

## **INTRODUCTION**

**Purpose and currency of checklist.** This checklist is designed to be used with the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1), CLIENT FILE OPENING AND CLOSING (A-2), FAMILY PRACTICE INTERVIEW (D-1), and POLYFAM AGREEMENT DRAFTING (D-8) checklists.

Drafting agreements for polyamorous families is a very new area for legal practitioners. Neither this checklist nor the POLYFAM AGREEMENT DRAFTING (D-8) checklist is represented to be a comprehensive list of the issues to consider for inclusion in a polyfam agreement. The lawyer should also review, as appropriate, the checklists for FAMILY LAW AGREEMENT PROCEDURE (D-2), SEPARATION AGREEMENT DRAFTING (D-3), AND MARRIAGE AGREEMENT DRAFTING (D-4).

There are at least five reasons for having a polyfam agreement:

- (1) Each member of the polyfam will be fully aware of the situation of the others as they move forward together.
- (2) The polyfam will have a “roadmap” created by them for how their polyfam will work, based on their own plans for the future.
- (3) The polyfam will have an agreed-upon way to resolve differences or dissolve the polyfam that does not involve going to court.
- (4) Any decision-maker called upon to resolve issues among the polyfam members will have enough information to make a decision about issues which arise.
- (5) It provides a polyfam with a space to identify the roles, obligations, and rights each party in the polyfam will assume and to crystallize their roles and resulting entitlements.

There are at least three ways to structure the involvement of counsel in drafting an agreement:

- (1) One counsel takes instructions jointly (with an appropriate retainer letter), drafts an agreement, and sends each adult member of the polyfam to another lawyer for independent legal advice (in essence, this is a mediated agreement, and counsel drafting the agreement does not provide legal advice to any parties).
- (2) Each member of the polyfam has counsel, who work together in a collaborative law format to develop an agreement.
- (3) Each member of the polyfam has counsel, who negotiate the agreement.

Consider which structure will best serve the client and the polyfam of which they are a member. Remember that polyfam agreements have many intersecting issues to address, and it is more efficient and cost effective for all parties to work on the original draft of the agreement in some collective manner. The internal decision making and other formal or informal conflict resolution mechanisms polyfams may already have should also be recognized and built upon, with these structures being incorporated into any legal agreement making process.

The checklist is current to September 4, 2024.

## **LEGEND**



**Checkbox**



**Important Reminder**



**Deadline or Limitation Date**

### NEW DEVELOPMENTS

- **Supreme Court Family Rules.** Amendments to the Supreme Court Family Rules, B.C. Reg. 169/2009 came into effect on September 9, 2024 (B.C. Reg. 165/2024), including provisions allowing for affidavits to be sworn or affirmed by video conference.
- **Family Law Act.** Amendments to the *Family Law Act*, S.B.C. 2011, c. 25 (the “FLA”) received Royal Assent on May 1, 2023, including amendments to: rules applying to the presumption of advancement or presumption of resulting trust (s. 81.1); exclusions applying to excluded property (ss. 85(3) and 96); designations of limited members (s. 113(2)); disability benefits (s. 122); and calculation of a limited member’s proportionate share on death of a member prior to pension commencement (s. 124). The applicability of certain amendments may depend on whether the family law proceeding is a “pre-existing proceeding”, meaning a proceeding under the *FLA* respecting property division or to set aside or replace an agreement respecting property division, commenced before May 11, 2023. Amendments that will come into force at a later date by regulation pertain to: pets as “companion animals” (s. 97); commuted value transfer options (s. 113(2)(b)); Locked-in Retirement Accounts and Life Income Funds (s. 117.1); annuities (s. 118.1); survivor benefits payable under pension plans (s. 126.1); and administrative fees relating to pension division (s. 140).
- **Divorce Act.** Amendments to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) came into force on March 1, 2021. The amended provisions on care of children are similar to the regime under the *FLA*. Provisions relating to family violence and relocation are also more reflective of the *FLA*. Family law practitioners are advised to familiarize themselves with the amendments.
- **Updated practice directions for sealing orders and applications to commence proceedings anonymously.** Litigants seeking a sealing order in a civil or family law proceeding must follow the guidelines as set out in Supreme Court Civil [Practice Direction PD-58](#)—Sealing Orders in Civil and Family Proceedings. For the procedure to commence proceedings using initials or a pseudonym in civil or family law proceedings, see Supreme Court Civil [Practice Direction PD-61](#)—Applications to Commence Proceedings Anonymously. Practice Directions 58 and 61 were updated on August 1, 2023. Note that, in circumstances where children are the subject of any polyfam agreement, the parties may wish to have an exemption to any sealing order to permit any child subject to a sealed matter to have access to their court records as an adult.

