



## **POLYAMOROUS RELATIONSHIPS AND FAMILY LAW IN CANADA**

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## 1.0 INTRODUCTION

Part VIII of the *Criminal Code*,<sup>1</sup> “Offences Against the Person and Reputation,” is an odd amalgam of offences. The part includes many of the offences suggested by its title, such as assault, homicide and manslaughter, as well as less obvious offences relating to blasphemous libel, the procuring of feigned marriages and the unlawful solemnization of marriages. The subtitle under which the offences of bigamy and polygamy are found is “Offences Against Conjugal Rights,” a reminder of the social and religious climate from which the offences sprang.

This paper will present the early findings of a new study on perceptions of polyamory in Canada and explore how the domestic relations legislation of Canada’s common law provinces do and do not address the legal issues arising when one or more persons enter or exit a polyamorous relationship. Polyamorous relationships are non-dyadic, like bigamous and polygamous families, but are, in the sense the term is used in this paper, predicated on egalitarian values rather than religious orthodoxy and are consciously entered into by freely consenting adults. First, however, the paper will review the emergence of dyadic marriage in western cultures, its ascendance to the dominant form of domestic relationship and the criminalization of non-dyadic relationships.

### 1.1 The historical context

Dyadic marriages have been the norm in western civilizations since at least the 7<sup>th</sup> Century BCE, by which time monogamy had become firmly established among the ancient Greeks. The ancient Romans absorbed the idea into their law, and cultural standards encouraging monogamous marriage spread across Europe and northwestern Africa along with the troops and magistrates of the Roman Empire.<sup>2</sup> When the Empire’s provinces began falling to the Franks and Teutons in the 5<sup>th</sup> Century CE, the resulting void was filled by the church, establishing a temporal authority separate from the state,

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<sup>1</sup> *Criminal Code*, RSC 1985, c. C-46

<sup>2</sup> See the judgment of Bauman C.J. in *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras. 146 to 179 for an excellent summary of the origin and ascendance of dyadic marriage in the west.

and an assortment of civil kratocracies of varying natures and durability, and a thousand years of codified Roman Law gradually yielded to the parallel rule of Cannon Law within the church and the *Leges Barbarorum* without.<sup>3</sup>

The ecclesiastic courts took matters relating to marriage into their jurisdiction, a subject which grew significantly in importance following the declaration that marriage is a Christian sacrament at the 1184 Council of Verona.<sup>4</sup> The church courts thus took authority over the matrimonial torts, including jactitation of marriage, criminal conversation and ravishment – all plainly interferences with “conjugal rights” – as well as the matrimonial offences, including adultery, cruelty, desertion and bigamy.<sup>5</sup>

The English Parliament passed legislation on the issue of bigamy about 80 years after the Henrician Reformation and the formal subjugation of Cannon Law to that of the state. The *Bigamy Act* of 1603<sup>6</sup> took the offence out of the hands of the ecclesiastical courts, put it into those of the common law courts and upgraded the offence to a capital felony:<sup>7</sup>

... if any person or persons within his Majesties Dominions of England and Wales, being married, or which hereafter shall marry, do at any time ... marry any person or persons, the former husband or wife being alive ... then every such offence shall be felony ...

Blackstone described the legal circumstances of bigamy in the 18<sup>th</sup> Century thusly:<sup>8</sup>

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<sup>3</sup> See Edward Jenks' work *Law and Politics in the Middle Ages* (London, UK: John Murray, 1898) for a description of the rise of Cannon law and the *Leges Barbarorum* – literally, “laws of the barbarians” – from the ashes of Roman Law, and the subsequent development of the common law. See especially pp. 32 to 45.

<sup>4</sup> Francis Schüssler Fiorenza and John Galvin, eds., *Systematic Theology: Roman Catholic Perspectives* (Minneapolis MN: Fortress Press, 1991), vol. 2 at p. 320

<sup>5</sup> See John-Paul Boyd, “Half-Baked Torts: Uncommon Causes of Action in Family Law Proceedings” (2007) 65:1 Advocate 21 for a discussion of matrimonial causes.

<sup>6</sup> *An Act to restrain all Persons from Marriage until their former Wives and former Husbands be dead* (UK), 1 Jac. I, c. 11.

<sup>7</sup> *Ibid.* at s. 1

<sup>8</sup> William Blackstone, *Commentaries on the Laws of England*, 7th ed. (Oxford UK: Clarendon Press, 1776), vol. 4. at pp. 164 to 166.

The ... species of offences which especially affect the commonwealth are those against the public police and oeconomy. By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. ...

Another felonious offence, with regard to [the] holy estate of matrimony, is what our law corruptly calls bigamy; which properly signifies being twice married, but with us is used as synonymous to polygamy, or having a plurality of wives at once. Such a second marriage ... is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it a felony, by reason of it's being so great a violation of the public oeconomy and decency of a well ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations ...

Bigamy, the term being used interchangeably with polygamy,<sup>9</sup> was thus viewed as having been criminalized because of the threat it posed to popular rectitude and social order. This view differs only slightly in emphasis from the reasoning expressed in the preamble to the *Bigamy Act* 173 years earlier, which described the offence as being “to the great Dishonour of God and the utter undoing of divers honest Men’s Children, and others.”

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<sup>9</sup> The misuse of the terms noted by Blackstone continues. The definition of “polygamy” in James Cahill, *The Cyclopedic Law Dictionary*, 2nd ed. (Chicago IL: Callaghan and Company, 1922) at p. 779 reads as follows, cites omitted:

The act or state of a person who, knowing that he has two or more wives, or that she has two or more husbands, marries another. It differs from “bigamy” ... but “bigamy is now commonly used even where “polygamy” would be strictly correct. On the other hand, “polygamy” is used where “bigamy” would be strictly correct.

Joseph Nolan and Jacqueline Nolan-Haley are more plainspoken in *Black’s Law Dictionary*, 6th ed. (St. Paul MN: West Group, 1990) at p. 1159:

Bigamy literally means a second marriage distinguished from a third or other; while polygamy means many marriages [and] implies more than two.

Social attitudes were evolving, however, and passage of the *Divorce and Matrimonial Causes Act*<sup>10</sup> in 1857 finally allowed husbands and wives to obtain divorces *a vinculo matrimonii* in the common law courts without the passage of a private members' bill through Parliament;<sup>11</sup> the best the ecclesiastical courts would provide previously was a divorce *à mensâ et thoro*, a divorce from bed and board, later known as a judicial separation. The act further diminished the power of the ecclesiastical courts by vesting sole jurisdiction over family breakdown and the remaining matrimonial causes in the new and aptly named Court for Divorce and Matrimonial Causes.<sup>12</sup>

The *Divorce and Matrimonial Causes Act* preserved the former matrimonial offences as grounds for divorce, reflecting the rectitude of the Victorian era in which the act was drafted and the discomfort occasioned by its implicit acknowledgment that some spouses *do* wish to end their marriages. Under s. 27, husbands could petition for divorce on the ground of their wife's adultery; wives' grounds for divorce were somewhat more complex:

... it shall be lawful for any Wife to present a Petition to the said Court, praying that her Marriage may be dissolved, on the Ground that since the Celebration therefor her Husband has been guilty of incestuous Adultery, or of Bigamy with Adultery, or of Rape, or Sodomy or Bestiality, or of Adultery coupled with such Cruelty as without Adultery would have entitled her to a Divorce *à Mensâ et Thoro*, or of Adultery coupled with Desertion, without reasonable Excuse, for Two Years or upwards ...

The same section defined bigamy thusly:

... Bigamy shall be taken to mean [the] Marriage of any Person, being married, to any other Person during the Life of the former Husband or Wife, whether the Second Marriage shall have taken place within the Dominions of Her Majesty or elsewhere.

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<sup>10</sup> *An Act to amend the Law relating to Divorce and Matrimonial Causes in England* (UK), 20 & 21 Vict., c. 85.

<sup>11</sup> Lest divorces be granted with undue ease or indifferent scrutiny, s. 10 of the act required that all petitions for divorce or nullity be heard by "Three or more Judges of the said Court."

<sup>12</sup> Peter Bromley provides a very readable discussion of the history of divorce in England in *Family Law*, 5th ed. (London UK: Butterworths, 1976) at pp. 69 to 74 and 236 to 241.



The criminal character of bigamy was carried forward in the *Offences Against the Person Act*<sup>13</sup> four years later, one of the first aggregated statements of criminal offences in the United Kingdom. Bigamy was addressed at s. 57 of the act, sandwiched between child-stealing at s. 56 and attempting to procure an abortion at s. 58:

Whosoever, being married, shall marry any other Person during the Life of the former Husband or Wife, whether the Second Marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Seven Years and not less than Three Years, – or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour; and any such Offence may be dealt with, inquired of, tried, determined, and punished in any County or Place in England or Ireland where the Offender shall be apprehended or be in Custody, in the same Manner in all respects as if the Offence had been actually committed in that County or Place: Provided that nothing in this Section contained shall extend to any Second Marriage contracted elsewhere than in England and Ireland by any other than a Subject of Her Majesty, or to any Person marrying a Second Time whose Husband or Wife shall have been continually absent from such Person for the Space of Seven Years then last past, and shall not have been known by such Person to be living within that Time, or shall extend to any Person who, at the Time of such Second Marriage, shall have been divorced from the Bond of the First Marriage, or to any Person whose former Marriage shall have been declared void by the Sentence of any Court of Competent Jurisdiction.

Although the prescribed punishments were harsh – penal servitude for three to seven years or imprisonment for up to two years, “with or without hard labour” – bigamy had ceased to be a capital offence. Alexander Cairns described the evidence required in 1926 to obtain a conviction for bigamy as follows:<sup>14</sup>

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<sup>13</sup> *An Act to consolidate and amend the Statute Law of England and Ireland relating to Offences Against the Person* (UK), 24 & 25 Vict., c. 100

<sup>14</sup> Alexander Cairns, *Eversley's Law of the Domestic Relations*, 4th ed. (London UK: Sweet & Maxwell Limited, 1926) at p. 45. See also Cecil Turner, *Kenny's Outlines of Criminal Law*, 17th ed. (Cambridge UK: Cambridge University Press, 1958) at pp. 201 to 207.

In an indictment for bigamy the first marriage must be strictly proved, and mere reputation and cohabitation will not suffice; and it is doubtful whether the unsupported admission of the defendant is enough. With reference to the second marriage, it is sufficient if the parties go through the forms and ceremonies legal and necessary in the place of celebration, though the marriage itself, from the circumstances attending it, is void, as not being recognized by the law; but the form of ceremony must be recognized by the law of the place where it is solemnized.

## 1.2 Bigamy and polygamy today

In Canada's present *Criminal Code*, bigamy and polygamy are separate offences, as they were in the original legislation, introduced in 1892.<sup>15</sup> The elements of the offence of *bigamy* are set out at s. 290:<sup>16</sup>

- (1) Every one commits bigamy who
  - (a) in Canada,
    - (i) being married, goes through a form of marriage with another person,

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<sup>15</sup> *An Act respecting the Criminal Law*, 55 & 56 Vict., c. 29, ss. 276 and 278. I suspect that the rationale for dealing separately with bigamy and polygamy arose from the strong social and political reaction to Mormonism, and the doctrine of "celestial marriage" that was church policy from about 1840 to 1890, which effloresced throughout North America in the second half of the 19<sup>th</sup> Century. Note the language describing the offence of polygamy in s. 278:

- Every one is guilty of an indictable offence ... who -
- (a) practises, or by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, ... agrees or consents to practise or enter into
    - (i) any form of polygamy;
    - (ii) any kind of conjugal union with more than one person at a time;
    - (iii) what among the persons commonly called Mormons is known as spiritual or plural marriages; ...
  - (b) celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (a) of this section; ...

<sup>16</sup> "Form of marriage" is defined in s. 214 of the *Code* as follows:

- form of marriage includes a ceremony of marriage that is recognized as valid
- (a) by the law of the place where it was celebrated, or
  - (b) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated

- (ii) knowing that another person is married, goes through a form of marriage with that person, or
  - (iii) on the same day or simultaneously, goes through a form of marriage with more than one person;
- (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) ...

Pursuant to s. 291(1) of the *Code*, bigamy is an indictable offence subject to a maximum penalty of five years' imprisonment.

The elements of the offence of *polygamy*, also made an indictable offence with a maximum penalty of five years' imprisonment, are provided at s. 293:<sup>17</sup>

- (1) Every one who
- (a) practises or enters into or in any manner agrees or consents to practise or enter into
    - (i) any form of polygamy, or
    - (ii) any kind of conjugal union with more than one person at the same time,whether or not it is by law recognized as a binding form of marriage, or
  - (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

Ward L.J. provided a glimpse of the contemporary English view of bigamy in the case of *Whiston v Whiston*, when he described the offence as "an outrage upon public decency by the profanation of a solemn ceremony."<sup>18</sup> This view is strikingly similar to

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<sup>17</sup> "Polygamy" and "conjugal union" are defined in neither the *Code* nor the *Interpretation Act*, RSC 1985, c. I-21. See the *Code's* definition of "form of marriage," *supra*, fn 16.

<sup>18</sup> *Whiston v Whiston*, [1995] Fam 198 (CA). The quote itself was likely borrowed from Courtney Stanhope Kenny, author of successive editions *Kenny's Outlines of Criminal Law*, from 1902 until his death in 1930. Interestingly, more developed arguments against bigamy had been articulated hundreds of years earlier by theologians such as St. Augustine and Thomas Aquinas. It may be that the thinking of these Catholic philosophers failed to find purchase within a moral landscape dominated by post-Reformation values.

that offered by Blackstone two centuries earlier, who likewise criticized bigamy as a violation of the “decency of a well ordered state,” whose members are to be concerned with “the rules of propriety, good neighbourhood, and good manners.”

A somewhat more fulsome recent expression of the evils of bigamy was provided in the evidence of John Witte Jr., a professor at Emory University and an “expert in legal history, marriage and historical family law, and religious freedom,” called by the Attorney General of Canada to give evidence on the evolution of western attitudes toward marriage in *Reference re: Section 293*.<sup>19</sup> Bauman C.J. summarized Witte’s opinion, offered with respect to polygyny specifically,<sup>20</sup> as follows:

[229] ... For more than 1750 years the Western legal tradition has also declared polygamy to be an offence. The denunciation of the practice has been based on natural, philosophical, political, sociological, psychological and scientific arguments. Polygamy, it has consistently been argued, is associated with harm: harm against women, against children, against men and against society. ...

[230] The harms against women include: exploitation; commodification; social isolation; the inevitable favouritism of some women and deprecation of others within the household; discrimination; and, impoverishment.

[231] The harms against children include: the negative impacts on their development caused by discord, violence and exploitation in the marital home; competition between mothers and siblings for the limited attention of the father; diminishment of the democratic citizenship capabilities of children as a result of being raised by mothers deprived of their basic rights; impoverishment; and, violation of their fundamental dignity.

[232] The harms against men include: the unequal distribution of spouses and related ostracism of younger men forced to compete for a scarcer supply of women; the creation of a false appetite for patriarchy; inflammation of male lust; and deprivation of the essential bond of mutuality that is unique to the marital institution.

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<sup>19</sup> *Supra*, fn 2

<sup>20</sup> *Ibid.* at para. 169

[233] Finally, the harms to society that flow from polygamy include: threats to the social order and a greater need for social supports as women lacking education and opportunity to enhance themselves, as well as their children, find themselves impoverished upon divorce or the death of their husbands; harms to good citizenship; threats to political stability; and the undermining of human dignity and equality.

### 1.3 Distinguishing polyamory

Bigamous, polygamous and polyamorous relationships all share the quality of involving more than two simultaneous participants. Bigamous and polygamous relationships both involve marriages or, to be more precise, ceremonies which purport to marry their participants. Polyamorous relationships do not involve marriage ceremonies claiming to bind the participants to each other, although such relationships may certainly include one or more dyads who are married to each other. Polyamorous relationships also have the singular quality of not being prohibited by the *Criminal Code*; see the discussion at §1.3.2 below.

#### 1.3.1 Bigamous relationships

As the *Criminal Code* defines the offence, bigamy consists of: a married person completing a purported marriage ceremony with another person; a person completing a purported marriage ceremony with a married person; or, a person marrying more than one person at the same time. The two critical elements of the offence, then, consist of:

- a) knowing that a party is, or is about to be, married; and,
- b) completing a marriage ceremony with one or more parties despite that knowledge.

The required ceremony itself is ostensible rather than actual, as any marriage subsequent to a valid subsisting marriage is void by definition.<sup>21</sup>

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<sup>21</sup> See, for example: *Felton v Felton*, 1999 CanLII 5952 (BCSC) at para. 35; *Re Capon, Capon and O'Brian v McLay*, [1965] 2 OR 83 (OCA); *Fleming v Fleming et al.*, [1934] OR 588 (OHCJ); *McCullough v Ralph*, [1942] OWN. 80 (OHCJ); and, *Thompson v Crawford (falsely called Thompson)*, [1932] OR 281 (OHCJ).

