

ACTION TO BE CONSIDERED	NOTES
<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 PROCEDURE (D-7) 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. 	

ACTION TO BE CONSIDERED	NOTES
<ul style="list-style-type: none"> • 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> <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 which 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 dependents, 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 reserve 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 	

ACTION TO BE CONSIDERED	NOTES
<p>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 in 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.</p> <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. Preliminary Matters 2. Effective Date of Agreement 3. Identification of Parties 4. Recitals 5. Consideration and Introductory/Interpretation Clauses 6. Legal Context 7. Polyfam Process 8. Living Together 9. Property 10. Children, Child Support, Contact with a Child 11. “Spousal” Support 12. Effect of Various Events on the Polyfam 13. Annual Review 14. Amendment 15. Miscellaneous and General Provisions <p style="text-align: center;">CHECKLIST</p> <ol style="list-style-type: none"> 1. PRELIMINARY MATTERS <ol style="list-style-type: none"> 1.1 Complete the CLIENT FILE OPENING AND CLOSING (A-2), FAMILY PRACTICE INTERVIEW (D-1), and POLYFAM AGREEMENT PROCEDURE (D-7) checklists. 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). 	

ACTION TO BE CONSIDERED	NOTES
<p>2. EFFECTIVE DATE OF AGREEMENT</p> <p>2.1 Depending on the use to which the document is put, it may be a fraud on either the court or Canada Revenue Agency to indicate that an agreement was executed before it was actually signed by the last party. See item 1.1 in the SEPARATION AGREEMENT DRAFTING (D-3) checklist.</p> <p>3. IDENTIFICATION OF PARTIES</p> <p>3.1 Refer to item 2, “Names and Addresses of Parties”, in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist.</p> <p>4. RECITALS</p> <p>4.1 Include the customary personal identification for each polyfam member (d.o.b., address, S.I.N., employment, “marital status”, children’s details, etc.).</p> <p>4.2 Include any factual information that will impact a polyfam member’s entitlement or obligations before the polyfam agreement (e.g., spousal support payable) and any tax consequences. You may need a pension or tax specialist’s opinion.</p> <p>4.3 Include a robust description of the polyfam, emphasizing:</p> <ul style="list-style-type: none"> .1 The intentionality of the polyfam process. .2 The principles of polyamory by which this polyfam operates. .3 How the polyfam was formed (e.g., were two people partners, and added a third?). <p>4.4 Include a description of all previous family relationships that continue to carry obligations or potential liabilities that may affect the polyfam (e.g., separation agreements, court orders, child or spousal support claims).</p> <p>4.5 Include a careful statement of intention which includes:</p> <ul style="list-style-type: none"> .1 Parties are aware of their legal position as an individual, as a spouse (if applicable), under benefit programs, and under legislation. .2 Parties intend to create a polyfam in which the relationships between the members are governed by the agreement, rather than by any rights or obligations that the law would otherwise impose by virtue of their relationship with another adult; intend to opt out of any legislation that would apparently apply to them notwithstanding the agreement; and wish to agree on how the polyfam members will represent themselves to the world (e.g., at the workplace, when benefits are available for your “spouse”; how do you declare the polyfam?). .3 What issues are settled by the agreement? For example: <ul style="list-style-type: none"> (a) Formation of polyfam. (b) Additions to polyfam. (c) Departures from polyfam. (d) Property ownership before, during, and after polyfam. 	