### OF NOTE

- **Issues with jurisdiction and overlapping legislation.** The laws governing dyadic families are different from one jurisdiction to another. In British Columbia, there are 203 laws that contain defined terms or concepts for “conjugal”, “married”, or “spouse”; in Alberta, there are 816. Consider which laws apply. You will have to review, without limitation, the specifics of laws affecting:
  - formation of families and obligations when the family ends;
  - succession and intestate succession;
  - if applicable, conception, birth, and parentage of a child with assisted human reproduction technology; and
  - entitlement to various programs, benefits, or support (e.g., child tax benefit, eligible dependent claims, health benefits and insurance, pension division, child support and spousal support).

Consider which provisions of those laws relate to a polyfam, and how; which provisions of those laws it is possible to opt out of; whether there is any bar to creating an enforceable agreement among polyfam members; and any other applicable provincial, federal or Indigenous laws.

In *British Columbia Birth Registration No. 2018-XX-XX5815*, 2021 BCSC 767, the court acknowledged that there is a gap in the *FLA* with respect to children born to polyfams.

- **Aboriginal law.** If the client or the other party has ties to an Indigenous community, special considerations may apply (e.g., see items 1.13 and 2.18.6 in the FAMILY PRACTICE INTERVIEW D-1) checklist). Note the requirements of Part 10, Division 3 of the *FLA*, which sets out standing and notice in cases concerning Nisga’a and treaty First Nations children and treaty lands. The *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c. 20 (the “*FHRMIRA*”) applies to married couples or common-law partners living on-reserve lands where at least one spouse is a First Nation member. The *FHRMIRA* provides mechanisms for First Nations to create laws pertaining to matrimonial real property and sets out provisional federal rules for use until First Nations establish their own laws. Consider seeking the advice of a lawyer with experience in Aboriginal law. Further information on Aboriginal law issues is available on the “Aboriginal Law” page in the “Practice Areas” section of the CLEBC website ([www.cle.bc.ca](http://www.cle.bc.ca)) and in other CLEBC publications.
- **Tax alert.** As some aspects of a polyfam agreement may have significant tax implications for the parties, it is recommended the parties seek advice from their respective tax advisors, especially if pensions are involved. In addition, if one polyfam member works in another jurisdiction, this may impact income for tax purposes and carry tax consequences.
- **Law Society of British Columbia.** For changes to the Law Society Rules and other Law Society updates and issues “of note”, see LAW SOCIETY NOTABLE UPDATES LIST (A-3).
- **Additional resources.** For more information regarding the drafting of family law agreements, see *Family Law Agreements: Annotated Precedents*, 3rd ed. (CLEBC, 1998–). See the British Columbia Law Institute’s “Report on Parentage: A Review of Parentage under Part 3 of the *Family Law Act*” published in June 2024.

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1.	INITIAL CONTACT	
1.1	Conduct a conflicts of interest check. Complete the CLIENT FILE OPENING AND CLOSING (A-2) and FAMILY PRACTICE INTERVIEW (D-1) checklists. Do not act for opposing parties. In addressing potential conflicts, consider not only the polyfam members but also any third parties who may be involved in the case, including former or new partners of the polyfam members, as well as relevant corporate entities or relatives who have made financial contributions to the polyfam members, if relief is sought from them. Always refer the parties for independent legal advice, and document having done so. If joint retainers are used, confirm the limitations and scope of joint retainers, and provide an outline of the same to the parties for their review before they sign in harmony with their retainer agreement. Review and comply with rules 3.4-5 to 3.4-9 of the <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”), and refer to the Law Society’s <a href="http://www.lawsociety.bc.ca/for-lawyers/practice-resources/">draft precedent for joint retainers</a> under “Practice Resources”, available at <a href="http://www.lawsociety.bc.ca/for-lawyers/practice-resources/">www.lawsociety.bc.ca/for-lawyers/practice-resources/</a> .	<input type="checkbox"/>
1.2	Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110).	<input type="checkbox"/>
1.3	Arrange the initial interview.	<input type="checkbox"/>

2.	INITIAL INTERVIEW	
2.1	Discuss and confirm the terms of your retainer and the calculation of your fee. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist.	<input type="checkbox"/>
2.2	Find out the names and addresses of other parties and their lawyers, if any.	<input type="checkbox"/>
2.3	Discuss the background of the parties and their relationship, the general nature of the proposed agreement as the client understands it, and the client’s objectives and expectations. Consider and discuss:	<input type="checkbox"/>
	.1 What the shape of the polyfam will be.	
	.2 How do the parties identify their relationship structure?	
	.3 Whether there are currently members of the polyfam who would be treated as “spouses” (either married or interdependent adult/common law).	
	.4 Whether the polyfam does, or may, include children (and how they will be conceived).	
	.5 How the polyfam is organized (e.g., all living together).	
	.6 How the polyfam works with respect to decision making.	
	.7 How the polyfam views connections (emotional or sexual) with non-polyfam members.	
	.8 How the polyfam views financial connections, sharing, and independence.	