### 1.3.2 Polygamous relationships

The elements of the offence of polygamy are less straightforward, and are made out when a person:

- a) enters into
  - i) a “form of polygamy” or
  - ii) simultaneous “conjugal unions,”

whether the means by which entry purports to be formalized are recognized as a marriage ceremony or not; or,

- b) participates in the purported means of formalization of a form of polygamy or a conjugal union.

It is not immediately clear that a ceremony of some sort is a necessary element of the offence, as it is with bigamy. It certainly is for the second arm of the offence, but for the first, the reference in s. 293(1)(a) to “whether or not [the form or polygamy or conjugal union] is ... recognized as a binding form of marriage” does not necessarily require that a formal rite of some sort have been conducted for the offence to be made out; it should be remembered that “form of marriage,” defined in s. 214, refers not to the nature of the impugned relationship but to the marriage *ceremony*. Further, the introductory words of s. 293(1)(a) refer to offenders entering into a form of polygamy or a conjugal union by mere consent, as well as by the contractual obligation implied by a marriage ceremony: the offence captures anyone who “practises or enters into or in any manner agrees or *consents* to practise or enter into” a polygamous relationship or conjugal union.

The absence of definitions of “polygamy” and “conjugal union” from the *Code* adds to the confusion. Most definitions of polygamy, including those in *Black’s Law Dictionary* and *The Cyclopedic Law Dictionary*,<sup>22</sup> *The Dictionary of Canadian Law*<sup>23</sup> and *The Concise*

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<sup>22</sup> Both *supra*, fn 9

<sup>23</sup> Daphne Dukelow and Betsy Nurse, *The Dictionary of Canadian Law*, 2nd ed. (Toronto ON: Carswell, 1995) at p. 913.

*Oxford Dictionary*<sup>24</sup> define the term to mean having many *wives* or many *husbands*, persons in respect of whom a marriage ceremony is necessary to qualify as a “wife” or a “husband.” The reference to “conjugal union” at s. 294(1)(a)(ii) could be read as capturing unmarried relationships entered into without the benefit of formalization, however in *R. v Tolhurst and Wright*, the Ontario Court of Appeal held the term “conjugal union” to “predicate some form of union under the guise of marriage,”<sup>25</sup> and the bulk of the dictionaries just referenced describe the term “conjugal” as relating to marriage or the married state.<sup>26</sup>

Bauman C.J. reached the same conclusion, that the terms “polygamy” and “conjugal union” relate to marriages only, in *Reference re: Section 293*:

[992] In my view, the concept of “conjugal union” in s. 293 is intended to capture a union which is a marriage. That is made plain by the closing words of ss. 1(a), “whether or not it is by law recognized as a binding form of marriage”. It is also made plain by dictionary meanings of the two words. ...

[1017] A “conjugal union” coming within the prohibition may not need be recognized as a “binding form of marriage,” but the whole thrust of the section is that it must be a purported form of marriage. ...

[1020] In my view, it is clear that the offence created in ss. 293(1)(a) is premised on some form of sanctioning event because the status prohibited by the section – “polygamy” and “any kind of conjugal union with more than one person at the same time” – both have at their core, as I have discussed, “marriage” (whether or not recognized as legally binding). And “marriage” has at its core the voluntary joining of two individuals with the requisite intent to “marry” and the recognition and sanction by the couple’s community. ...

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<sup>24</sup> Della Thompson, ed., *The Concise Oxford Dictionary of Current English*, 9th ed. (Oxford UK: Clarendon Press, 1995) at p. 1059.

<sup>25</sup> *Rex v Tolhurst and Wright*, [1937] OR 570 (OCA)

<sup>26</sup> *Black’s Law Dictionary*, supra, fn 9 at p. 302; *The Cyclopedic Law Dictionary*, supra, fn 9 at p. 210; and, *The Concise Oxford Dictionary*, supra, fn 24 at p. 281. Only *The Dictionary of Canadian Law*, supra, fn 23 at p. 231 defines “conjugal” as potentially including unmarried persons: “related to the married or marriage-like state.”

Some sort of formalizing event is thus required for the offence of polygamy to be made out, and unmarried cohabiting relationships between more than two persons are accordingly not captured, at least not in British Columbia and Ontario, by s. 293. Whatever the distinction might be between persons engaged in a “form of polygamy” and a “conjugal union,” both terms require the parties’ relationship to be actually or purportedly formalized through some form of marriage ceremony.

### 1.3.3 Polyamorous relationships

The term polyamory is a clumsy portmanteau of the Greek *polus* for “much” and the Latin *amor* meaning “love,”<sup>27</sup> and is sometimes used interchangeably with the term polyfidelity, which in place of love borrows the Latin word *fidelitas*, meaning loyalty or fealty.<sup>28</sup> As these terms suggest, people who are polyamorous are, or prefer to be, involved in more than one intimate relationship at a time. Some polyamorists are involved in stable, long-term, loving relationships involving two or more other people. Others are simultaneously engaged in a number of relationships of varying degrees of permanence and commitment. Still others are involved in a web of concurrent relationships ranging from short-term relationships that are purely sexual in nature to more enduring relationships characterized by deep emotional attachments.

Maura Strassberg described polyamory in a 2003 article in the *Capital University Law Review* as follows:<sup>29</sup>

... Contemporary practitioners have coined the names “polyamory” and “polyfidelity” to describe a wide range of partner arrangements that vary as to the number of people involved, the sexes of those involved, the sexualities of those involved, the level of commitment of those involved, and the kinds of relationships pursued.

Imaged as a form of commitment which is flexible and responsive to the needs and interests of the individuals involved, rather than a rigid institution imposed

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<sup>27</sup> The *gamy* in bigamy and polygamy comes from *gamos*, the Greek word for “marrying.”

<sup>28</sup> Some distinguish the meaning of polyfidelity as referring only to relationships in which the participants do not date outside the *ménage*.

<sup>29</sup> Maura Strassberg, “The Challenge of Post-Modern Polygamy: Considering Polyamory” (2003) 31 *Capital University L R* 439 at pp. 439 to 441



in cookie cutter fashion on everyone, this new polygamy reflects postmodern critiques of patriarchy, gender, heterosexuality and genetic parenthood. Such a “postmodern polygamy” might occasionally look like traditional patriarchal polygamy, but it differs in important ways. For example, it could as easily encompass one woman with several male partners as it could one man with multiple female partners. It also includes the expanded possibilities created by same-sex or bi-sexual relationships, neither of which [is] contemplated by traditional polygamy.

The three themes of *adaptability, choice* and a *transcendence of traditional gender and parenting roles* are echoed in the public statements of a number of contemporary groups supporting polyamory, which often include a fourth theme of *transparency and honesty*. The Canadian Polyamory Advocacy Association, for example, promotes equality for people involved in polyamorous relationships, and defines its members’ views in contradistinction to those held by faith-based, patriarchal polygamists:<sup>30</sup>

We are the poly majority: modern, secular, egalitarian polyamory.

We believe every adult should create her own relationships. No loving, life-enhancing possibility is out of bounds. ...

We believe in affirmative concern for the feelings, well-being, and autonomy of every person. ...

Our relationships are custom-made by those in them, without preset roles. ...

The website of *Loving More*, an online magazine established in 1985 to provide information and education on polyamorous lifestyles, describes polyamory as follows:<sup>31</sup>

... “polyamory” connotes multiple romantic relationships carried out with certain assumptions and ideals: of honesty and clear agreements among partners, mutual good will and respect among all involved, intense interpersonal communication, and high ethical standards. ...

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<sup>30</sup> <http://polyadvocacy.ca/majority/>, retrieved 2 June 2016.

<sup>31</sup> <http://www.lovemore.com/home/what-is-polyamory/>, retrieved 6 June 2016.

... polyamory refers to emotionally connected relationships openly involving three or more people. It is about honesty, integrity and respect. Some examples of poly relationships: A married couple might have other emotionally connected partners. Three, four or more people might all live together bonded as a family, raise children and have emotional and sexual connections between all or some combinations within the group. Someone might have several distant romantic partners they see only occasionally.

If it sounds complex, that's because it can be as complicated as the emotions and connections involved. A polyamorous relationship is very much a design-it-yourself project. This is one reason why polys put such stock in abundant, honest communication – and why it can all look pretty confusing. ...

Wikipedia offers a plausible definition of polyamory that also resonates with the four themes identified:<sup>32</sup>

The term “polyamorous” can refer to the nature of a relationship at some point in time or to a philosophy or relationship orientation (much like gender or sexual orientation). The word is sometimes used in a broader sense, as an umbrella term that covers various forms of multiple relationships, or forms of sexual or romantic relationships that are not sexually exclusive. Polyamorous arrangements are varied, reflecting the choices and philosophies of the individuals involved, though there is disagreement on how broadly the concept of polyamory applies. An emphasis on ethics, honesty, and transparency all around is widely regarded as the crucial defining characteristic. ...

People who identify as polyamorous typically reject the view that sexual and relational exclusivity are necessary for deep, committed, long-term loving relationships. ... Sex is not necessarily a primary focus in polyamorous relationships, which commonly consist of people seeking to build long-term relationships with more than one person on mutually agreeable grounds, with sex as only one aspect of their relationships. In practice, polyamorous relationships are highly varied and individualized according to those participating. For many, such relationships are ideally built upon values of trust,

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<sup>32</sup> <https://en.wikipedia.org/wiki/Polyamory>, retrieved 6 June 2016

loyalty, the negotiation of boundaries, and compersion, as well as overcoming jealousy, possessiveness, and the rejection of restrictive cultural standards.

In fairness, however, and putting aside concerns raised by groups like the CPAA about polygamous relationships that are patriarchal in structure and are entered into for religious reasons, a polygamous cohabiting *ménage* formed by freely consenting, informed adults,<sup>33</sup> whose personal values emphasize equality and honesty, would otherwise be indistinguishable from a polyamorous relationship apart from the purported marriage of its members.

#### 1.4 The contemporary context

The traditional model of the western nuclear family, consisting of married heterosexual parents and their legitimate offspring, which prevailed almost unaltered for more than a thousand years, has been evolving at an ever-increasing pace since the dawn of the industrial revolution, along with the legal concepts and structures that support it. The legal disabilities of married women under their coverture were the first to go,<sup>34</sup> followed by the disabilities associated with bastardy.<sup>35</sup> The *Divorce Act* provided the first consistent, national scheme for divorce in 1968,<sup>36</sup> and the baby boomers, the oldest of whom turned 65 in 2011, are the first generation to have lived almost the whole of their adult lives under federal divorce legislation.<sup>37</sup> Not only has the stigma associated with divorce largely evaporated, but the rate of remarriage and repartnering has continued to rise over the last two decades, as has the number of blended families, which are now as commonplace as unblended families.<sup>38</sup> Sexual orientation became a

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<sup>33</sup> In this paper, the term *ménage* is used to describe committed polyamorous social groups. Although the term is not widely accepted within the polyamorous community, the definition of *ménage* as referring to a household or the members of a household (see *The Concise Oxford Dictionary of Current English*, *supra*, fn 24 at p. 850) provides a convenient distinction from *family*, which implies relatedness by blood or law.

<sup>34</sup> John-Paul Boyd, "The Interesting Evolution of Married Women's Property Rights" (2005) 63:4 Advocate 537

<sup>35</sup> See, for example, *An Act respecting Legitimation by Subsequent Marriage*, SBC 1922, c. 43 and the 1926 *Legitimacy Act* (UK), 16 & 17 Geo. 5, c. 60.

<sup>36</sup> *Divorce Act*, SC 1968, c. 24

<sup>37</sup> John-Paul Boyd, *Economic and Other Issues of Spouses Separating Later in Life* (Calgary AB: Canadian Research Institute for Law and the Family, 2016)

<sup>38</sup> Nora Bohnert, Anne Milan and Heather Lathe, *Enduring Diversity: Living Arrangements of Children in Canada over 100 Years of the Census* (Ottawa ON: Statistics Canada, 2014)

prohibited ground of discrimination in the mid-nineties,<sup>39</sup> following which same-sex marriage became legal in Ontario in 2002,<sup>40</sup> and in eight other provinces and territories in rapid succession thereafter, until the introduction of the *Civil Marriage Act* in 2005 legalized same-sex marriage throughout the country.<sup>41</sup> Legislation giving unmarried cohabiting couples property rights identical to those of married spouses became law in Saskatchewan in 2001,<sup>42</sup> in Manitoba in 2004<sup>43</sup> and in British Columbia in 2011.<sup>44</sup>

In Canada, *family* is now thoroughly unmoored from presumptions about marriage, gender, sexual orientation, reproduction and childrearing; the notion that romantic relationships, whether casual, cohabiting or connubial, must be limited to two persons at one time may be the next focal point of change.

The scant data currently available on polyamorous relationships suggest that the number of people involved in such families is not insignificant and may be increasing:<sup>45</sup> according to a 2009 article in *Newsweek*, *Loving More* has “15,000 regular readers,” and more than 500,000 Americans live in openly polyamorous relationships;<sup>46</sup> in *Polyamory in the Twenty-First Century*, a book cited in *Reference re: Section 293*, the author estimates that one in 500 Americans, or about 10 million people, are polyamorous;<sup>47</sup> and, the website of the CPAA identifies two other national organizations supporting or connecting people involved polyamorous relationships, eight similar organizations

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<sup>39</sup> *Egan v Canada*, [1995] 2 SCR 513

<sup>40</sup> *Halpern v Canada (Attorney General)* (2002), 60 OR (3d) 321 (ONSC)

<sup>41</sup> *Civil Marriage Act*, SC 2005, c. 33, s. 2

<sup>42</sup> *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2)*, SS 2001, c. 51

<sup>43</sup> *The Common-Law Partners' Property and Related Amendments Act*, SM 2002, c. 48

<sup>44</sup> *Family Law Act*, SBC 2011, c. 25

<sup>45</sup> Statistics Canada does not collect data on non-dyadic family relationships. “Census families” in the 2011 Census are composed of: married spouses living in the same home, with or without children; “common-law” couples living in the same home, with or without children; and, single parents living with one or more children. Marital status of census respondents is tracked as married, separated, living common-law, widowed and divorced.

<sup>46</sup> Jessica Bennett, “Polyamory: The Next Sexual Revolution?” *Newsweek* (28 May 2009), available at <http://www.newsweek.com/polyamory-next-sexual-revolution-82053>, retrieved on 7 June 2016.

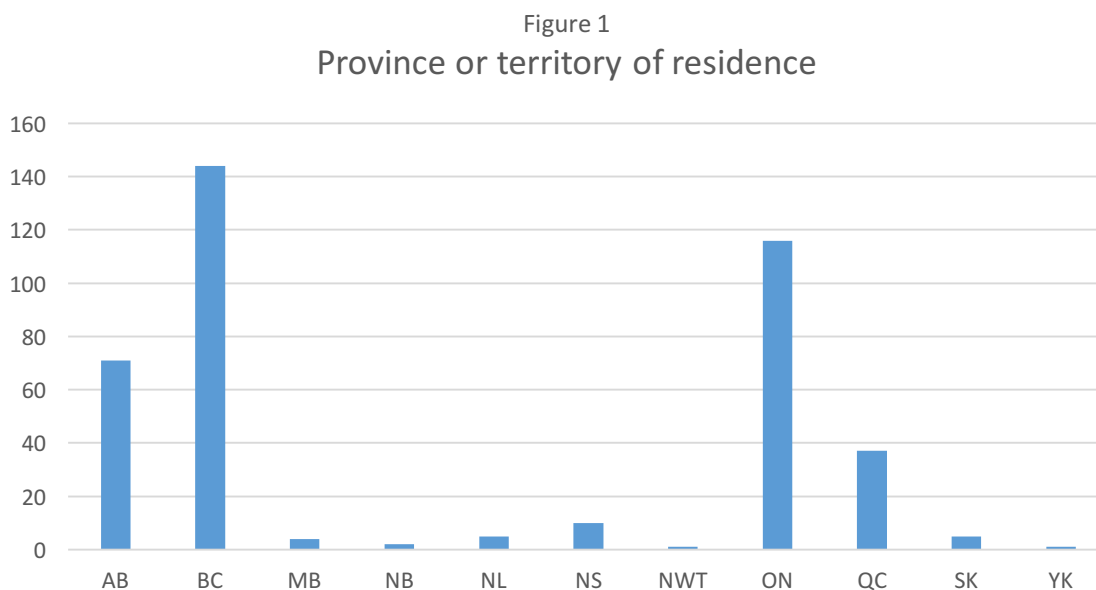
<sup>47</sup> Deborah Anapol, *Polyamory in the Twenty-First Century: Love and Intimacy with Multiple Partners* (Lanham, MD: Rowman & Littlefield Publishers Inc., 2010) at p. 44. If the same base rate applied in Canada, almost 72,000 Canadians would be polyamorous (Statistics Canada, CANSIM, table 051-0001).

based in the Maritimes, 36 in Québec and Ontario, 23 in the Prairies and 22 in British Columbia.<sup>48</sup>

#### 1.4.1 Research study: Perceptions of polyamory in Canada

On 20 June 2016, the Canadian Research Institute for Law and the Family began a study on Canadian perceptions of polyamory, advertised with the assistance of the CPAA, intended to gather data by way of an electronic survey supplemented by follow-up interviews with selected respondents.<sup>49</sup> Although the interviews have not yet taken place, preliminary data from 547 survey respondents is available and suffice to give some sense of the demographics and attitudes of those involved in polyamorous relationships.