ACTION TO BE CONSIDERED	NOTES
<p>(e) Management of affairs during polyfam:</p> <ul style="list-style-type: none"> i. decision-making; ii. financial contributions; and iii. financial management. <p>(f) Support of children:</p> <ul style="list-style-type: none"> i. during polyfam; and ii. after a person leaves polyfam. <p>(g) Intentions about care and support of children if polyfam ends.</p> <p>5. CONSIDERATION AND INTRODUCTORY/INTERPRETATION CLAUSES</p> <p>Note: Placement of some of these clauses is a matter of drafting style. They are variously placed at the beginning and the end of the agreement. See also item 15 in this checklist.</p> <p>5.1 Ensure that you include a term “for one dollar and other valuable consideration paid by each party to all of the others, the receipt and sufficiency of which is hereby acknowledged by each party” to counter any inquiry into whether there was consideration for the agreement.</p> <p>5.2 Adopt the recitals and schedules as part of the agreement, and include warranties about their accuracy and a statement that each party relies on the statements made by the others.</p> <p>5.3 Include a representation and warranty from each party, confirming that each party is aware of the assets, debts, and financial situation of each of the others, either on the basis of or apart from the schedules.</p> <p>5.4 Definitions—consider setting them out in a schedule. Define terms with care, especially any terms which may have a different meaning in the context of legislation.</p> <p>5.5 General principles that govern the interpretation of the agreement (e.g., insertion of headings for convenience only).</p> <p>5.6 Schedules, such as:</p> <ul style="list-style-type: none"> .1 Definitions (see item 5.4 in this checklist). .2 Assets that are polyfam property (see item 9.1 in this checklist). .3 Assets, debts, and financial situation of each of the parties (see item 5.3 in this checklist). <p>6. LEGAL CONTEXT</p> <p>6.1 Include a term outlining what the law would say about the relationships in the polyfam, apart from the agreement. (For example: A and B are married and each would be entitled to a division of the property acquired or increased in value during the marriage, and to a consideration of entitlement for spousal support; C and A have lived together in a sexual and emotional relationship for one year and would be a common-law couple under federal law but not under provincial law.) This may be challenging, but it will be helpful in providing advice to your client.</p>	

ACTION TO BE CONSIDERED	NOTES
<p>6.2 Include a statement about the many laws which are structured to apply to two-person couple. See “Issues with jurisdiction and overlapping legislation” under “Of note” in this checklist. See also item 4.4 (governing law) in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist.</p> <p>6.3 Include a term addressing whether or not the agreement continues to apply as written, if there are changes in the law (whether common law, legislation, or equity).</p> <p>7. POLYFAM PROCESS</p> <p>7.1 Since polyamorous relationships are generally governed by principles of honesty, transparency, choice, adaptability, and transcendence over traditional gender roles, it is important to include a statement of the governing principles, but also spell out what that actually looks like. (E.g., house meetings, counselling.)</p> <p>7.2 Will the polyfam maintain records? (E.g., financial records, updated schedules.)</p> <p>7.3 If there are disagreements, what process will polyfam use? Many polyfams opt for mediation/arbitration over court or collaborative family law because of the expense and/or uncertainty. See “New developments” in this checklist regarding the new arbitration division in the <i>Family Law Act</i>.</p> <p>.1 Include dispute resolution clauses, with reference to discretion (or not) to elect mediation, arbitration, or recourse to the courts.</p> <p>.2 If using arbitration, should the arbitrator have the power to add a clause consistent with the philosophy and terms of the agreement, if a novel situation arises?</p> <p>8. LIVING TOGETHER</p> <p>8.1 Where will the polyfam be living? Consider:</p> <p>.1 Is the polyfam home currently owned by one or more of the polyfam. If so, see item 9 in this checklist, and consider:</p> <p>(a) How to address ownership.</p> <p>(b) Whether the other polyfam members will acquire an interest over time, and whether such interests are in proportion to contributions or equal. If interests are in proportion to contributions, address what counts as a contribution (e.g., taxes, insurance, repairs, renovations).</p> <p>(c) How equity will be divided if polyfam dissolves.</p> <p>.2 If not, what are the living arrangements, and how will rent and other expenses for rental property be treated.</p> <p>8.2 How will the work of running the home be divided?</p> <p>8.3 Will the polyfam share a vehicle? If so, what are the financial terms relating to acquisition, licensing, repairing, or maintaining the vehicle?</p> <p>8.4 If a polyfam member gets a “windfall” does it belong to them or is it shared? Address:</p>	

