

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p style="text-align: center;">INTRODUCTION</p> <p>Purpose and currency of checklist. This checklist is designed to be used with the CLIENT IDENTIFICATION AND VERIFICATION PROCEDURE (A-1), CLIENT FILE OPENING AND CLOSING (A-2), FAMILY PRACTICE INTERVIEW (D-1), and POLYFAM AGREEMENT DRAFTING (D-8) checklists.</p> <p>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).</p> <p>There are at least four reasons for having a polyfam agreement. First, so that each member of the polyfam is fully aware of the situation of the others as they move forward together. Second, so that the polyfam has a “roadmap” created by them for how their polyfam will work, based on their own plans for the future. Third, so that the polyfam has an agreed-upon way to resolve differences, and/or dissolve the polyfam, that does not involve going to court. Fourth, so that any decision-maker called upon to resolve issues among the polyfam members has enough information to make a decision about issues which arise.</p> <p>This checklist is current to September 1, 2020.</p> <p>New developments:</p> <ul style="list-style-type: none"> • COVID-19 pandemic. The COVID-19 pandemic has had significant impacts on society, including families in British Columbia and the practice of family law: inability to attend, or aversion to, in-person meetings; possible delays at government agencies and public registries; border closures; unpredictable economic circumstances, etc. Counsel should keep apprised of developments related to COVID-19 (and response measures) that may affect family practice. Check the BC Courts website (bccourts.ca) to obtain up-to-date Practice Directions, Notices to the Profession, guides to remote proceedings, and announcements from all levels of court in response to the COVID-19 pandemic. Confirm procedures for case conferences, filing materials, in-person appearances, use of remote technology, and etiquette for video and telephone appearances. Although the limitation periods for filing a civil or family action have been suspended for a certain period of time during the state of emergency in British Columbia in accordance with the <i>COVID-19 Related Measures Act</i>, S.B.C. 2020, c. 8, and amendments thereto, don’t wait! File your Notices of Civil and Family Claim now. • Retroactive adjustment of child support. It is possible in certain situations to vary child support retroactively, even when the children are no longer “children” for the purposes of support; see <i>Michel v. Graydon</i>, 2020 SCC 24. • Remote Child Support Mediation. In September 2020, Legal Aid BC launched a Remote Child Support Mediation service. The new online program provides free mediation services to assist with child support issues. See mylawbc.com/remote-mediation/ for more information. • New arbitration provisions in <i>Family Law Act</i>. A new Division 4– Arbitration was added to Part 2 of the <i>FLA</i> and came into force on September 1, 2020 (B.C. Reg. 160/2020). It is strongly recommended that practitioners review the new Division 4 before drafting or revising arbitration clauses in agreements or commencing any arbitration proceeding. <p>Of note:</p>					

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<ul style="list-style-type: none"> • 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: <ul style="list-style-type: none"> ○ 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). <p>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.</p> • 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. • Division of Family Property. In <i>Venables v. Venables</i>, 2019 BCCA 281, the Court of Appeal held that the <i>Family Law Act</i>, S.B.C. 2011, c. 25, does not preclude the court from taking into account the origins of property as formerly excluded when determining whether equal division of family property would be significantly unfair. The intention of the parties has been highlighted as a key factor. • Aboriginal law. Special considerations may apply to children who have ties to an Indigenous community. For example, notice of various hearings may be required to be sent to a First Nation (e.g., <i>Family Law Act</i>, ss. 208 and 209, address standing and notice in hearings for guardianship of Nisga’a children and treaty First Nations children, respectively). Note that a child’s culture is one of the factors to be considered with all others in determining a child’s best interests (see <i>H. (D.) v. M. (H.)</i>, [1999] 1 S.C.R. 761, and the <i>Child, Family and Community Service Act</i>, R.S.B.C., 1996 c. 46, s. 4(2)). Note also that <i>An Act respecting First Nations, Inuit, and Métis children, youth and families</i>, S.C. 2019, c. 24, came into force on January 1, 2020. It sets out a new federal legislative framework for Indigenous children involved in child protection matters that must be adhered to by the <i>Child, Family and Community Service Act</i>, and by courts applying that statute. Review the federal <i>Family Homes on Reserves and Matrimonial Interests or Rights Act</i>, S.C. 2013, c. 20, which pertains to the ability of First Nations to make rules about family residences on reservation lands and how those homes will be used and occupied upon the breakdown of a spousal relationship. Sections 13 to 52 apply to First Nations that have not enacted their own matrimonial real property laws. The Act applies to married and common-law spouses living on reserve lands where at least one spouse is a First Nations member, as defined by the Act. It provides separate regimes for matrimonial property division for member and non-member spouses on reserve and is very different from the provincial legislation. Consider whether a lawyer with Aboriginal law experience should be consulted. For further information, see the articles published in the “Aboriginal Law” page in the “Practice Areas” section of the Continuing Legal Education Society of British Columbia website at www.cle.bc.ca. 					