The majority of survey respondents live in British Columbia (35.6%), Ontario (28.7%) and Alberta (17.6%),<sup>50</sup> see Figure 1, and are between 25 and 44 years old (74.4%), see Figure 2.



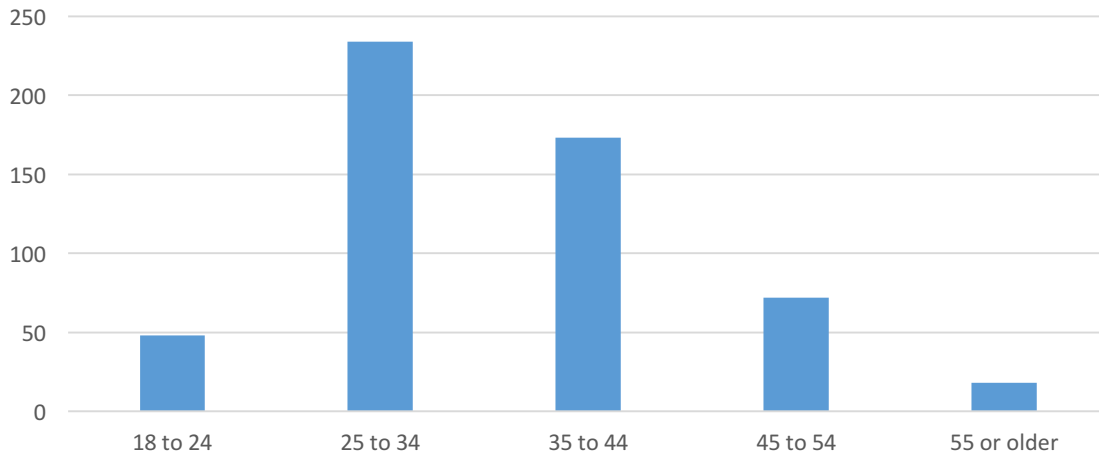
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<sup>48</sup> <https://www.facebook.com/notes/canadian-polyamory-advocacy-association-cpaa/canadian-polyamory-groups/10153957494953420>, retrieved on 7 June 2016.

<sup>49</sup> <http://fluidsurveys.com/surveys/Crllf/perceptions-of-polyamory-in-canada/>

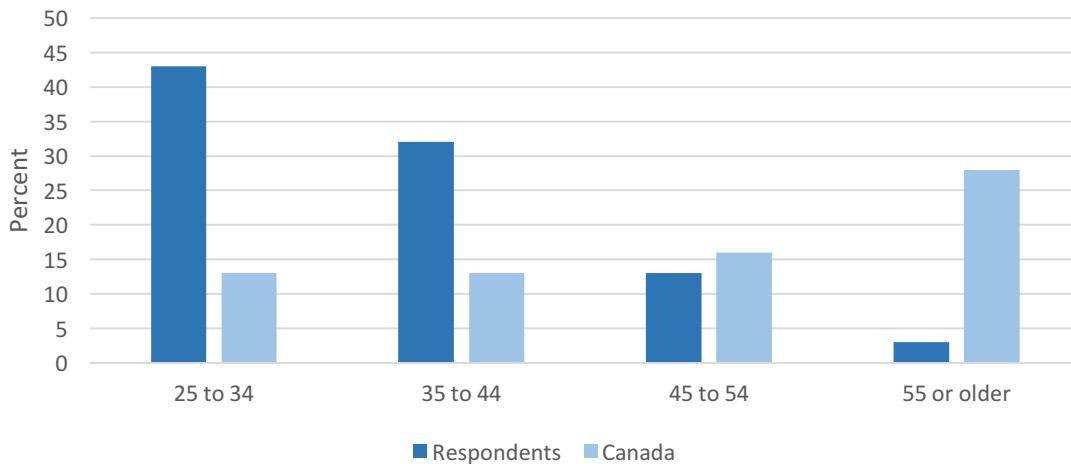
<sup>50</sup> One-quarter of survey respondents (143) declined to answer this question, which may reflect a certain degree of apprehension resulting from the criminalization of polygamy by the *Criminal Code*.

Figure 2  
Age



Respondents tend to be younger than the general Canadian population, with 75% of respondents being between the ages of 25 and 44, compared to 26% of the general population, and 16% of respondents being age 45 or older, compared to 44% of the general population, see Figure 3.<sup>51</sup>

Figure 3  
Distribution of age of respondents and general population



Most respondents had completed high school (96.7%), and respondents' highest levels of education attained were undergraduate degrees (26.3%), followed by post-graduate

<sup>51</sup> Canadian population data: Statistics Canada 2011 Census, catalogue no. 98-311-XCB2011025.

or professional degrees (19.2%) and college diplomas (16.3%), see Figure 4. Respondents reported achieving significantly higher levels of educational attainment than the general population of Canada: 37% of respondents reported holding an undergraduate university degree, compared to 17% of the general population; and, 19% of respondents reported holding a post-graduate or professional degree, compared to 8% of the general population, see Figure 5.<sup>52</sup>

Figure 4  
Educational attainment

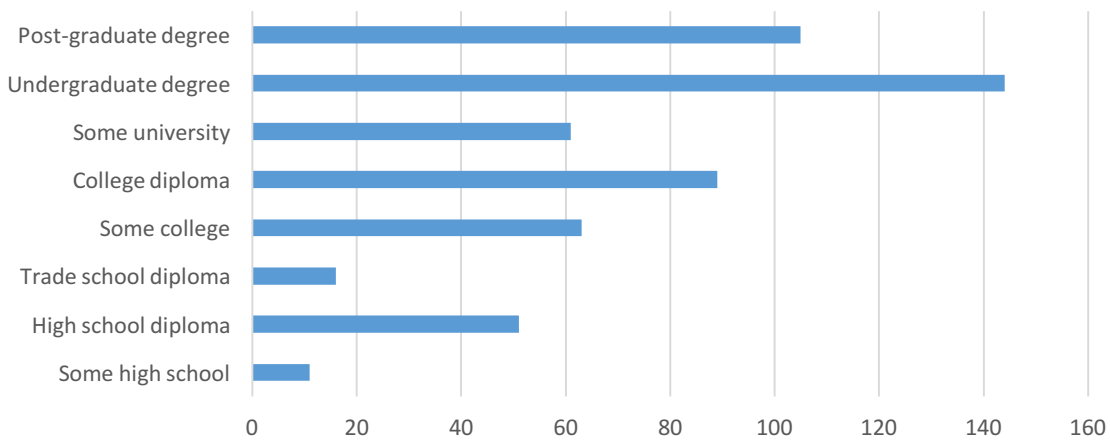
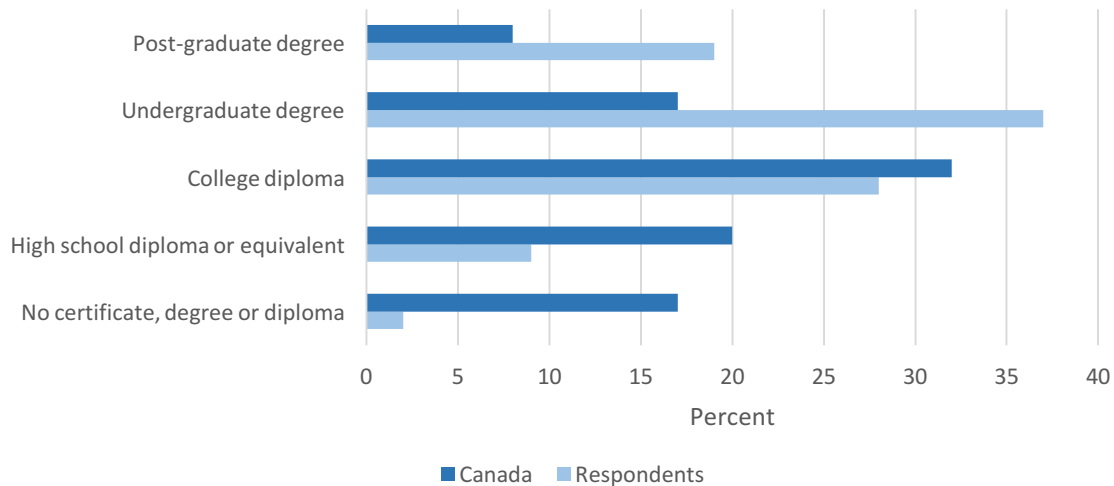


Figure 5  
Distribution of educational attainment among respondents and general population



<sup>52</sup> Canadian population data: Statistics Canada estimate for June 2016, CANSIM table 282-0003.

Although almost half of respondents had annual incomes of less than \$39,999 (46.8%), almost two-thirds were not the sole income-earner in their household (65.4%) and more than three-fifths of respondents' households (62.3%) had incomes between \$80,000 and \$149,999 per year, see Figure 6. Compared to the Canadian population, fewer respondents (47%) had incomes less than \$40,000 per year than the general population (60%), and more respondents (31%) had incomes of \$60,000 or more per year than the general population (23%), see Figure 7.<sup>53</sup>

Figure 6  
Annual income of individuals and households

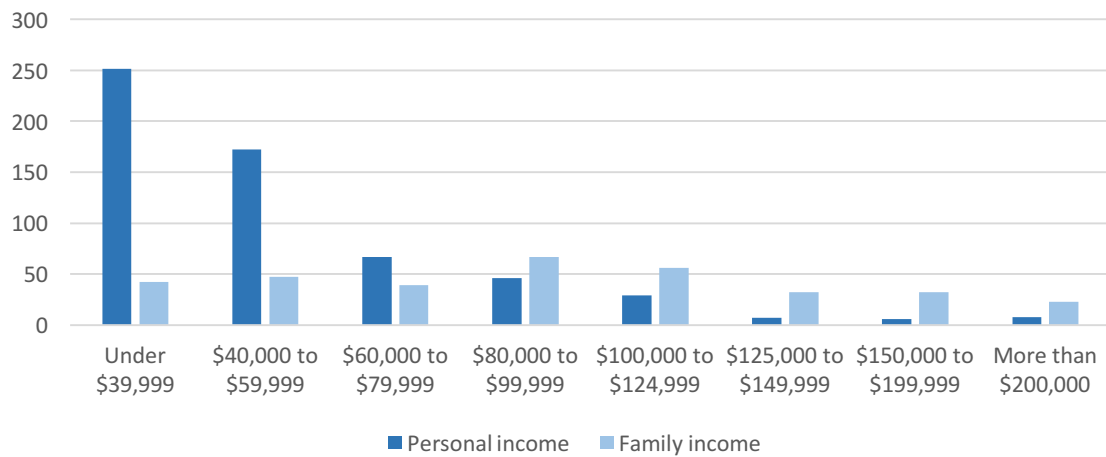
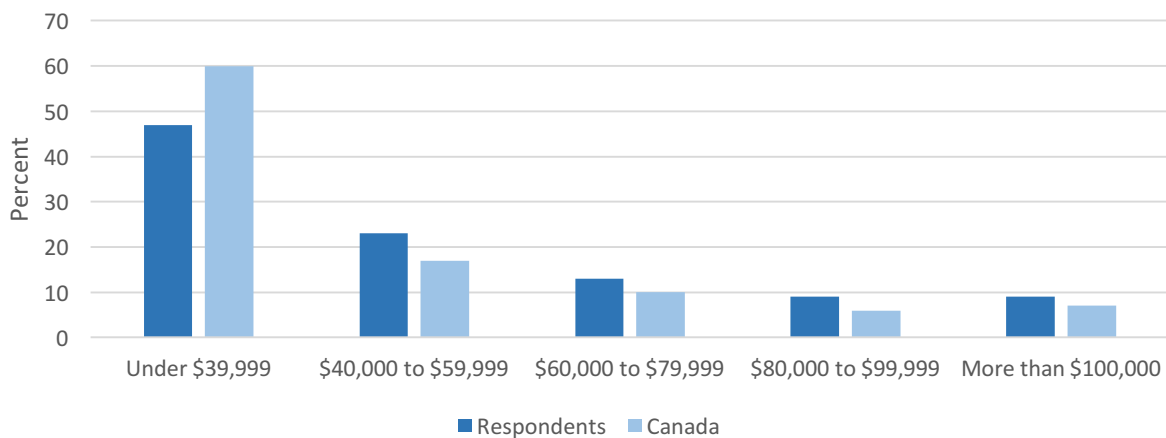


Figure 7  
Distribution of income of respondents and general population

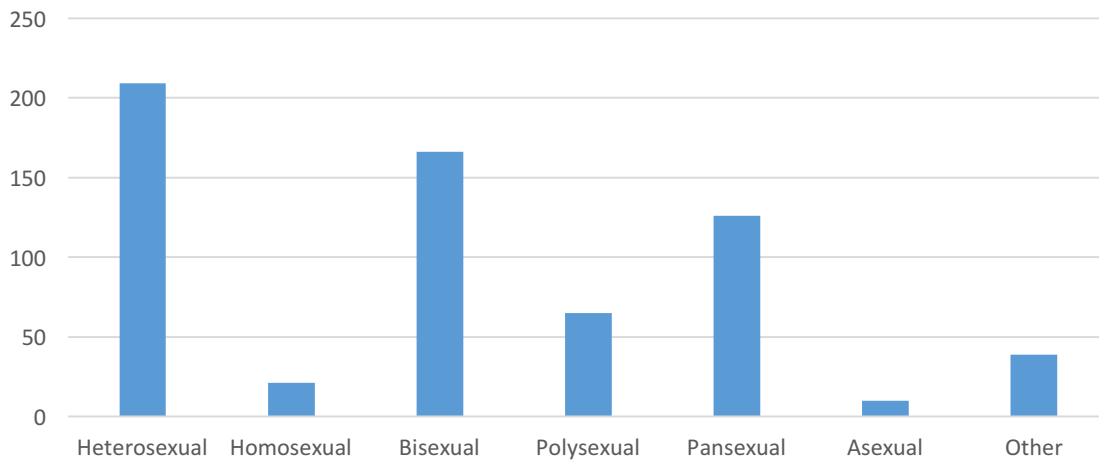


<sup>53</sup> Canadian population data: Statistics Canada estimate for 2014, CANSIM table 206-0051.



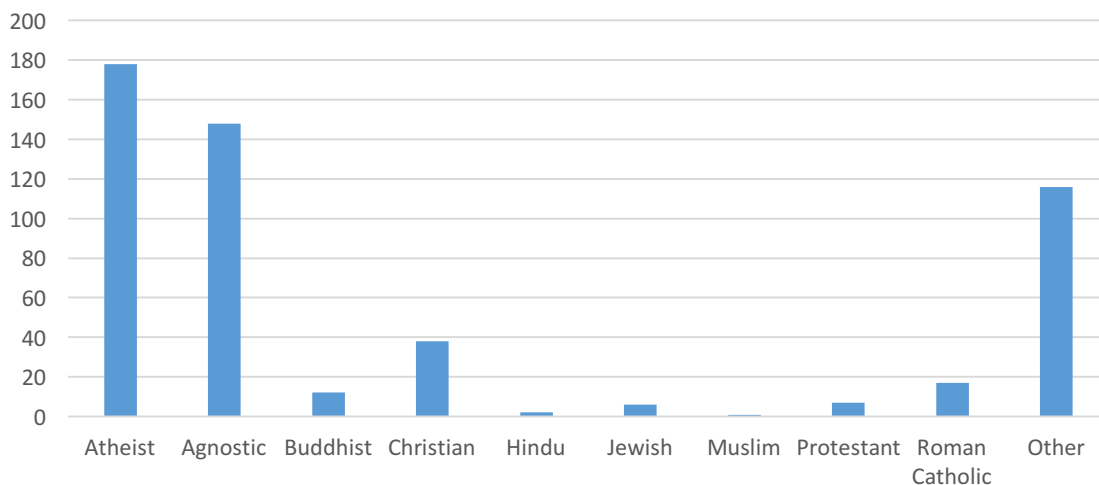
Slightly less than one-third of respondents identified as male (30%) and almost three-fifths identified as female (59.7%); the rest identified as genderqueer (3.5%), gender fluid (3.2%), transgender (1.3%) or “other” (2.2%). A plurality of respondents described their sexuality as either heterosexual (39.1%) or bisexual (31%), see Figure 8.