ACTION TO BE CONSIDERED	NOTES
<p>.1 What does “windfall” include: e.g., wrongful dismissal claim, damages in tort, inheritance, lottery winnings, employment bonus, other.</p> <p>.2 See item 6.6 (gifts and windfalls) in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist</p> <p>8.5 Will the polyfam have pets? If so are there limits, conditions, or other terms about the pets?</p> <p>8.6 What expenses will be shared by the polyfam? Address:</p> <p>.1 Rent/mortgage.</p> <p>.2 Insurance.</p> <p>.3 Taxes.</p> <p>.4 Home repairs.</p> <p>.5 Food.</p> <p>.6 Cleaning supplies.</p> <p>.7 Home maintenance.</p> <p>.8 Daycare, if applicable.</p> <p>.9 Other.</p> <p>8.7 In what proportion will expenses be shared?</p> <p>.1 Equally.</p> <p>.2 In proportion to income.</p> <p>8.8 Will the parties have a joint bank account?</p> <p>.1 Rules about using funds.</p> <p>8.9 Who will pay debts? See also item 7 “Responsibility for Debts” in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist and item 10 “Responsibility for Debts” in the SEPARATION AGREEMENT DRAFTING (D-3) checklist.</p> <p>.1 Person who incurred the debt.</p> <p>.2 The polyfam, collectively.</p> <p>.3 Other.</p> <p>8.10 See also item 8 “Management of Affairs” in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist.</p> <p>9. PROPERTY</p> <p>9.1 Will each party continue to own whatever they owned before the formation of the polyfam? If not, how will such property be owned? Consider use of schedules.</p> <p>.1 Statement of assets that are polyfam property.</p> <p>.2 Statement of types of assets that will become polyfam property.</p> <p>.3 Statement of types of assets that will not become polyfam property.</p> <p>9.2 Will members of the polyfam have or acquire an interest in property acquired, or property value increased, by other polyfam members during the time their polyfam are together?</p> <p>9.3 If polyfam members purchase something jointly (e.g., vehicle, home), how will they own it?</p>	

ACTION TO BE CONSIDERED	NOTES
<p>.1 Equally, regardless of contributions.</p> <p>.2 In proportion to their financial contribution.</p> <p>.3 In some other proportion.</p> <p>9.4 Who will be on the title of jointly-acquired property? Will the title be joint, or tenants in common?</p> <p>9.5 How will property be divided if one person leaves the polyfam?</p> <p>9.6 How will property be divided if the polyfam dissolves?</p> <p>9.7 Special provisions for dividing the family home, if the polyfam owns a home.</p> <p>9.8 See also item 6 “Ownership of Property” in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist and item 11 “Division of Property” in the SEPARATION AGREEMENT DRAFTING (D-3) checklist.</p> <p>10. CHILDREN, CHILD SUPPORT, CONTACT WITH A CHILD</p> <p>10.1 Existing children. Does any polyfam member, prior to formation of the polyfam, have a child? If yes, address:</p> <p>.1 Where that child currently lives, and will live going forward.</p> <p>.2 Who is responsible for caring for the child.</p> <p>.3 Who pays for support of the child, and in what financial proportions.</p> <p>.4 What role other polyfam members will play in relation to that child (e.g., caregiving, financial support).</p> <p>10.2 Future children. Does this polyfam plan to have a child? If so, address:</p> <p>.1 The plan for conception.</p> <p>.2 If the child will be conceived with assisted human reproduction techniques, consider what additional agreements are required under the law so that intended parents can be listed as the legal parents of the child.</p> <p>.3 Who will be the parents of the child.</p> <p>NOTE: you must review the law to determine who is legally permitted to be named as a “parent” of the child under the applicable laws; and discuss same with your client.</p> <p>.4 Who will be responsible for caring for the child.</p> <p>.5 Who will support the child, and in what financial proportions.</p> <p>.6 What role other polyfam members will play in relation to that child (e.g., caregiving, financial support).</p> <p>10.3 Address how the polyfam will support a child if the polyfam dissolves:</p> <p>(a) How will the amount of support payable or receivable be established.</p> <p>(b) What will count as extraordinary expenses.</p> <p>10.4 If an adult is no longer part of the polyfam, either because that adult left the polyfam, or because the polyfam dissolved, does the adult have a right to have contact time with any children of the polyfam?</p> <p>10.5 What are the terms for contact or time with a child:</p>	