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<ul style="list-style-type: none"> • Additional resources. For more information regarding the drafting of family law agreements, see <i>Family Law Agreements—Annotated Precedents</i>, 3rd ed. (CLEBC, 1998–). • 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). The Law Society’s resources related to procedures generally and issues arising from COVID-19 can be viewed at www.lawsociety.bc.ca/about-us/covid-19-response/. <p style="text-align: center;">CONTENTS</p> <ol style="list-style-type: none"> 1. Initial Contact 2. Initial Interview 3. After the Initial Interview 4. Drafting the Agreement 5. Closing the File <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. INITIAL CONTACT <ol style="list-style-type: none"> 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. 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 AND VERIFICATION PROCEDURE (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110). 2. INITIAL INTERVIEW <ol style="list-style-type: none"> 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. 2.2 Find out the names and addresses of other parties and their lawyers, if any. 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: <ol style="list-style-type: none"> .1 What the shape of the polyfam will be. .2 Whether there are currently members of the polyfam who would be treated as “spouses” (either married or interdependent adult/common law). .3 Whether the polyfam does, or may, include children (and how they will be conceived). 					

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<p>.4 How the polyfam is organized (e.g., all living together).</p> <p>.5 How the polyfam works with respect to decision making.</p> <p>.6 How the polyfam views connections (emotional or sexual) with non-polyfam members.</p> <p>.7 What the polyfam is hoping to achieve with the agreement .</p> <p>.8 Whether the agreement implicates the laws of more than one province.</p> <p>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 legislative provisions. Think about:</p> <p>.1 Whether parts can be omitted (e.g., if the polyfam has no children).</p> <p>.2 What parts need to be supplemented (e.g., if conception by assisted reproductive technology is contemplated).</p> <p>.3 Whether (and what) other documents are required, such as elections or designations, wills, representation agreements, or powers of attorney.</p> <p>.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.</p> <p>.5 Mechanisms for dispute resolution.</p> <p>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.</p> <p>2.6 Refer to item 2.18 (special issues), and any other relevant items listed in item 2 “Initial Interview” of the FAMILY PRACTICE INTERVIEW (D-1) checklist.</p> <p>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.</p> <p>2.8 Ensure that the proposed terms are workable and reasonable in the circumstances.</p> <p>2.9 Get instructions to proceed with drafting the polyfam agreement, and any other agreements required.</p> <p>2.10 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 Practice Resource: Model non-engagement letters (lawsociety.bc.ca)).</p> <p>3. AFTER THE INITIAL INTERVIEW</p> <p>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.</p> <p>3.2 Open the file: place this checklist in the file and make entries in your diary and bring forward (“BF”) systems.</p>					

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<p>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>Code of Professional Conduct for British Columbia</i> (the “BC Code”), rule 7.2-9). See item 1.1 in this checklist.</p> <p>3.4 Consider legislation in other relevant jurisdictions (see “Issues with jurisdiction and overlapping legislation” under “Of note” in this checklist).</p> <p>4. DRAFTING THE AGREEMENT</p> <p>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.</p> <p>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.</p> <p>4.3 See item 2.4 of 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.</p> <p>4.4 Prepare the first draft.</p> <p>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 new arbitration division in the <i>Family Law Act</i>.</p> <p>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.</p> <p>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.</p> <p>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.</p>					

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<p>4.9 Prepare the final documents. Refer to items 2.10 through 2.12 in the FAMILY LAW AGREEMENT PROCEDURE (D-2) checklist, as applicable. Ensure compliance with the requirements of any applicable legislation.</p> <p>4.10 Arrange for signing and execution of the polyfam agreement, and any other documents required.</p> <p>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 rule 7.2-9 of the <i>BC Code</i>). See items 1.1 and 3.3 of this checklist.</p> <p>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).</p>					
<p>5. CLOSING THE FILE</p>					
<p>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.</p>					
<p>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.</p>					
<p>5.3 Close the file. See the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p>					