Figure 8  
Sexuality



Most respondents described themselves as atheists (33.9%) or agnostic (28.2%). Of those subscribing to an organized faith, most said that they were Christian (non-denominational, 7.2%; Roman Catholic, 3.2%; Protestant, 1.3%), see Figure 9. However, almost a quarter of respondents (22.1%) described their faith as “other,” a broad category including Wicca, Paganism and Pantheism.

Figure 9  
Religious affiliation



More than three-fifths of respondents (68%) said that they are currently in a polyamorous relationship. Almost two-fifths of the respondents who said that they are *not* currently in a polyamorous relationship (39.9%) said that they had been in such a relationship in the last five years.

Most of respondents' polyamorous relationships involved three adults (50.4%), see Figure 10. Only a fifth of respondents said that the members of their relationship lived in a single household (19.7%). Where the members of a *ménage* lived in more than one household, most lived in two households (44.3%) or three households (22.2%), see Figure 11.

Figure 10  
Members per relationship

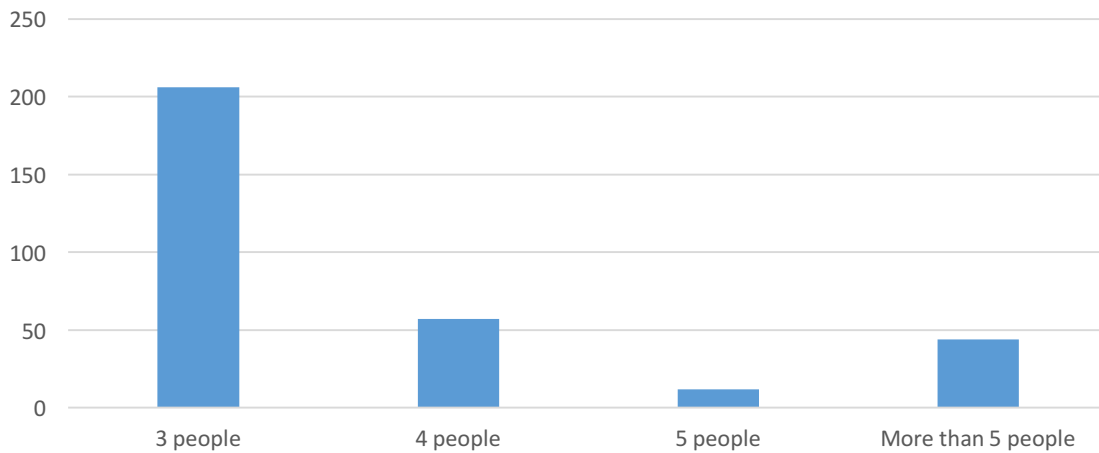
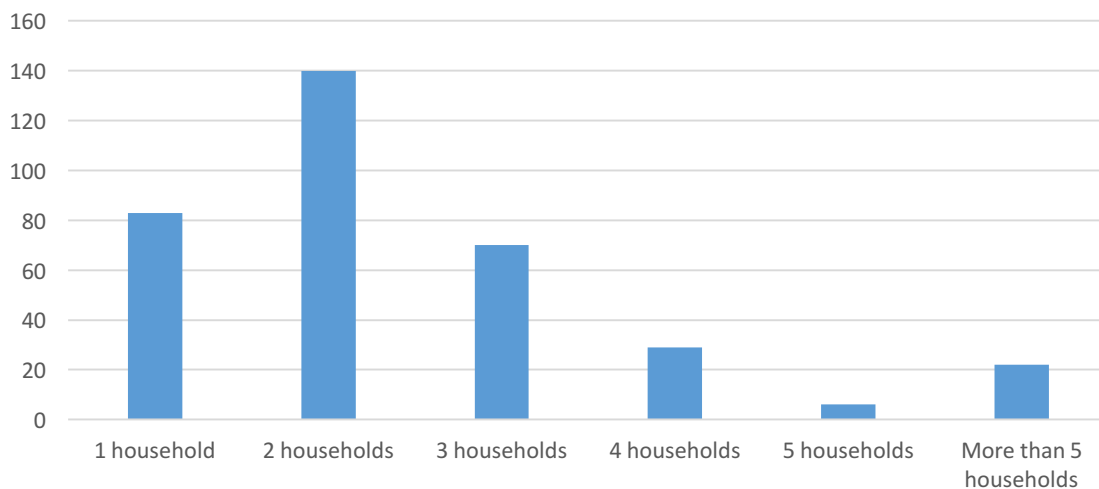


Figure 11  
Households per relationship



Where the members of a *ménage* live in one household, three-fifths of respondents' households involved at least one married couple (61.2%), and there was only one married couple in those households. Where the members of a *ménage* lived in more than one household, almost half involved at least one married couple (45.4%), and 85% of those households involved one married couple while the remainder involved two married couples (12.9%), three married couples (1.4%) and more than three married couples (0.7%).

In the past five years, 53.4% of respondents said that one or more individuals had been added to their *ménage*; of these respondents, 74.2% had at least one man join their relationship and 73% had at least one woman join their relationship. More than one-third of all respondents (36.6%) said that one or more individuals had left their *ménage* in the last five years; 64.7% of these respondents said that at least one man had left their relationship and 67.9% said that at least one woman had left their relationship. Women and men tend to join and leave *ménages* in roughly equal numbers, see Figures 12 and 13.

Figure 12  
Persons joining relationship in last five years

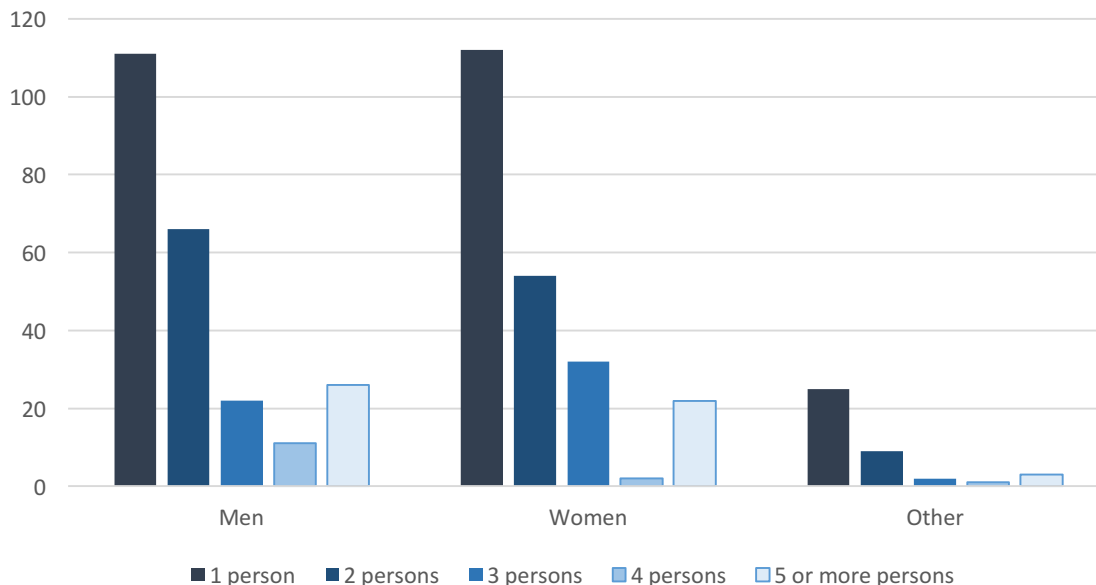
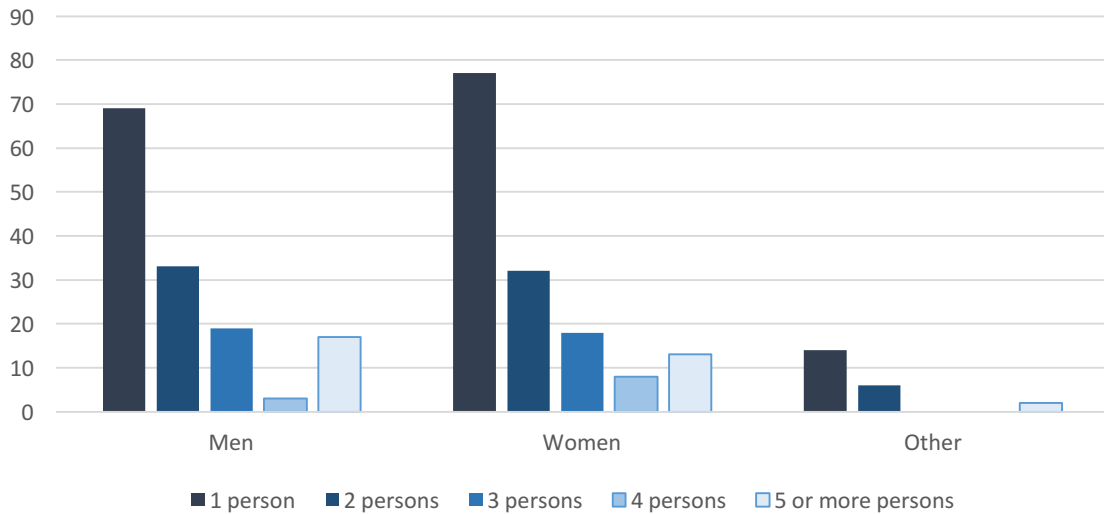
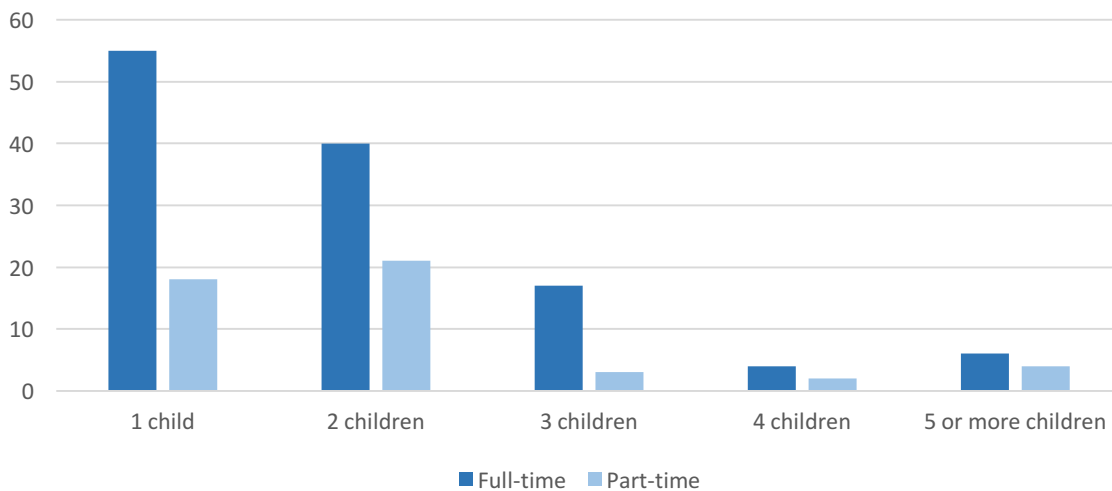


Figure 13  
Persons leaving relationship in last five years



Almost a quarter of respondents (23.2%) said that at least one child under the age of 19 lives full-time in their household under the care of at least one parent or guardian, and 8.7% said that at least one child lives part-time in their household under the care of at least one parent or guardian, see Figure 14.

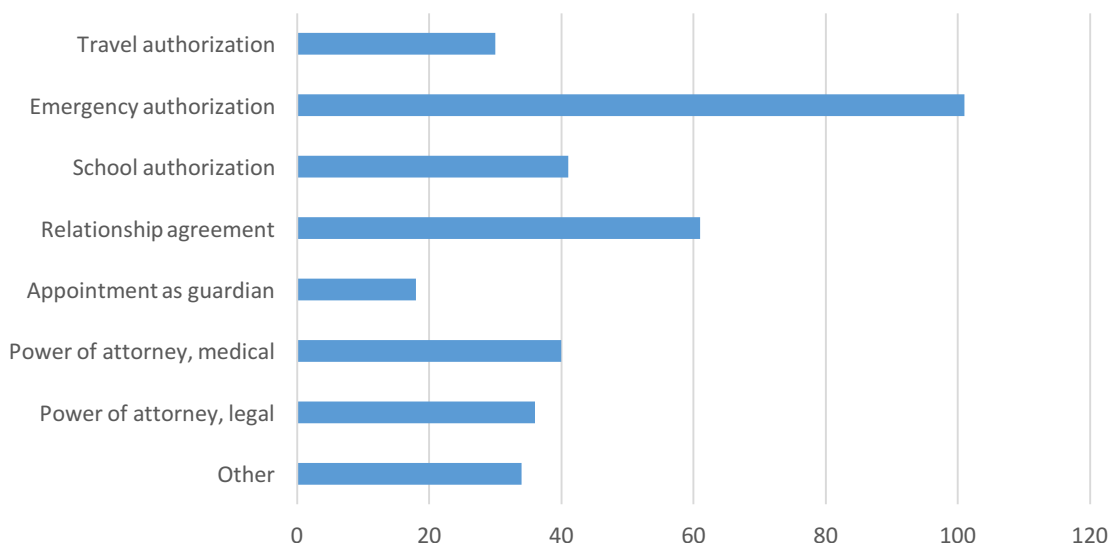
Figure 14  
Children present in household



Slightly less than one-third of respondents (32.2%) said that they had taken legal steps to formalize some aspect of the rights and responsibilities of the members of their

*ménage*. Most of these respondents had signed emergency authorizations (57.4%), followed by relationship agreements (34.7%), powers of attorney for medical matters (22.7%), school authorizations (23.3%) and powers of attorney for legal matters (20.5%), see Figure 15.

Figure 15  
Formalization of rights and responsibilities



The themes of adaptability, choice, a transcendence of traditional gender and parenting roles, and transparency and honesty, discussed above, were also revealed in respondents' answers to questions about their views of polyamorous relationships, see Figures 16 and 17.

When asked about the extent to which they agreed that *everyone in a polyamorous relationship should be treated equally regardless of gender or gender identity*, for example, 82.1% strongly agreed and 12.5% agreed with the statement. Over one-half of respondents (52.9%) strongly agreed and 21.5% agreed with the statement that *everyone in a polyamorous relationship should be treated equally regardless of parental or guardianship status*. The substantial majority (89.2%) strongly agreed and 9.2% agreed with the statement that *everyone in a polyamorous should have the responsibility to be honest and forthright with each other*. Likewise, a large majority of respondents agreed or strongly agreed that all members of a polyamorous family should have a say about changes in their relationship, including about the admission of new members, and that each member should be able to leave the *ménage* if and when they choose.

