has a net worth of \$1,000,000, and
Spouse C, who in their sole name has a net worth of \$200,000.

In this scenario, Spouses A and B have a marriage-like relationship and consider themselves to be spouses, as do Spouses B and C. Spouses A and C do not have a marriage-like relationship and do not consider themselves to be spouses with one another. No property is held in joint names by any combination of the parties. Spouse A leaves their relationship with Spouse B. As between Spouses A and B, is the pot of family property presumptively \$1.2M? If an equal division of family property were effected as between Spouses A and B, what would remain in the pot of family property as between Spouses B and C if they were to separate? What if, prior to the determination of Spouses A and B's respective claims against each other to family property,

Spouses B and C also separate? Must Spouse C wait for the determination of the claim between Spouses A and B before a determination of their claim against Spouse B?

Parentage and Parenting

Although the best interest test in place with respect to parenting for children across Canada provides for a nuanced and contextually situated analysis, normative assumptions related to the expectation of dyadic and monogamous relationships may influence that analysis when it comes to parentage. With a view to parenting, what additional considerations might apply to families that have involved more than one adult in their children's lives?

Example for consideration:

Assume a family includes relationships between Spouses A and B and Spouses B and C, who all live together. Spouses A and C do not have a romantic or sexual relationship with each other and do not consider themselves to be spouses. None of the three partners are married to each other. Spouse A earns \$20,000 per year. Spouse B earns \$100,000 per year and Spouse C earns \$300,000 per year. Spouses A and B are the biological parents of two children, who were conceived during the relationship without the use of assisted reproduction and with the understanding by all three parties that the children will be the children of all three spouses. The children have been cared for throughout their lives in equal parts by Spouses A, B, and C, and all significant decisions respecting the children have been made jointly by Spouses A, B, and C. Spouses B and C separate. Unlike the circumstances in *C.C. (Re)* and *No. 2018-XX-XX5815*, no order has been made declaring Spouse C a parent of the children and, after Spouse B and C's separation, neither Spouse A nor Spouse B agrees that Spouse C should be a parent or a guardian of the children. What recourse does Spouse C have to ensure that they remain involved in the children's lives as was initially contemplated?

Assume that the parties decide that they are all guardians of the children and, in principle, they should share parenting time with the children equally. What does equal parenting time look like in the circumstance where two guardians live together in one household and another guardian

lives separately? Is the split of parenting time determined by individual or by household? How is decision-making responsibility apportioned between the guardians?

Consider further what might occur if Spouses A and B subsequently separate, such that all three guardians live in separate households. What considerations might arise regarding the best interests of the children in the circumstance that their guardians live in three different households?

Given the current state of the law across Canada, the aforementioned questions cannot be answered by counsel with a high degree of certainty. Yet, individuals in consensual non-monogamous relationships may still seek advice from family lawyers as these folks form relationships and families, and have relationships that break down.

PART V: Practice Points

Family law practitioners can take several steps to assist in moving the law forward in an effort to provide consensual non-monogamous spouses adequate legal protections.

First, family lawyers can make an effort to recognize that these families exist and that their needs and concerns are within the scope and consideration of their practice. This can be done by educating themselves and their staff about the existence and needs of people in consensual non-monogamous relationships; by creating intake forms that do not assume dyadic and monogamous relationships; by choosing materials and imagery for websites that reflect families with more than two adults; and by choosing language that acknowledges the possibility that clients may have been, or currently are in, a consensual non-monogamous relationship. When assisting these folks, family lawyers should avoid making assumptions about what relationship labels mean to clients and should instead solicit from clients in their own words what they mean when they use a particular label to describe their relationship.

Further, while family law practitioners have an obligation to encourage settlement of disputes through alternative dispute resolution mechanisms where those mechanisms are appropriate,¹²⁶ in the absence of proactive legislative reform, it may be necessary for folks to take a chance at litigating these disputes, where differences are too difficult to resolve, in order to see progress in the law. That said, it seems likely that the current body of case law is limited, at least in part, due to the fear of societal stigma, together with the inherent financial and emotional cost of litigation and the additional risks associated with litigating when the law that applies to an issue is uncertain. As such, to serve those litigants, family lawyers may need to consider whether providing services on a pro-bono or low-bono basis aligns with their desire to establish change through case-law.

When representing individuals in consensual non-monogamous relationships, family lawyers must turn their minds to the mechanisms available for seeking justice, without requiring parties to reframe their relationships to fit the mold of dyadic monogamous relationships. Requiring such reframing may be dishonest, inherently degrading and harmful, may lead to unjust results, and may perpetuate the misconception that all spouses live in monogamous dyadic relationship. This does little, if anything at all, to propel the law forward or to adequately serve the families impacted by the current law.

Finally, family law practitioners can continue to raise awareness of the existence of consensual non-monogamous spouses by talking and writing about it, and by pushing for legislative reform that will acknowledge and include non-monogamous relationships.

¹²⁶ See, for example, *Divorce Act*, RSC 1985, c 3 (2nd Supp.), s 7.7(2).

Conclusion

When consensual non-monogamous families form and when these relationships break down, the people in these relationships can face the same legal issues as those often arising in monogamous relationships. These may include:

- a. the aspiration to proactively plan and establish an agreement for what happens if the relationship dissolves;
- b. the desire to formally recognize who is a parent for those planning to have children; and,
- c. the need to address common issues that arise on the breakdown of relationship such as ongoing financial support, the need to divide property accumulated during a relationship, and making ongoing arrangements for the care of children.

Yet, consensual non-monogamous families are ignored by the current legislation and there is a limited body of case law that addresses the breakdown of their relationships. These relationships are becoming increasingly accepted and family law should align with that reality. If efforts are not made by legislators, the judiciary, and family law practitioners to recognize these relationships, these folks will continue to be left with insufficient certainty regarding the law and inadequate access to justice. As practitioners, we have an opportunity to contemplate consensual non-monogamy broadly, and polyamory specifically, in our practices. Doing so will help families be recognized and protected, which is something all families – no matter what they look like – deserve.

Appendix “A” – Searches Conducted via CanLII Database

polyamory OR polyamorous
non-monogamy OR non-monogamous
“relationship anarchy” OR “relationship anarchist”
"open relationship" OR “open marriage”
(swinging /s relationship) OR EXACT(swinger)
“multiple spouses” OR “concurrent spouses” OR "simultaneous spouses"
“multiple partners” OR “concurrent partners” OR "simultaneous partners"
“three spouses” OR “four spouses” OR “five spouses” OR “six spouses”
“three partners” OR “four partners” OR “five partners” OR “six partners”