	.9 What the polyfam is hoping to achieve with the agreement.	
	.10 Whether the agreement implicates the laws of more than one province.	
2.4	Discuss in detail the proposed agreement, referring to the clauses set out in the POLYFAM AGREEMENT DRAFTING (D-8) checklist. Go over key points and <i>legislative</i> provisions. Think about:	<input type="checkbox"/>
	.1 Whether parts can be omitted (e.g., if the polyfam has no children).	
	.2 What parts need to be supplemented (e.g., if conception by assisted reproductive technology is contemplated, <i>British Columbia Birth Registration No. 2018-XX-XX5815</i> , 2021 BCSC 767 and consider whether you need expert advice).	
	.3 Whether (and what) other documents are required, such as elections or designations, wills, representation agreements, or powers of attorney.	
	.4 Consequences of certain types of events (death, incapacity, desire to withdraw from the polyfam, etc.). In general, discuss various types of events that might occur, and the desired consequences.	
	.5 Mechanisms for dispute resolution, which may include counselling or agreed upon conflict resolution mechanisms the polyfam may have implemented formally or informally.	
2.5	Discuss any need to retain professional advisors for valuations, tax issues, pensions, or complex financial issues. Discuss the method of choosing experts, payment for services, and additional retainer requirements. Confirm instructions on these issues in writing.	<input type="checkbox"/>
2.6	Refer to item 2.18 (special issues), and any other relevant items listed in item 2 “Initial Interview” in the FAMILY PRACTICE INTERVIEW (D-1) checklist.	<input type="checkbox"/>
2.7	Where the client has not already done so, advise the client to discuss the various issues with the other members of the polyfam and reach a satisfactory solution, and then inform you of the results.	<input type="checkbox"/>
2.8	Ensure that the proposed terms are workable and reasonable in the circumstances.	<input type="checkbox"/>
2.9	Obtain instructions to proceed with drafting the polyfam agreement, and any other agreements required.	<input type="checkbox"/>
2.10	Obtain instructions about the gender identity and pronouns of your client and make sure the agreement reflects those instructions.	<input type="checkbox"/>
2.11	Obtain instructions about how the polyfam wishes to have their relationship identified and named in the agreement.	<input type="checkbox"/>
2.12	If you are not in a position to act, advise the client. Make a record of the advice given, and file your notes. Send a non-engagement letter (for samples, see the Law Society website at <a href="http://www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Ltrs-NonEngagement.pdf">www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/Ltrs-NonEngagement.pdf</a> ).	<input type="checkbox"/>

<b>3.</b>	<b>AFTER THE INITIAL INTERVIEW</b>	
3.1	Send a letter to the client confirming the retainer and instructions, stating the conditions upon which you have agreed to act, and summarizing the points discussed. Refer to CLIENT FILE OPENING AND CLOSING (A-2) checklist. If a joint retainer is being used, send a joint retainer letter with the joint retainer agreement. See item 1.1 in this checklist.	<input type="checkbox"/>
3.2	Open the file: place this checklist in the file and make entries in your diary and bring forward (“BF”) systems.	<input type="checkbox"/>
3.3	Send a letter or email to counsel for the other parties, if any, advising of your involvement. If another party has not retained counsel, urge the party in writing, to get independent legal representation. Make it clear to the other parties that you are not protecting their interests and that you are acting exclusively in the interests of your client (see <i>BC Code</i> , rule 7.2-9).	<input type="checkbox"/>
3.4	Consider legislation in other relevant jurisdictions (see “Issues with jurisdiction and overlapping legislation” under “Of note” in this checklist).	<input type="checkbox"/>