Figure 16  
Attitudes toward equality

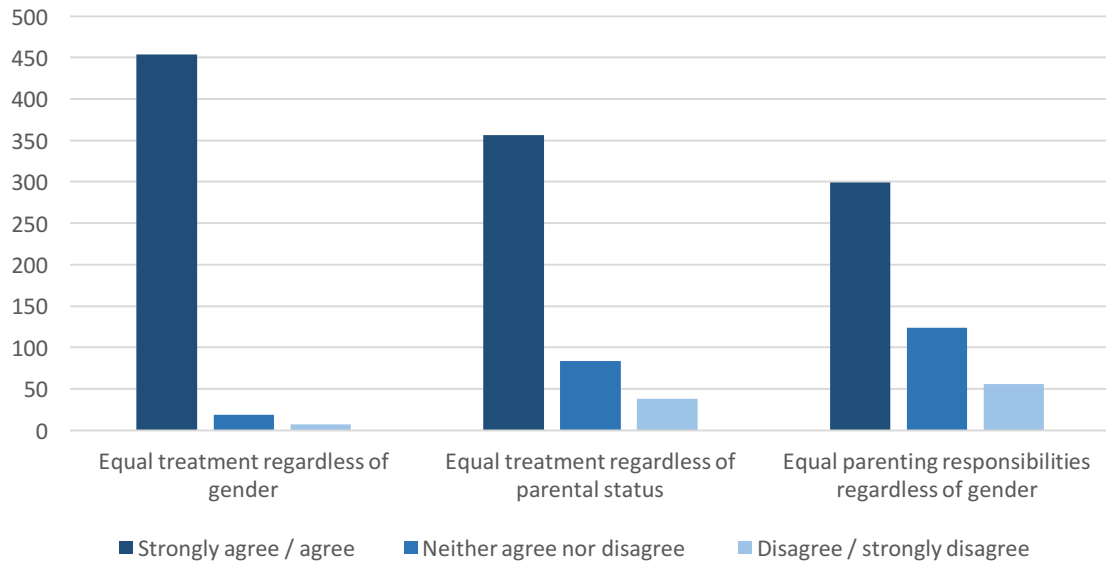
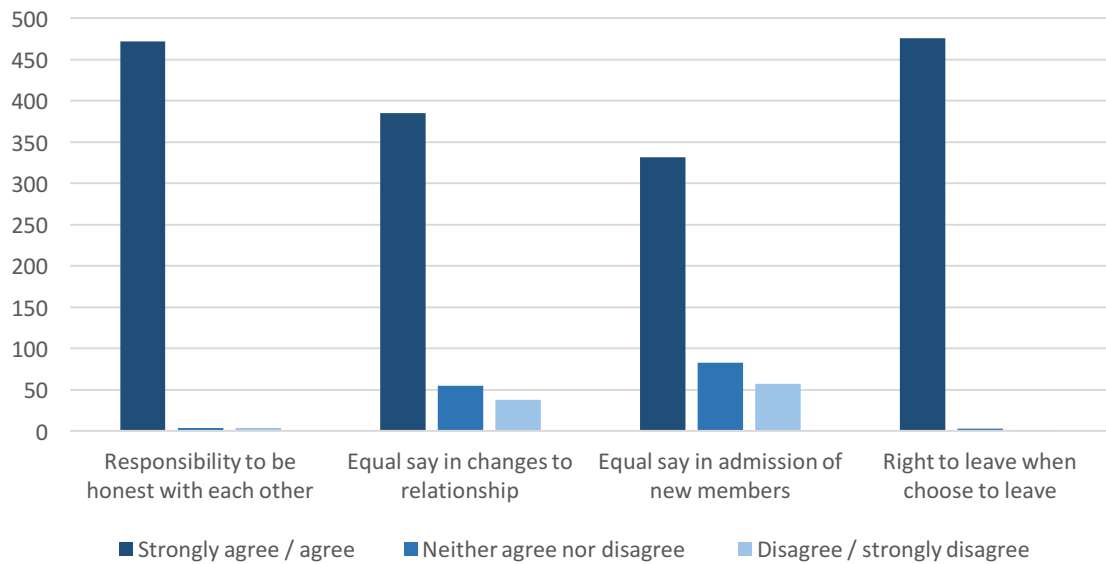
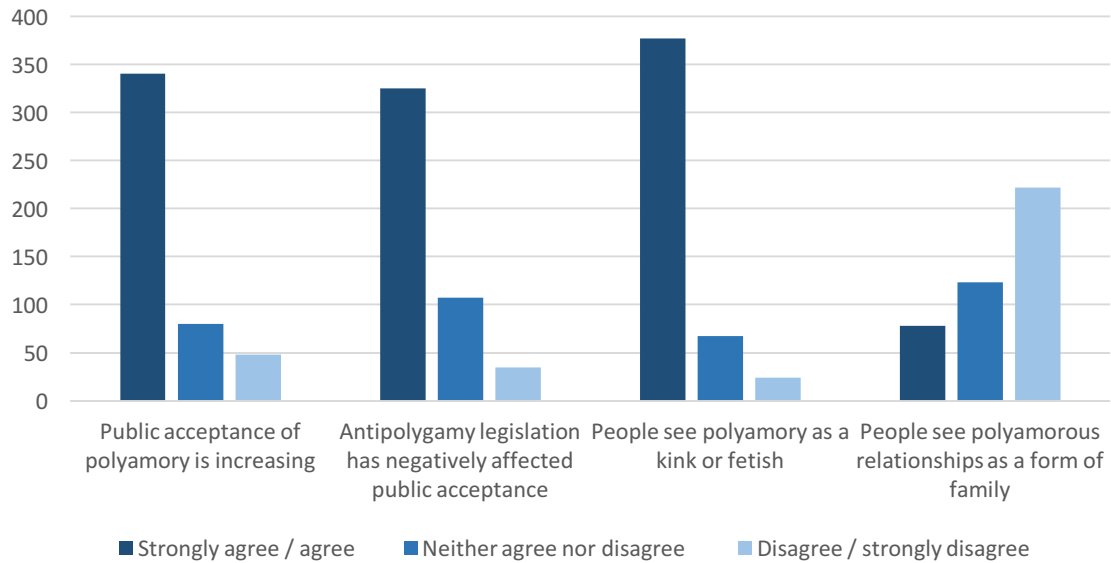


Figure 17  
Attitudes toward relationships



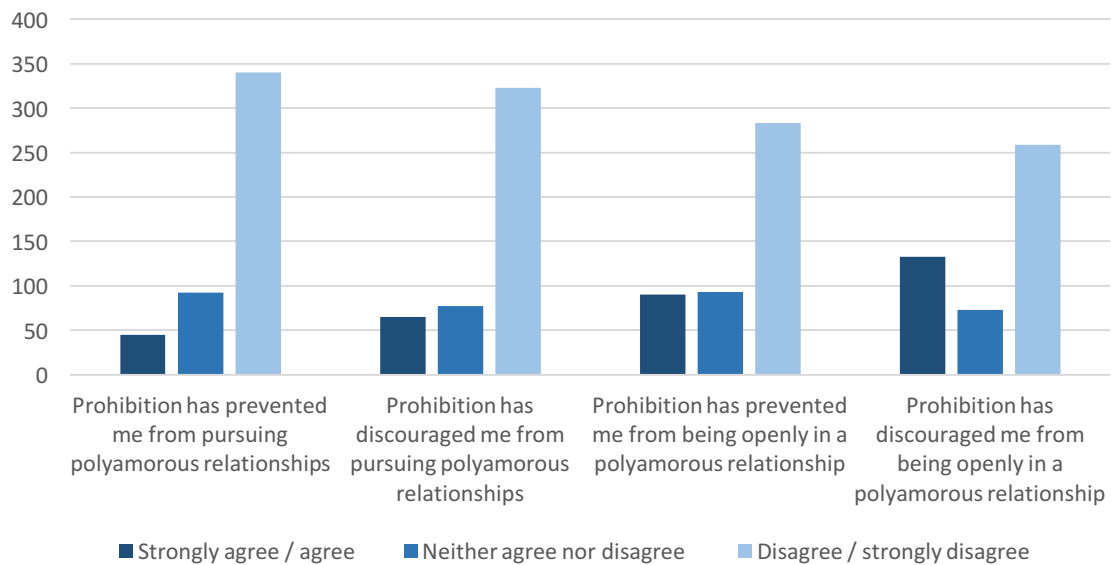
Although 82.4% of respondents agreed or strongly agreed that the number of people who identify as polyamorous is increasing and 80.9% agreed or strongly agreed that the number of people who are openly involved in polyamorous relationships is increasing, respondents had mixed views about public attitudes toward polyamory, see Figure 18.

Figure 18  
Perceptions of public attitudes toward polyamory



Despite concern about the impact of the *Criminal Code* prohibition against polygamy on public acceptance of their relationships, respondents are not significantly deterred by that prohibition from pursuing the relationships they choose, see Figure 19.

Figure 19  
Impact of *Criminal Code* prohibition of polygamy



The Institute's complete report on this study, including the text of the survey, will be available on its website by December 2017.<sup>54</sup>

#### 1.4.2 The future of family law

If the number of persons involved in polyamorous relationships is indeed increasing, urban family law lawyers can expect to be consulted with respect to polyamorous households on an increasingly frequent basis, regarding not the probability of prosecution but the legal issues arising from the formation and dissolution of these relationships.<sup>55</sup> Although counsel need to be aware of the social history and elements of the offences of bigamy and polygamy, if for no other reason than to provide clients with peace of mind, the critical knowledge to acquire concerns the extent to which the legislation and common law governing domestic relations applies to the parties to a polyamorous relationship and the agreements that may be drafted to protect the interests of people entering and leaving polyamorous *ménages*.

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<sup>54</sup> <http://www.crilf.ca>

<sup>55</sup> Strassberg, in "The Challenge of Post-Modern Polygamy," *supra*, fn 29 at pp. 442 and 443, writes:

... Postmodern polygamy has moved from being a utopian dream or an interesting thought experiment, to being a real, albeit fringe, American social practice. ... Both on and off the web, a polyamorous "community" is developing. ... The development of community solidarity, together with a nascent public presence, suggests that polyamorists may be on the verge of "coming out of the closet" as an interest group with a political agenda.



## 2.0 FAMILY LAW AND POLYAMOROUS RELATIONSHIPS

The parties to a dyadic household will typically find themselves dealing with family law issues at one of three points in the arc of their relationship: at the beginning, before or shortly after the decision is made to live together or to marry; toward the end, when the collapse of the relationship has become reasonably foreseeable; and, after the end of the cohabiting phase of the relationship, when separation has occurred. The parties to a polyamorous household share the same basic relationship arc, except that the *ménage* may neither form nor dissolve *in toto*, as shown by the Institute's research. The household may form when one or more persons join a preexisting dyadic relationship, it may form from the agreement of three or more people not previously involved in a subsisting relationship with each other, and an existing *ménage* may grow as new members are added; likewise, one or more participants may leave a *ménage* without the termination of the family altogether or the loss of its non-dyadic quality. Legal assistance may therefore be helpful not just at the initial formation and conclusive dissolution of the family, but as individuals are added to and leave the household.

The legal issues potentially affecting those involved in a polyamorous relationship are the same as those involved in a dyadic relationship, less the question of divorce only married spouses must answer. Apart from that, however, the parties to a polyamorous *ménage* will need to be concerned with the following matters when the household dissolves or diminishes:

- a) the care and management of children after the departure of one or more members from the household;
- b) the payment of child support and children's special expenses;
- c) entitlement to and liability for the payment of spousal support;
- d) the division of property, including jointly-owned property and claims made in respect of property owned by only one or some members of the household; and,
- e) the allocation of debt for which one or more parties are or may become liable.

These subjects may be preemptively addressed at the formation of dyadic relationships as well, usually through a cohabitation, marriage or relationship agreement of some sort. However, if disputes concerning these issues cannot be resolved by the members of the *ménage* themselves, resort may be had to the same variety of in- and out-of-court dispute resolution processes available to those leaving dyadic family relationships.

Although out-of-court processes are likely to be preferred, not least because of the associated flexibility and privacy, court remains the forum of last resort when non-adversarial processes are inappropriate or have failed. Family law disputes are governed by a variety of national and provincial legislation, augmented by the common law where lacunae are found, and participants in polyamorous relationships will need to be advised as to their statutory obligations and entitlements. Save and except for the matter of child support, people engaged in out-of-court dispute resolution processes may pursue whatever solution strikes them as the least inequitable according to the principles and values they choose; disputants engaged in litigation have no such luxury and must proceed as the statutes and regulations require.

## 2.1 Determining the applicable law

The legislation that might apply at the dissolution of a dyadic relationship includes the federal *Divorce Act*,<sup>56</sup> for married spouses, and a miscellany of provincial or territorial legislation specific to the domicile of the parties, whether married or unmarried.<sup>57</sup> The uncodified principles of equity and the common law that might also apply in family law disputes include the presumptions of advancement, gift and loan, the resulting and constructive trust, the law of unjust enrichment and the law of contracts.

The *Divorce Act* will be inapplicable to the parties to a polyamorous household, save in respect of any parties who happen to be married to each other, leaving the household primarily subject to provincial legislation on domestic relations. Although recourse to the courts under that legislation may always be had with respect to parenting and child

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<sup>56</sup> *Divorce Act*, RSC 1985, c. 3 (2nd. Supp.)

<sup>57</sup> The following portion of this paper will discuss the rights and obligations flowing from polyamorous family relationships arising from the domestic relations legislation of the common law provinces in a summary manner only, and the reader is accordingly cautioned that the author's description of the relevant legislation is perforce incomplete. The author will be very grateful to receive readers' corrections and suggestions for clarification; please send any such to jpbzyd@ucalgary.ca.

support, regardless of relationship status, the applicability of that legislation with respect to other legal issues will, however, depend on:

- a) a very careful reading of the statute as to how terms such as “spouse,”<sup>58</sup> “guardian” and “parent” are defined;
- b) the extent to which unmarried persons may rely on the statute in respect of the division of family property and establishing entitlement to spousal support; and,
- c) a construction of the statute which is holistic and takes into account the overall scheme of the statute and the intentions of government.<sup>59</sup>

A review of the local legislation governing the distribution of matrimonial property may not end the analysis when assisting a party to a polyamorous household:

- a) where property is co-owned by two or more parties, the legislation generally applicable to the management and disposition of real, personal or corporate property between two or more persons will apply where the legislation on the division of matrimonial property does not;<sup>60</sup>

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<sup>58</sup> The *Divorce Act*, fn 56, *supra*, defines “spouse” as “either of two persons who are married to each other” at s. 2(1); the *Civil Marriage Act*, fn 41, *supra*, defines “marriage” as “the lawful union of two persons to the exclusion of all others” at s. 2.

<sup>59</sup> The contemporary approach to statutory interpretation is set out in *Bell ExpressVu Limited Partnership v R.*, 2002 SCC 42:

[26] In Elmer Driedger’s definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings ...

<sup>60</sup> The application of other legislation on the division of property will be governed by the rule of statutory interpretation that a statute of specific application is to be preferred and applied over a statute of general application. See: *Ass. of Area #23 v Lafarge*, 2001 BCSC 596 at paras. 27 and 29; *Condominium Plan No. 762 1828 v Marusyn*, 2010 ABQB 523 at para. 19; and, *Madore-Ogilvie v Kulwartian* (2006), 34 RFL (6th) 138 (ONSC) at para. 24.

- b) where the ownership of property is not shared with the party claiming an interest in that property, the principles of equity, usually unjust enrichment and the constructive trust, and, to the extent that it remains applicable in family law disputes, the resulting trust,<sup>61</sup> will apply; and,
- c) where the characterization of transfers between the parties or between a party's parent and a party is at issue, the presumptions of advancement and gift may apply, depending on their continued applicability in family law disputes<sup>62</sup> and the extent to which the presumptions relating to married spouses may apply to unmarried partners.<sup>63</sup>

Where the parties to a polyamorous household have a contract, such as a cohabitation or relationship agreement, the usual law of contracts will also apply, subject to any modifications of the general law imposed by statute in the family law context.

## 2.2 Alberta

The primary legislation on family law disputes in Alberta are: the *Family Law Act*,<sup>64</sup> concerning parentage, guardianship, the care of children, child support and spousal support; the *Matrimonial Property Act*,<sup>65</sup> concerning the division of the family home, household goods and other property owned by one or both spouses; and, the *Adult Interdependent Relationships Act*,<sup>66</sup> defining the circumstances in which unmarried cohabiting adults, including relatives, may acquire quasi-spousal status for the purposes of the *Family Law Act* and a number of other statutes.

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<sup>61</sup> *Kerr v Baranow*, 2011 SCC 10 at para. 15

<sup>62</sup> See *Pecore v Pecore*, 2007 SCC 17 at para. 36 and *Zhu v Li*, 2009 BCCA 128 at para. 51.

<sup>63</sup> See *McNamara v Rolston*, 2013 BCSC 2115 at para. 14, *J.A.B. v H.W.S.*, 2008 BCSC 655 at para 176 and *J.B. v S.C.*, 2105 BCSC 2136 at para. 87 in which it was held that the presumption of advancement should apply between unmarried spouses as it applies between married spouses. The effect of these decisions may be limited to British Columbia.

<sup>64</sup> *Family Law Act*, SA 2003, c. F-4.5

<sup>65</sup> *Matrimonial Property Act*, RSA 2000, c. M-8

<sup>66</sup> *Adult Interdependent Relationships Act*, SA 2002, c. A-4.5

### 2.2.1 Definitions

**Spouse.** Pursuant to the provincial *Interpretation Act*,<sup>67</sup> “spouse” means “the spouse of a married person.” With respect to spousal support, Part III of the *Family Law Act* provides that “spouse” includes former spouses. For the purposes of property division, s. 1(e) of the *Matrimonial Property Act* provides that “spouse” includes former spouses as well as a party to a void or voidable marriage.<sup>68</sup>

**Adult interdependent partner.** Under s. 3(1) of the *Adult Interdependent Relationships Act*, an “adult interdependent partner” is someone:

- a) who has lived with someone else in a “relationship of interdependence” for at least three years;
- b) who has lived with someone else in a relationship of interdependence for less than three years but had a child with that person; or,
- c) who has executed an adult interdependent partner agreement with another person.

The term “relationship of interdependence” is usefully defined at s. 1(1)(f) as follows:<sup>69</sup>

- (f) “relationship of interdependence” means a relationship outside marriage in which any 2 persons
- (i) share one another’s lives,
  - (ii) are emotionally committed to one another, and
  - (iii) function as an economic and domestic unit.