ACTION TO BE CONSIDERED	NOTES
<p>.1 After formation of the polyfam.</p> <p>.2 After dissolution of the polyfam.</p> <p>10.6 See also item 5 “Support of Spouses and Children” in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist and items 5 through 8 in the SEPARATION AGREEMENT DRAFTING (D-3) checklist, as appropriate.</p> <p>11. “SPOUSAL” SUPPORT</p> <p>11.1 Provision for withdrawal from the polyfam. If one member leaves the polyfam, are they entitled to financial support from the others? Consider:</p> <p>.1 Conditions of entitlement.</p> <p>.2 Amount(s).</p> <p>.3 Payors, and proportion or division of responsibility.</p> <p>.4 Duration.</p> <p>.5 Any other terms.</p> <p>11.2 Provision for dissolution of from the polyfam. If the polyfam dissolves, are any members entitled to financial support from any of the others? Consider:</p> <p>.1 Conditions of entitlement.</p> <p>.2 Amount(s).</p> <p>.3 Payors, and proportion or division of responsibility.</p> <p>.4 Duration.</p> <p>.5 Any other terms.</p> <p>11.3 See also item 5 “Support of Spouses and Children” in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist and item 9 “Spousal Support” in the SEPARATION AGREEMENT DRAFTING (D-3) checklist, as appropriate.</p> <p>12. EFFECT OF VARIOUS EVENTS ON THE POLYFAM</p> <p>12.1 Provisions for various events (to the extent not otherwise contemplated in the agreement), including their effect and the procedures to be followed:</p> <p>.1 Death (consider also provisions regarding life insurance policies on polyfam members; see item 6.8 (life insurance) in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist).</p> <p>.2 A polyfam member’s incapacity or inability to work.</p> <p>.3 Desire to withdraw from the polyfam.</p> <p>.4 Refusal to comply with terms of the polyfam agreement.</p> <p>.5 Desire to dissolve the polyfam.</p> <p>.7 Other.</p> <p>12.2 See also items 9 and 10 in the MARRIAGE AGREEMENT DRAFTING (D-4) checklist and item 12 “Provision for Death” in the SEPARATION AGREEMENT DRAFTING (D-3) checklist.</p>	

ACTION TO BE CONSIDERED	NOTES
<p>13. ANNUAL REVIEW</p> <p>13.1 Include a term confirming agreement to review the agreement annually, with consequences if they do not.</p> <p>Note: The parties should be encouraged to do this. A typical approach is a term providing that if they do not update their financial schedules, anything not listed there becomes shared property regardless of ownership. This can assist with the issue whereby people have been together for so long that no one remembers who bought or brought what.</p> <p>13.2 Annual updates to income information.</p> <p>13.3 Annual updates to assets/property information.</p> <p>13.4 Annual updates or changes to other information as required.</p> <p>14. AMENDMENT</p> <p>14.1 Any amendments, updates, or other changes must be in writing, signed by all parties, and attached to agreement (consider a document-sharing software).</p> <p>15. MISCELLANEOUS AND GENERAL PROVISIONS</p> <p>15.1 Statement that parties are aware of the obligation of full and frank disclosure, and that each is satisfied with the disclosure made by the other, and that they acknowledge failure to make full and frank disclosure may result in the agreement being reviewed, varied, or voided.</p> <p>15.2 Valuation methods, if relevant to any division, assessment, or other valuation of property.</p> <p>15.3 Statement that each party has been advised of their rights and has obtained independent legal advice or has chosen not to obtain independent legal advice. See <i>Code of Professional Conduct for British Columbia</i> (the “BC Code”), rules 3.4-32, 3.4-33, and 7.2-9 regarding independent legal advice and dealing with unrepresented parties.</p> <p>15.4 Execution of further assurances.</p> <p>15.5 Severability of invalid provisions. (Or non-severability; see item 6 and “Issues with jurisdiction and overlapping legislation” under “Of note” in this checklist.)</p> <p>15.6 Mutual releases, of all claims, including claims in trust, arising out of the polyfam arrangement, any “marriage-like” relationship, or joint ownership of property, except as set out in the agreement, acknowledging that there may be unintended consequences such as the interaction of the agreement with other laws, but that the parties affirm the agreement <i>inter se</i> regardless. See also item 6 in this checklist.</p> <p>15.7 Waivers of right to be designated or to be a beneficiary, as appropriate (life insurance, pension, health and other benefits, etc.)</p> <p>15.8 Agreement is in the words of all parties; confirmation that <i>contra proferentum</i> does not apply.</p>	

ACTION TO BE CONSIDERED	NOTES
<p>15.9 Statement that each party signs the agreement voluntarily, without undue influence or coercion, and that the agreement adequately provides for their present and future needs.</p> <p>15.10 Terms regarding successors and permitted assigns, inurement, agreement binding on estates.</p> <p>15.11 Notice provisions.</p> <p>15.12 Time is of the essence.</p> <p>15.13 Statement that the agreement constitutes the full and final settlement of all issues to which it relates, except that it may be amended by written agreement of the parties (witnessed independently in the same manner as this agreement). See item 14 in this checklist.</p> <p>15.14 Provisions that the parties have read and understood the contents of the agreement and are aware of the effect, purpose, and intent of the agreement.</p> <p>15.15 Costs and expenses of settling the agreement, and who will pay.</p> <p>15.16 Validity of counterparts, execution by facsimile or other specified electronic means, and other adopting instruments.</p>	