<b>4.</b>	<b>DRAFTING THE AGREEMENT</b>	
4.1	Prepare an outline of the agreement, indicating the clauses from your precedent file that will be included (see the POLYFAM AGREEMENT DRAFTING (D-8) checklist). Also prepare an outline of any other documents required. See also <i>Family Law Agreements: Annotated Precedents</i> , 3rd ed. (CLEBC, 1998–) for precedents and discussion.	<input type="checkbox"/>
4.2	Consider and specify the principal facts and assumptions underlying the agreement. This will assist the parties and any reviewing lawyer or court to understand the basis of the agreement.	<input type="checkbox"/>
4.3	See item 2.4 in the FAMILY LAW AGREEMENT PROCEDURE (D-2) checklist regarding the parties’ awareness of each other’s assets, and how to confirm accuracy and resolve any disputes.	<input type="checkbox"/>
4.4	Prepare the first draft.	<input type="checkbox"/>
4.5	Consider including a dispute resolution mechanism such as mediation or arbitration in the event of disputes. See <i>BC Code</i> , rule 3.2-4 on a lawyer’s obligation to advise and encourage settlement of disputes. See “New developments” in this checklist regarding the arbitration division in the <i>Family Law Act</i> , S.B.C. 2011, c. 25. Consider including agreed upon qualifications and experience polyfam members may want from a mediator/arbitrator (for example, preference for a mediator with experience mediating and working with polyfam structures/community).	<input type="checkbox"/>
4.6	Review the first draft, checking each clause to ensure that it achieves the client’s objectives, and checking the document as a whole to ensure that it is internally consistent. Make any necessary corrections and prepare the second draft.	<input type="checkbox"/>

4.7	Send the second draft to the client with a request that the client review it in its entirety and note any changes or questions the client may have. (If sending the document electronically, remove metadata to prevent the reader from viewing draft changes in the document's history.) Caution the client not to share the draft with the other parties, if applicable, until you and the client have agreed that the draft is in order. Once the client has approved the contents of the draft, most polyfam structures benefit from taking a draft agreement and working through it collectively away from lawyers. This can be encouraged in the polyfam setting, as individual legal advice for each polyfam member will address specific rights and entitlements for each respective party, and because much of the polyfam agreement is based on a high level of organization and communication between the polyfam members.	<input type="checkbox"/>
4.8	Review the entire agreement with the client and discuss any proposed changes or questions. Make any changes required to the second draft, and send copies to the other parties or their lawyers for comment. (If sending the document electronically, remove metadata to prevent the reader from viewing draft changes in the document's history. Consider whether to send the agreement in a format in which changes can be made by the other lawyer/party.) Decide whether to send the draft "without prejudice". If appropriate, confirm with the other lawyers the other parties' contribution to the cost of preparing the agreement. Review any alterations with the client.	<input type="checkbox"/>
4.9	Prepare the final documents. Refer to items 2.10 to 2.12 in the FAMILY LAW AGREEMENT PROCEDURE (D-2) checklist, as applicable. Ensure compliance with the requirements of any applicable legislation.	<input type="checkbox"/>
4.10	Arrange for signing and execution of the polyfam agreement, and any other documents required.	<input type="checkbox"/>
4.11	Where the other members of the polyfam have chosen not to obtain independent legal advice, ensure that they acknowledge (preferably in writing) that you have advised seeking legal advice, that they have refused, and that you have advised that you are not protecting their interests. Remind unrepresented persons to obtain independent legal representation and take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by you. Make it clear to the unrepresented person that you are acting exclusively in the interests of your client (see <i>BC Code</i> rule 7.2-9). See items 1.1 and 3.3 of this checklist.	<input type="checkbox"/>
4.12	Where the client insists on signing an agreement against your advice, put your opinion in writing and confirm with the client that, notwithstanding your advice, the client has instructed you that they still wish to sign the agreement. Consider declining to take the client's signature on an agreement you consider to be against their best interests (you might be called as a witness in the future).	<input type="checkbox"/>

<b>5.</b>	<b>CLOSING THE FILE</b>	
5.1	Send a copy of the agreement to other members of the polyfam or their counsel, if they are represented. Refer to Part 4 "Closing the File" of the FAMILY LAW AGREEMENT PROCEDURE (D-2) checklist, as applicable.	<input type="checkbox"/>

5.2	Prepare a reporting letter and account as soon as practicable after closing. Advise that changes in circumstances and legislation (e.g., tax law) make it essential that the agreement be reviewed from time to time. Ascertain whether the client wishes to meet for this purpose from time to time and, if so, make entries in your diary and “BF” systems. Advise the polyfam to update or create new wills and personal planning documents to reflect any parallel rights and entitlements as set out in their polyfam agreement.	<input type="checkbox"/>
5.3	Close the file. See the CLIENT FILE OPENING AND CLOSING (A-2) checklist.	<input type="checkbox"/>