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<sup>67</sup> *Interpretation Act*, RSA 2000, c. I-8, s. 28(1)(zz.1)

<sup>68</sup> A void marriage is void *ab initio* for breach of a fundamental requirement of marriage, such as being of the minimum age to marry, not being within the prohibited degrees of consanguinity and being unmarried. A voidable marriage is a marriage which may or may not be declared a nullity for reasons relating to the contractual aspect of marriage, including fraud, duress and mistake as well as lack of capacity to comprehend the nature of the ceremony or the commitment being made, and inability to consummate the marriage.

<sup>69</sup> In *Doe v Alberta*, 2007 ABCA 50 at para. 23, the court noted that an established relationship of interdependence with a parent living with a child will usually result in the formation of a relationship of interdependence with his or her child as well.

Two important limitations on a person's status as an adult interdependent partner are expressed at s. 5:

- (1) A person cannot at any one time have more than one adult interdependent partner.
- (2) A married person cannot become an adult interdependent partner while living with his or her spouse.

With respect to spousal support, Part III of the *Family Law Act* provides that "adult interdependent partner" includes former adult interdependent partners.

**Parent.** Under Part I of the *Family Law Act*, a "parent" is the birth mother or biological father of a child, and up to two people, who may include the birth mother or biological father, where a child is born as a result of assisted reproduction. With respect to child support, Part III of the *Family Law Act* provides that "parent" includes persons standing in the place of a parent.

**Guardian.** Under Part II of the *Family Law Act*, a "guardian" is a parent who has acknowledged his or her parentage of a child and "demonstrated an intention to assume the responsibility of a guardian," a person appointed as guardian in a guardian's will or a person appointed as guardian by the court.

Pursuant to s. 21(3), a parent may demonstrate an intention to assume the responsibility of a guardian in respect of a child in one or more of eleven advertent and inadvertent circumstances:

- (a) being married to the other parent at the time of the birth of the child,
- (b) being the adult interdependent partner of the other parent at the time of the birth of the child or becoming the adult interdependent partner of the other parent after the birth of the child,
- (c) entering into an agreement that meets the requirements of the regulations with the other parent to be a guardian of the child,
- (d) marrying the other parent after the birth of the child,
- (e) cohabiting with the other parent for at least 12 consecutive months during which time the child was born,
- (f) with respect to a female parent, carrying the pregnancy to term,

- (g) with respect to a child born as a result of assisted reproduction, being a parent of the child ... ,
- (h) being married to the other parent by a marriage that, within 300 days before the birth of the child, ended by
  - (i) death,
  - (ii) a decree of nullity, or
  - (iii) a judgment of divorce,
- (i) where the other parent is the birth mother of the child, voluntarily providing or offering to provide reasonable direct or indirect financial or other support, other than pursuant to a court order, for the birth mother during or after her pregnancy,
- (j) voluntarily providing or offering to provide reasonable direct or indirect financial or other support, other than pursuant to a court order, for the child, or
- (k) any other circumstance that a court ... finds demonstrates the parent's intention to assume the responsibility of a guardian in respect of the child.

### 2.2.2 Children

The provisions of the *Family Law Act* on parentage at ss. 7 and 8.1 are worded so as to limit the number of parents a child may have to two, even when the child is born through a means of assisted reproduction. The provisions of the *Child, Youth and Family Enhancement Act* on adoption allow "an adult" to apply for an adoption order,<sup>70</sup> and although the act does not contain an express statement to the effect that a child may only have two parents, s. 72, on the effect of adoption orders, provides as follows:

- (2) Subject to subsection (3), for all purposes, when an adoption order is made, the adopted child ceases to be the child of that child's previous parents, whether that child's biological mother and biological father or that child's adopting parents under a previous adoption order, and that child's previous parents cease to be that child's parents and guardians.

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<sup>70</sup> *Child, Youth and Family Enhancement Act*, RSA 2000, c. C-12, s. 62(1)

(3) If a child is adopted by the step-parent of the child, the child does not cease to be the child of the parent who has lawful custody and that parent does not cease to be the parent and guardian of the child.

However, pursuant to s. 23 of the *Family Law Act*, the court may appoint any number of persons as the guardian of a child, even where one or both of the child's parents are guardians.<sup>71</sup>

(1) The court may, on application by a person who

- (a) is an adult and has had the care and control of a child for a period of more than 6 months, or
- (b) is a parent other than a guardian of a child,

make an order appointing the person as a guardian of the child. ...

(9) For greater certainty, one or more persons may be appointed guardians of a child under this section despite the fact that one or both parents of the child are guardians pursuant to section 20.

Under s. 21 of the act, guardians are entitled to be informed of and consulted about significant parenting decisions that need to be made, are responsible for nurturing the child's physical, psychological and emotional development and are responsible for providing the child with the necessities of life.

Where a child has more than one guardian, a guardian may apply for a parenting order under s. 32, but only where:

- a) the guardians cannot agree as to how the rights and responsibilities of guardianship should be exercised; and,
- b) in the case of guardians who are parents, the guardians have separated.

Parenting orders may allocate the rights and responsibilities of guardianship and provide for parenting time with the child.<sup>72</sup>

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<sup>71</sup> Children age 12 and older must consent to the appointment under s. 24(1)(b).

<sup>72</sup> In Alberta and British Columbia, the terms *parenting time* and *contact* are used in place of "access." "Parenting time" denotes the time a guardian has with a child, and includes a certain level of day-to-day



Under s. 35, a guardian and another other person may apply for an order for contact between a child and a person who is not a guardian. Parents, guardians and persons standing in the place of a parent to a child may apply for such orders as of right, others, however, require leave of the court, sought on notice to the child’s guardians, pursuant to s-s. (2).

The powers entailed by guardianship, described at s. 26(5) and (6), do not include guardianship of the estate of the child. Under s. 8 of the *Minors’ Property Act*,<sup>73</sup> guardians may receive property with a value of \$10,000 or less on behalf of the child and are trustees of that property for the benefit of the child.<sup>74</sup> The court may appoint one or more persons as trustees of children’s property pursuant to s. 10 of the act.

### 2.2.3 Child support

Under ss. 47 and 49 of the *Family Law Act*, parents and persons “standing in the place of a parent” are obliged to provide support for a child.<sup>75</sup> The definition of standing in the place of a parent at s. 48 includes spouses as well as persons “in a relationship of interdependence of some permanence” with a parent:

- (1) A person is standing in the place of a parent if the person
  - (a) is the spouse of a parent of the child or is or was in a relationship of interdependence of some permanence with a parent of the child, and
  - (b) has demonstrated a settled intention to treat the child as the person’s own child.<sup>76</sup>

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discretion and responsibility for the child beyond the allocation of the responsibilities of guardianship between the parents, see Alberta’s *Family Law Act* at s. 32(5) and British Columbia’s *Family Law Act*, fn 44, *supra*, at ss. 1 and 45. “Contact” is the time someone other than a guardian, including parents who are not guardians, has with a child and does not imply any decision-making authority, see Alberta’s legislation at ss. 1(d) and 35 and British Columbia’s legislation at ss. 1 and 58.

<sup>73</sup> *Minors’ Property Act*, SA 2004, c. M-18.1

<sup>74</sup> *Minors’ Property Act Regulation*, Alta Reg. 240/2004, s. 2(1)

<sup>75</sup> The same obligation exists in respect of children younger than 16 for anyone who is “a parent, foster parent, guardian or head of a family” under s. 215(1)(a) of the *Criminal Code*.

<sup>76</sup> The court in *Malkhassian Estate (Re)*, 2014 ABQB 353 at para. 43 adopted the definition of “settled intention” provided in an Ontario case, *Re Spring and Spring* (1987) 61 OR (2d) 743 (ONSC): “a state of mind consciously formed and firmly established.”

Note that this definition does not use the term “adult interdependent partner” in tandem with “spouse” to establish liability for support, requiring instead a “relationship of interdependence of some permanence with a parent.” This, firstly, lowers the threshold of the nature of the relationship that must be proven in order to establish liability for child support and, secondly, expands the pool of potential payors beyond the dyadic limitations imposed on standing as an adult interdependent partner under s. 5 of the *Adult Interdependent Relationships Act*.

Under s. 50(1) of the *Family Law Act*, a parent or guardian may apply for a child support order, as well as “a person who has the care and control of the child.” Pursuant to s-s. (4), the court may make an order against more than one “parent” of a child.

#### 2.2.4 Spousal support

Under s. 56 of the *Family Law Act*, every spouse or adult interdependent partner has an obligation to support the other spouse or adult interdependent partner.<sup>77</sup> Although a person may only have one married spouse and s. 5 of the *Adult Interdependent Relationships Act* has the effect of

- a) limiting a person to having one adult interdependent partner at a time; and,
- b) preventing a spouse from being an adult interdependent partner while living with his or her spouse,

a person may nevertheless be subject to two simultaneous spousal support obligations where the relationships are successive and one relationship is a marriage.

#### 2.2.5 Division of property

Under ss. 1(e) and 3(1) of the *Matrimonial Property Act*, only married spouses or formerly married spouses may apply for a matrimonial property order, including orders under s. 19 for the exclusive occupancy of the family home.

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<sup>77</sup> The *Criminal Code* imposes a similar obligation on married spouses at s. 215(1)(b).

## 2.3 British Columbia

The primary legislation on family law matters in British Columbia is the *Family Law Act*,<sup>78</sup> which deals with the care of children, child support, spousal support, the care of children's property and the division of property owned by one or both spouses.

### 2.3.1 Definitions

**Spouse.** Under s.3 of the *Family Law Act*, a "spouse" is:

- a) someone who is married to another person;
- b) someone who has lived with another person in a "marriage-like relationship" for at least two years; and,
- c) a former spouse.

However, for all purposes of the act other than those dealing with the division of property and allocation of debt, "spouse" also includes:

- d) someone who has lived with another person in a "marriage-like relationship" for less than two years but had a child with that person.

**Parent.** Under Part III of the *Family Law Act*, a "parent" is the birth mother or biological father of a child conceived by sexual intercourse. Where a child is born as a result of assisted reproduction, up to six people may, by agreement, be the child's parents, including: up to two intended parents; a donor of sperm; a donor of ova; a surrogate mother; and, the spouse of a surrogate mother.

With respect to child support, "parent" includes a stepparent. A stepparent is "a spouse of the child's parent [who] lived with the child's parent and the spouse during the child's life."

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<sup>78</sup> *Supra*, fn 44

**Guardian.** Under Part IV of the *Family Law Act*, a “guardian” is:

- a) a parent who has lived with the other parent after the birth of the child;
- b) a person who is named as a parent in an assisted reproduction agreement; or,
- c) a person who is appointed as the guardian of the child by court order.

### 2.3.2 Children

Where a *ménage* is prepared to have a child through assisted reproduction and has the required distribution of genders and an assisted reproduction agreement, up to six members of the household may be the parents of the resulting child. Pursuant to s. 23, determinations of parentage under the *Family Law Act* determine parentage for all purposes of the law of British Columbia.

Where one or more members of a polyamorous *ménage* have children, or when assisted reproduction is undesirable, all or some of the other members of the household may be appointed as guardians of the child, in addition to the child’s parents, under s. 51(1)(a) of the act. However, under s. 50, such appointments can only be made by order, not by agreement and, under s. 51(2), applicants for appointment must provide the court with an affidavit to which is attached a recent vulnerable sector criminal records check,<sup>79</sup> a recent child protection records check and a recent protection order registry records check.<sup>80</sup>

Under ss. 40 and 41 of the act, guardians are entitled to be informed of and consulted about significant parenting decisions that need to be made, are responsible for day-to-day decision-making concerning the child, are responsible for nurturing the child’s physical, psychological and emotional development and are responsible for giving or withdrawing consent for the child.

Guardians may make agreements or apply for orders for the allocation or sharing of parental responsibilities and parenting time under ss. 44 and 45. Pursuant to s. 44(2),

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<sup>79</sup> John-Paul Boyd, *Easter Eggs and Bad Eggs: Surprises in the Drafting and Subsequent Interpretation of the Family Law Act* (Calgary AB: Canadian Research Institute for Law and the Family, 2015) at pp. 11 and 12

<sup>80</sup> Children age 12 and older must consent to the appointment pursuant to s. 51(4).

however, such agreements are not binding unless made after separation or in anticipation of separation, and under s. 45(2) such orders may not be made unless the guardians are separated. Guardians may nonetheless delegate certain responsibilities to other individuals under s. 43(2) while the guardian is “temporarily unable to exercise” those responsibilities:<sup>81</sup>

(2) If a guardian is temporarily unable to exercise any of the parental responsibilities described in section 41 (a), (c), (d), (f) to (j) or (l), the child's guardian, in writing, may authorize a person to exercise, in the best interests of the child, one or more of those responsibilities on that guardian's behalf while the guardian is unable to do so.

Persons other than guardians may make an agreement with a child’s guardians for contact with the child or apply for an order for contact with a child under ss. 58 and 59 of the act. A right of contact does not provide any right to the day-to-day care and control of the child.

A child’s guardians are not, however, the presumptive guardians of the child’s property, except for property worth \$10,000 or less.<sup>82</sup> Pursuant to s. 179, the court may appoint “one or more persons” as trustees of the child’s property after considering factors including the relationship between the child and the trustee and the comments of the Public Guardian and Trustee.

### 2.3.3 Child support

Under s. 147(1) of the *Family Law Act*, each parent and guardian has a duty to provide for the support of the child although in this context “guardian,” pursuant to s. 146, excludes non-parent guardians who are only responsible for the child’s legal and financial interests. A child may thus be simultaneously entitled to support from multiple persons qualifying as parents and guardians, although perhaps not from each payor in equal amounts. Section 147 further provides:

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<sup>81</sup> The notion of a “temporary inability” is undefined in the act and, as of writing, in the case law, and may offer some creative options for polyamorous families.

<sup>82</sup> *Family Law Act*, ss. 176 and 178; *Family Law Act Regulation*, BC Reg. 347/2012, s. 24

- (3) If a guardian who is not the child's parent has a duty to provide support for that child, the guardian's duty is secondary to that of the child's parents. ...
- (5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
  - (a) is secondary to that of the child's parents and guardians, and
  - (b) extends only as appropriate on consideration of
    - (i) the standard of living experienced by the child during the relationship between the stepparent and his or her spouse, and
    - (ii) the length of time during which the child lived with the stepparent.<sup>83</sup>

#### 2.3.4 Spousal support

Pursuant to s. 160, where a spouse is found to be entitled to spousal support, "the other spouse" has a duty to provide that support. Neither the definition of "spouse" nor any other provision in the act limits a person to having a single spouse. The definition of spouse at s. 3 reads as follows:

- (1) A person is a spouse for the purposes of this Act if the person
  - (a) is married to another person, or
  - (b) has lived with another person in a marriage-like relationship, and
    - (i) has done so for a continuous period of at least 2 years, or
    - (ii) except in [the parts of the act relating to the division of property and debt] has a child with the other person.

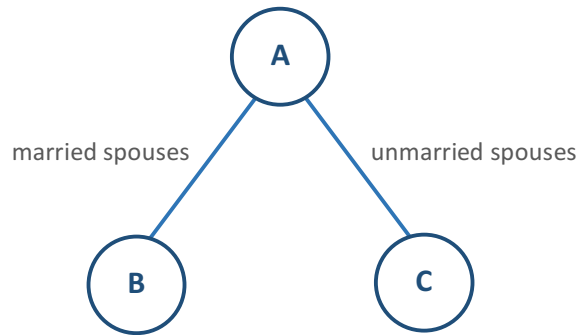
Accordingly, although a spousal relationship may only exist as between two people, a person may be in multiple spousal relationships at the same time. Even in a dyadic context, this conceptual model has led to persons being in simultaneous spousal relationships: firstly, with a husband or wife, from whom they were separated but not yet divorced; and, secondly, with a partner, with whom they had lived for the requisite minimum two-year period after separation.<sup>84</sup> In such circumstances, the romantic relationships are successive and the spousal relationships exist as a matter of law:

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<sup>83</sup> See also Child Support Guidelines, SOR/97-175, s. 5 regarding the child support obligations of persons standing *in loco parentis*.

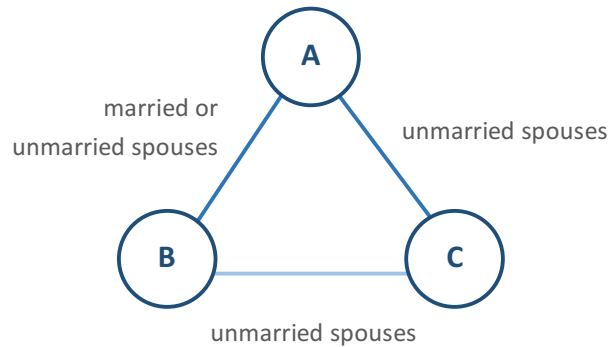
<sup>84</sup> See, for example, *Austin v Goerz*, 2006 BCSC 2055, affirmed on appeal.

Figure 20



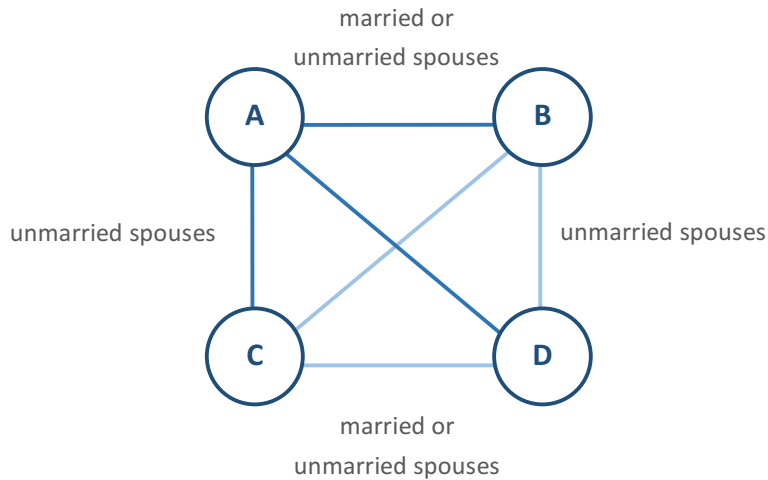
In Figure 20, for example, A is in a married spousal relationship with B at the same time as he or she is in an unmarried spousal relationship with C. In a non-dyadic context, the romantic relationships between A and B and A and C may co-occur with their legal relationships, and a third romantic and legal relationship may exist between B and C as well, see Figure 21, although only two of A, B or C may be married:

Figure 21



The *Family Law Act* does not restrict spousal relationships, or romantic relationships, to triads. The potential relationships within a tetrad, for example, are shown in Figure 22. In that diagram, A is in simultaneous spousal relationships with B, C and D, each of whom may be in their own spousal relationships with A as well as one or more of the other parties to the *ménage*. There may be up to two valid married relationships among the members of a tetrad, or among the members of a pentad.

Figure 22



Returning to the issue of spousal support, the logical consequence of ss. 3 and 160 of the *Family Law Act* is that where a party to a polyamorous relationship is found to be entitled to receive spousal support, all other persons qualifying as a spouse of that person may be obliged to pay it. It is unclear how the formulae described in the *Spousal Support Advisory Guidelines*<sup>85</sup> would need to be manipulated to produce rational ranges for duration and quantum.<sup>86</sup>

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<sup>85</sup> Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines* (Ottawa ON: Department of Justice, 2008).

<sup>86</sup> Although the *Advisory Guidelines* provide an exception at §12.3 where the payor has preexisting spousal support obligations, no exception is available where a recipient has multiple spousal support entitlements. However, spousal support is income reportable at Line 128 of the T1 General Income Tax and Benefit Return and is therefore included in the calculation of individual net disposable income; see *Advisory Guidelines* at §8.3.1 and John-Paul Boyd, *Obtaining Reliable and Repeatable SSAG Calculations* (Ottawa ON: Department of Justice, 2009) at §2.2. As the recipient's income has a direct bearing on the calculation of quantum, each payor's obligation will be tempered by the others' obligations. For the basic "with child support" formula, a rough reckoning might take the recipient's maximum entitlement (the amount payable by the payor with the highest income with no attribution of support from other payors to the recipient) and apportion that amount among the payors in proportion to their incomes; a more accurate but significantly more labour-intensive reckoning would require multiple iterative calculations attributing increasing amounts of spousal support income to the recipient until the range of each payor's obligation reflects the range of support payments contributed by the other payors. The iterative approach could be applied to the "without child support" formula, aiming at the equalization of net income cap, described at *Advisory Guidelines* §7.4.1, for each payor.



### 2.3.5 Division of property and debt

Married and unmarried spouses are entitled to share in family property and are responsible for family debt under s. 81 of the act. Although “spouse” has the same meaning for the purposes of property division as it does with respect to spousal support, the language of s. 81 clearly assumes that spousal relationships are dyadic in nature (emphasis added):

Subject to an agreement or order that provides otherwise and except as set out in this Part and [the part dealing with the division of pensions],

(a) spouses are *both* 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 interest* in all family property as a tenant in common, and is equally responsible for family debt.

For those who find themselves in simultaneous spousal relationships for want of a timely divorce, the language of s. 81 poses surprisingly few problems. Pursuant to ss. 84 and 85, a spouse is presumed to keep the property he or she brings into a relationship and is required to share only the property acquired between the date the relationship began and the date of separation;<sup>87</sup> separate, successive romantic relationships should therefore translate into separate, successive property obligations.

For people engaged in polyamorous relationships, terms such as “both” and “half interest,” presume the existence of only one spousal relationship and raise obvious difficulties where an out of court settlement cannot be obtained. However, rather than dismissing a claim brought under the *Family Law Act*, or applying other potentially relevant legal mechanisms, such as the *Partition of Property Act*<sup>88</sup> in the case of co-owners or the principles of the resulting or constructive trust in the case of sole owners, the

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<sup>87</sup> The provisions of the act defining what is and isn’t shared between spouses are far more complicated than this description suggests. See John-Paul Boyd, *Dividing Property and Allocating Debt under British Columbia’s Family Law Act: The Case Law to Date* (Calgary AB: Canadian Research Institute for Law and the Family, 2016) for a more detailed description of the treatment of family property, excluded property and family debt under the *Family Law Act*.

<sup>88</sup> *Partition of Property Act*, RSBC 1996, c. 347

court may elect to adopt a purposive interpretation of the legislation hewing to government's intended approach to the division of family property, with the effect that:

- a) all spouses would be entitled to family property and responsible for family debts; and,
- b) on separation, all spouses would have a right to an undivided equal, but not one-half, interest in family property and would be equally liable for family debt.

This approach seems especially probably given the absence of explicit statements, such as those found in the Alberta legislation and in the federal *Divorce Act*, intended to restrict standing under the legislation to persons engaged in dyadic relationships.

## 2.4 Manitoba

The primary legislation on family law matters in Manitoba are: *The Family Maintenance Act*,<sup>89</sup> concerning the care of children, child support and spousal support; *The Family Property Act*,<sup>90</sup> concerning the division of the family home and other family assets owned by one or both spouses or partners; and, *The Child and Family Services Act*,<sup>91</sup> concerning guardianship of and access to children by persons other than parents.

### 2.4.1 Definitions

**Spouse.** Under s. 1 of *The Family Property Act* and s. 1(1) of *The Family Maintenance Act*, a “spouse” is someone who is married to another spouse. The term is defined so as to limit the number of spouses captured by the definition to two:

“spouse” where used in relation to another spouse means the person who is married to that spouse, and “spouses” means two persons who are married to each other

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<sup>89</sup> *The Family Maintenance Act*, CCSM, c. F20

<sup>90</sup> *The Family Property Act*, CCSM, c. F25

<sup>91</sup> *The Child and Family Services Act*, CCSM, c. C80

**Common-law partner.** Under *The Family Property Act* and *The Family Maintenance Act*, a “common-law partner” is a someone who:

- a) has registered a common-law relationship with another person under *The Vital Statistics Act*;<sup>92</sup> or,
- b) has lived with another person in a conjugal relationship for at least three years.

Under *The Family Maintenance Act* only, “common-law partner” also includes someone who:

- c) has lived with another person in a conjugal relationship for at least one year and has had a child with that person.

“Conjugal relationship” is defined in none of *The Family Property Act*, *The Family Maintenance Act* or *The Interpretation Act*.<sup>93</sup> However, the courts have treated the term as synonymous with “common-law relationship” and what in British Columbia is termed a “marriage-like relationship.”<sup>94</sup>

A related term, “common-law relationship,” is defined in s. 1 of *The Family Property Act* and *The Family Maintenance Act* to a similar effect as the definition of “spouse:”

“common-law relationship” means the relationship between two persons who are common-law partners of each other

**Parent.** Under *The Family Maintenance Act* and *The Child and Family Services Act*, “parent” means a biological or adoptive parent

**Guardian.** Under *The Child and Family Services Act*, a “guardian” is a person other than a parent who has been appointed as the guardian of a child by court order.

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<sup>92</sup> *The Vital Statistics Act*, CCSM, c. V60

<sup>93</sup> *The Interpretation Act*, CCSM, c. I80

<sup>94</sup> See *Huberdeau v Reid*, 2007 MBQB 69 at para. 22 and *J.W. v L.W.T.*, 2006 MBQB 157 at para. 39.

**Child.** Under *The Family Maintenance Act*, “child” includes a child to whom a person stands *in loco parentis*.

#### 2.4.2 Children

Under s. 39 of *The Family Maintenance Act*, parents who have cohabited after the birth of their child are presumed to have joint care and control of their child. Custody under the act may include “legal custody,” the right to make parenting decisions with respect to the child, and “physical custody,” the right to have the child’s residence.<sup>95</sup>

The court may appoint adults other than parents to be the guardian of a child under s. 77 of *The Child and Family Services Act*. The act implies, however, that someone so appointed obtains the exclusive right to make parenting decisions to the detriment of the child’s parents (emphasis added):

(4) Where an order is made under this section, *the applicant is for all purposes the guardian* of the person of the child and has the care and control of the child and is responsible for the maintenance, education and well-being of the child.

Under s. 78 of *The Child and Family Services Act*, “a grandparent, stepparent or other member of a child’s family” may apply for access to a child. “Other member of a child’s family” is interpreted in light of the act’s definition of “family:”<sup>96</sup>

“family” means a child’s parent, stepparent, siblings, grandparent, aunt, uncle, cousin, guardian, person *in loco parentis* to a child and a spouse or common-law partner of any of those persons

Although persons other than parents may not apply for guardianship of a child without disrupting the rights of parents to legal custody of that child, it appears that anyone in a polyamorous household who behaved as a parent to the child may be able to apply for access to the child.<sup>97</sup>

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<sup>95</sup> See *Abbot v Taylor* (1986), 2 RFL (3d) 163 (MCA) for a discussion of these terms.

<sup>96</sup> *Scott v Walter and Gzebb*, 2006 MBQB 271 at para. 14

<sup>97</sup> *Chartier v Chartier*, [1999] 1 SCR 242 remains the leading case on determining whether a person stands in the place of a parent to a child.

The parents of a child are presumptively guardians of the child's estate. A parent may be appointed as the sole guardian of the child's estate under s. 2(a) of *The Infant's Estates Act*,<sup>98</sup> or the parents of a child may consent to the appointment of another person as guardian under s-s. (b). Pursuant to s. 9, the guardian of a child's estate is entitled to possess and control the child's property and may expend that property to provide for the "maintenance, education, advancement, or benefit of the infant" where the parents are unable to do so.

### 2.4.3 Child support

Pursuant to s. 36(1) of *The Family Maintenance Act*, each parent of a child is responsible for the financial support of the child. Under s-ss. (2) and (3), spouses of parents and persons living with parents in "conjugal relationships"<sup>99</sup> are also responsible to support the parent's child, but only "while the child is in the custody" of the parent and only to the extent that the parents have failed to provide for the child.

Persons standing *in loco parentis* to a child have a responsibility to support the child that extends after separation pursuant to s. 36(4). However, the obligations of such persons are "secondary to that of the child's parents."

### 2.4.4 Spousal support

Under s. 4 of *The Family Maintenance Act*, spouses and common-law partners have an obligation to support each other, regardless of their conduct during their relationships, and a spouse or common-law partner may apply for a support order under s. 9 where the other spouse or partner is in breach of this obligation.

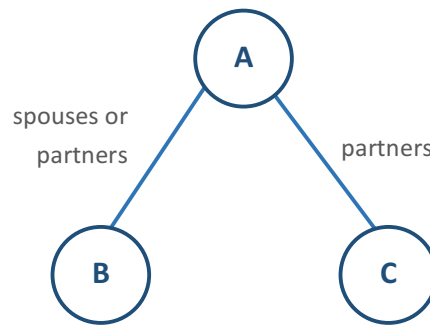
Although the definitions of "spouse" and "common-law partner" require individual spousal and common-law relationships to be understood as dyads, like British Columbia's *Family Law Act*, the definitions do not exclude the possibility of a person being in a spousal relationship and a common-law relationship, or in more than one common-law relationship, at the same time:

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<sup>98</sup> *The Infants' Estates Act*, CCSM, c. I35

<sup>99</sup> Interestingly, liability falls on parents' unmarried cohabitants under s. 36(3) without the necessity of a cohabitant qualifying as a "common-law partner" of the parent. All that is required to attract liability is "cohabiting in a conjugal relationship" with a parent while the child is in the custody of the parent.

Figure 23



Accordingly, it appears that a party to a polyamorous relationship is entitled to seek support from any of the persons with respect to whom he or she qualifies as a spouse or common-law partner who have breached their obligation to support the party.

#### 2.4.5 Division of property

*The Family Property Act* applies to both spouses and common-law partners, pursuant to ss. 2 and 2.1. Under s. 3, the act applies to “every asset of the spouse or common-law partner,” except for, under s. 4(1), assets acquired by a spouse:

- (a) while married to but living separate and apart from the other spouse; or
- (b) while married to a former spouse unless the asset was acquired while living separate and apart from the former spouse and it can be shown that the asset was acquired in contemplation of marriage to the present spouse; or
- (c) while unmarried.

and except for, under s. 4(2.2), assets acquired by a common-law partner:

- (a) while living separate and apart from his or her common-law partner;
- (b) while in a common-law relationship with a former common-law partner unless the asset was acquired while living separate and apart from the former common-law partner and it can be shown that the asset was acquired in contemplation of the common-law relationship with the present common-law partner; or
- (c) before the commencement of cohabitation.

Pursuant to s. 13, spouses and common-law partners are presumptively entitled to an equalization of the assets to which the act applies (emphasis added):

Each spouse *and* common-law partner has the right upon application to an accounting and ... an *equalization* of assets in accordance with this Part.

Although the exclusions provided in s. 4 are functionally problematic when a person is involved in successive married and unmarried relationships, the provisions of ss. 3 and 13 of the act clearly permit the equalization of property between persons engaged in simultaneous common-law partnerships, including where two or more of those persons are spouses.<sup>100</sup>

## 2.5 New Brunswick

The primary legislation on family law matters in New Brunswick are: the *Family Services Act*,<sup>101</sup> concerning the care of children, child support and spousal support; the *Guardianship of Children Act*;<sup>102</sup> and, the *Marital Property Act*,<sup>103</sup> concerning the division of marital property and marital debts.

### 2.5.1 Definitions

**Spouse.** Under Part VII of the *Family Services Act*, a “spouse” is “either of 2 persons who are married to each other.” Under the *Marital Property Act*, a spouse is “a married person.”

**Common-law partner.** Under the *Family Services Act*, a “common-law partner” is a person who “cohabits in a conjugal relationship with another person if the persons are not married to each other.” “Cohabit” is defined as living together “in a family relationship.”

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<sup>100</sup> Note that the phrase “an equalization of assets” in s. 13 does not imply a division between only two persons, as the terms “both” and “half interest” do at s. 81 of British Columbia’s *Family Law Act*.

<sup>101</sup> *Family Services Act*, SNB 1980, c. F-2.2

<sup>102</sup> *Guardianship of Children Act*, RSNB 2011, c. 167

<sup>103</sup> *Marital Property Act*, RSNB 2012, c. 107

**Parent.** Under s. 1 of the *Family Services Act*, a “parent” includes:

- a) a mother or father;
- b) a guardian; and,
- c) a person who lives with a child and has “demonstrated a settled intention to treat the child as a child of his or her family,”

but excludes:

- d) a natural parent whose guardianship rights have been terminated under the *Guardianship of Children Act*.

Parentage is determined under Part VI of the act for all purposes of the law of New Brunswick, and a child may have no more than two natural parents.<sup>104</sup>

**Guardian.** Under the *Family Services Act*, a “guardian” is a person appointed as a guardian under the *Guardianship of Children Act*.

**Child.** Under the *Family Services Act*, “child” includes a child to whom a parent’s spouse stands *in loco parentis*.

### 2.5.2 Children

Pursuant to s. 129(1) of the *Family Services Act*, where a child has more than one parent, both parents are presumed to have joint custody of the child. Under s-s. (2), however, the court may order that a parent or “any person” have sole or joint custody of a child. Under s-s. (3), the court may order that a parent or “any person” have access to the child. Note the broad definition of “parent” at s. 1 which includes guardians and persons standing *in loco parentis* to the child.

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<sup>104</sup> Adoption is addressed at Part V of the act, which appears not to limit the number of persons who may apply to adopt a child.



The parents of a child are, under s. 2 of the *Guardianship of Children Act*, presumed to be the joint guardians of their child.<sup>105</sup> The parents may also, under s-s. (1):

(1) ... jointly appoint in writing another person or persons to be guardian or guardians of their child.

Under s. 5 of the act, unless the terms of such an appointment provide to the contrary, a child's guardian has a right to custody of the child and to participate in decision-making with respect to the child:

(1) Except as limited by the terms of the appointment, a guardian established or appointed under this Act

(a) has, subject to an order of custody issued by a court of competent jurisdiction, the right to the custody of the child and to control the child's education and upbringing, and

(b) shall exercise care and management of all property belonging to or intended for the use and benefit of the child ...

(2) If guardians are to act jointly or a guardian is to act jointly with a surviving parent, the rights and duties conferred by this section shall be shared jointly, subject to the paramount right of the surviving parent to custody of the child.

It appears that the *Family Services Act* allows the court to make orders awarding custody of and access to a child to persons in addition to the child's parents. Under the *Guardianship of Children Act*, however, parents may appoint other persons to be the guardians of their child, vesting those persons with a right of custody, without the necessity of a court order.

### 2.5.3 Child support

Under s. 113 of the *Family Services Act*, "every parent" has an obligation to support his or her child, and nothing in the act limits the number of persons who may have

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<sup>105</sup> The *Guardianship of Children Act* does not define "parent," nor is the term defined in the *Interpretation Act*, RSNB 1973, c. I-13. Absent a specific reference to the definition set out in the *Family Services Act*, the word should not be assumed to have a meaning in the *Guardianship of Children Act* other than its plain and ordinary meaning.

simultaneous child support obligations. An application for a child support order may be made by a parent.

#### 2.5.4 Spousal Support

Under s. 112(1) of the act, every spouse has an obligation to support him- or herself and “the other spouse.” Although the definition of “spouse” at s. 111 limits the meaning of the term to married spouses, s. 112(3) imposes the obligation set out in s-s. (1) also on:

- (3) Two persons, not being married to each other, who have lived together
    - (a) continuously for a period of not less than three years in a family relationship in which one person has been substantially dependent upon the other for support, or
    - (b) in a family relationship of some permanence where there is a child born of whom they are the natural parents,
- and have lived together in that relationship within the preceding year ...

As with the legislation prevailing in British Columbia and Manitoba, although the obligations set out in s. 112 are couched in dyadic terms, nothing in the New Brunswick legislation suggests that a person may not be involved in concurrent qualifying relationships and thus be subject to concurrent spousal support obligations or entitlements.

#### 2.5.5 Division of property and debt

Under ss. 3(1) and 9 of the *Marital Property Act*, only married spouses may apply to court for a division of marital property and marital debts.

## 2.6 Newfoundland and Labrador

The primary legislation on family law matters in Newfoundland and Labrador are: the *Children’s Law Act*,<sup>106</sup> concerning the care of children; and, the *Family Law Act*,<sup>107</sup>

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<sup>106</sup> *Children’s Law Act*, RSNL 1990, c. C-13

<sup>107</sup> *Family Law Act*, RSNL 1990, c. F-2

concerning child support, spousal support, the division of the family home and division of matrimonial assets.

### 2.6.1 Definitions

**Spouse.** Under s. 1 of the *Family Law Act*, a “spouse,” for all purposes of the act, is “either of 2 persons” who are married to each other.

**Partner.** For the purposes of Part III of the *Family Law Act* concerning child support and spousal support, “partner” is defined at s. 35 as:

- (c) ... either of 2 persons who have cohabited in a conjugal relationship outside of marriage
  - (i) for a period of at least 2 years, or
  - (ii) for a period of at least one year, where they are, together, the biological or adoptive parents of a child.

**Parent.** Under s. 1 of the *Family Law Act*, a “parent,” for all purposes of the act, is the birth mother or biological father of a child, and includes “a person who has demonstrated a settled intention to treat a child as a child of his or her family.”<sup>108</sup> Under Part I of the *Children’s Law Act*, a child is the child of his or her “natural parents.”

Special rules relating to the parentage of children conceived by artificial insemination are provided at s. 12 of the *Children’s Law Act*, pursuant to which a child may have one mother and two fathers if the donor cohabits with the mother:

- (2) A man whose semen was used to artificially inseminate a woman is in law the father of the resulting child if he was married to or cohabiting with the woman at the time she is inseminated even if his semen was mixed with the semen of another man.

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<sup>108</sup> In *J.P. v I.R. and Director of Child Welfare (Nfld.)* (1993), 108 Nfld & PEIR 354 (NLUFC) at para. 28, the court adopted the test to demonstrate a “settled intention” given in *Blair v Blair* (1982), 27 RFL (2d) 309 (OUFC): “in my view 1) actual intent must be established; 2) the intent must be ‘settled’; 3) the intent must be ‘demonstrated’; 4) the intent may be inferred from the conduct of the respondent; and 5) the inference may be rebutted by evidence of the actual intent.”

(3) A man who is married to a woman at the time she is artificially inseminated solely with the semen of another man shall be considered in law to be the father of the resulting child if he consents in advance to the insemination.

(4) A man who is not married to a woman with whom he is cohabiting at the time she is artificially inseminated solely with the semen of another man shall be considered in law to be the father of the resulting child if he consents in advance to the insemination, unless it is proved that he refused to consent to assume the responsibilities of parenthood.

(5) Notwithstanding a married or cohabiting man's failure to consent to the insemination or consent to assume the responsibilities of parenthood under subsection (3) or (4), he shall be considered in law to be the father of the resulting child if he has demonstrated a settled intention to treat the child as his child unless it is proved that he did not know that the child resulted from artificial insemination.

(6) A man whose semen is used to artificially inseminate a woman to whom he is not married or with whom he is not cohabiting at the time of the insemination is not in law the father of the resulting child.

### 2.6.2 Children

Pursuant to s. 26 of the *Children's Law Act*, "the father and the mother" of a child are presumptively entitled to custody of the child. A person with custody has "the rights and responsibilities of a parent" with respect to the child. A parent or "other party" may apply to court for custody of or access to the child under s. 27.

Pursuant to s. 69, the parties to an application for custody or access include: the child's mother and father; persons having "demonstrated a settled intention to treat the child as a child of his or her family; and, persons having the "actual care and upbringing" of the child prior to the application. Nothing in the *Children's Law Act* appears to restrict the custody of a child to two persons.

Under s. 56, a parent or "other person" may apply for the appointment of "a guardian" of a child's property, and, under s. 57, parents are equally entitled to be appointed as guardians. Although s. 56 uses the singular form of "guardian," s. 57 clearly

contemplates that a child may have more than one guardian; the *Interpretation Act* further provides that, in an act, words expressed in the singular include the plural.<sup>109</sup>

### 2.6.3 Child support and spousal support

Under s. 37 of the *Family Law Act*, every parent, including every person standing *in loco parentis* to a child, has an obligation to support his or her child. Under s. 36 of the *Family Law Act*, every spouse and partner has obligation to support him- or herself and “the other spouse or partner.”

Pursuant to s. 39, the court may order “a person” to provide support for his or her dependents, on the application of the dependent or a parent of the dependent. Nothing in the *Family Law Act* appears to prevent applications for support being brought against multiple payors.

### 2.6.4 Division of property

Applications under Parts I and II of the *Family Law Act*, concerning property interests in the matrimonial home and the division of matrimonial assets, may only be brought by spouses.

## 2.7 Nova Scotia

The primary legislation on family law matters in Nova Scotia are: the *Maintenance and Custody Act*,<sup>110</sup> concerning the care of children, child support and spousal support; and, the *Matrimonial Property Act*,<sup>111</sup> concerning the division of the matrimonial home and matrimonial assets.

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<sup>109</sup> *Interpretation Act*, RSNL 1990, c. I-19, s. 22(h)

<sup>110</sup> *Maintenance and Custody Act*, RSNS 1989, c. 160

<sup>111</sup> *Matrimonial Property Act*, RSNS 1989, c. 275

### 2.7.1 Definitions

**Spouse.** Under both the *Matrimonial Property Act* and the *Maintenance and Custody Act*, “spouse” means “either of a man and woman” who are married to each other.<sup>112</sup>

**Common-law partner.** “Common-law partner” is defined by s. 2 of the *Maintenance and Custody Act* in the same circular, self-referential manner used in the Manitoba legislation:

(aa) “common-law partner” of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least two years

**Parent.** Under the *Maintenance and Custody Act*, “parent” is defined as “including” a person who has been ordered to pay child support. In the absence of a broader definition in the *Interpretation Act*,<sup>113</sup> the meaning of “parent” in which such persons are included must be its ordinary meaning.<sup>114</sup>

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<sup>112</sup> The *Maintenance and Custody Act* will be significantly amended when the *Parenting and Support Act*, SNS 2015, c. 44 comes into effect. Among other things, “spouse” will be defined as:

- (m) “spouse” means either of two persons who
- (i) are married to each other, ...
  - (iv) are domestic partners or are former domestic partners within the meaning of Section 52 of the *Vital Statistics Act*,
  - (v) not being married to each other, cohabited in a conjugal relationship with each other continuously for at least two years, or
  - (vi) not being married to each other, cohabited in a conjugal relationship with each other and have a child together.

<sup>113</sup> *Interpretation Act*, RSNS 1989, c. 235

<sup>114</sup> The *Children and Family Services Act*, SNS 1990, c. 5 provides a much more fulsome definition at s. 3(1):

- (r) “parent or guardian” of a child means
- (i) the mother of the child,
  - (ii) the father of the child where the child is a legitimate or legitimated child,
  - (iii) an individual having the custody of the child,
  - (iv) an individual residing with and having the care of the child,
  - (v) a step-parent,

**Guardian.** Under s. 2 of the *Maintenance and Custody Act*, “guardian” includes:

(e) ... a head of a family and any other person who has in law or in fact the custody or care of a child<sup>115</sup>

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(vi) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child,

(vii) an individual who has acknowledged paternity of the child and who

(A) has an application before a court respecting custody or access or against whom there is an application before a court for support for the child at the time proceedings are commenced pursuant to this Act, or

(B) is providing support or exercising access to the child at the time proceedings are commenced pursuant to this Act,

but does not include a foster parent

Under the *Parenting and Support Act*, “parent” will be defined thusly:

(i) “parent” includes

(i) a person who is determined to be the parent of a child under this Act,

(ii) a person who has demonstrated a settled intention to treat a child as the person's own child, but does not include a foster parent under the *Children and Family Services Act*, and

(iii) a person who has been ordered by a court to pay support for a child

<sup>115</sup> According to the *The Cyclopedic Law Dictionary*, *supra*, fn 9 at p. 481, the “head of a family” is a householder who provides for a family, in a relationship of father and child or husband and wife. *The Dictionary of Canadian Law*, *supra*, fn 23 at p. 547 likewise defines the term as “a person who has charge of a household and who has one or more dependents there in” and as “the member of a family who habitually is the chief provider for the needs of such a family.” Unfortunately, these definitions raise more questions than answers in a post-*Charter* era. As the court put it in *Plante v Plante*, [1990] NSJ No. 443 (NSFC):

[27] Was he a “head of a family”? In fact what is a head of a family? Can a family have two heads, or more? If only one head per family, is it the male or female?

[28] Interesting though this quaint phrase might be for analysts, the working of 2(e) ties to the phrase, “a head of a family” the further phrase, “... and any other person who has in law or in fact the custody or care of a child.” In short, whatever the definition of a head of a family, it implies someone who has “in law or in fact” the custody or care of a child. ...

As to the meaning of “guardianship,” see *Fitzgerald v Siepierski* (27 June 2000), Dartmouth SFHF 1999-004074 (NSSC):

[21] The definition of guardian says that “guardian includes.” That therefore means that in addition to its ordinary meaning the word also includes the words that follow. The dictionary definition of guardian is:

1. a defender, protector, or keeper;
2. a person having legal custody of another person and his or her property when that person is incapable of managing his or her own affairs ...

**Child.** Under the *Matrimonial Property Act*, “child” means “a child of both spouses” and includes a person both spouses have “demonstrated a settled intention to treat as a child of the marriage.”<sup>116</sup> A child entitled to benefit from the payment of child support under the *Maintenance and Custody Act* is a “dependent child.”

### 2.7.2 Children

Pursuant to s. 18(4) of the *Maintenance and Custody Act*, “the father and mother” of a child are joint guardians of the child and equally entitled to “the care and custody” of the child.<sup>117</sup> Pursuant to s-s. (2), certain persons may apply for orders that a child be in the care of a parent, a guardian or an “authorized person,” including parents and guardians and, with leave, “another member of the child’s family or another person.”

As the act does not prohibit a child from being in the “care and custody” of more individuals than his or her parents, and appears to allow parents to apply for orders

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<sup>116</sup> In *Gardiner v Gardiner*, 2001 NSSF 20 the court adopted a list of factors which might demonstrate a “settled intention” to treat a child as one’s own given in *Major v Major* (1998), 175 Sask R 34 (SKQB), including:

- changing the child’s name to that of the respondent
- discussing the possibility of adopting the child ...
- the duration of the child’s relationship with the respondent
- whether the respondent participates in disciplining the child
- whether the respondent provided financial support for the child
- whether the application is for interim or final support
- whether there has been any intention to terminate the relationship
- whether the child has a relationship with the noncustodial biological parent
- whether any other person is obligated to support the child
- whether the respondent spends time personally with the child
- whether the respondent is a “psychological parent”
- whether the respondent has ever sought custody of or access to the child
- the nature of the post separation conduct of the applicant or the respondent, such as a denial by the applicant of access to the child by the respondent

<sup>117</sup> Guardianship is also addressed in the *Guardianship Act*, SNS 2002, c. 8, which concerns guardianship of the estate of children exclusively, in the manner of Part IV of New Brunswick’s *Children’s Law Act*. Under s. 3, the court may appoint a parent or another person as a guardian of the property of a child.



that the child be under the care of a guardian – bearing in mind the expansive meaning of the term – or an authorized person,<sup>118</sup> parents may apply to court for an order that other members of the *ménage* jointly have care and custody of their child.

### 2.7.3 Child support

Pursuant to s. 8 of the *Maintenance and Custody Act*, everyone who is a parent or a guardian of a child has an obligation to provide for that child, and the court may make an order to that effect pursuant to s. 9. Nothing in the act appears to prevent applications for support being brought against multiple payors, indeed s. 11(2) contemplates two putative fathers enjoying simultaneous obligations to pay child support:

(2) Where there are two or more possible fathers, a court may order each of them to make payments ...

### 2.7.4 Spousal Support

A spouse or common-law partner may apply for an order of spousal support under s. 3 of the *Maintenance and Custody Act* against another spouse or common-law partner. Nothing in the act appears to prevent applications for support being brought against multiple payors.

### 2.7.5 Division of property

Pursuant to ss. 5, 10, 11 and 12 of the *Matrimonial Property Act*, the definition of “matrimonial home” at s. 3 and the definition of “matrimonial asset” at s. 4, the *Matrimonial Property Act* is limited in application to married spouses. The constitutionality of the exclusion of unmarried persons from the operation of the *Matrimonial Property Act* was affirmed by the Supreme Court of Canada in *Nova Scotia v Walsh*.<sup>119</sup>

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<sup>118</sup> This term is likewise undefined.

<sup>119</sup> *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83

## 2.8 Ontario

The primary legislation on family law matters in Ontario are: the *Children's Law Reform Act*,<sup>120</sup> concerning the care of children; and, the *Family Law Act*,<sup>121</sup> concerning child support, spousal support and the division of the family home and family property.

### 2.8.1 Definitions

**Spouse.** Under s. 1(1) of the *Family Law Act*, "spouse" means either of two people who are married to each other. The definition is expanded by s-s. (2) thusly:

(2) In the definition of "spouse," a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

For the purposes of Part III of the act on support obligations, s. 29 broadens the meaning of "spouse" still further:

"spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited,<sup>122</sup>

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.<sup>123</sup>

"Cohabit" is defined at s. 1(1) as living together "in a conjugal relationship, whether within or outside marriage."

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<sup>120</sup> *Children's Law Reform Act*, RSO 1990, c. C.12

<sup>121</sup> *Family Law Act*, RSO 1990, c. F.3

<sup>122</sup> It appears that polygamous spouses are included within the definition of "spouse" as a result of s.1(2); both s. 1(2) and s. 29 operate to expand the basic definition at s. 1(1).

<sup>123</sup> Although the phrase "of some permanence" is largely understood in terms of duration, see for example *De Souza v De Souza* (1999), 48 RFL (4th) 63 (ONCJ), the parties' behaviour and intentions for their relationship are also relevant factors in determining the relative permanence of their relationship, see *Re Labbe and McCullough* (1979), 23 OR (2d) 536 (ONCJ) and *Johazi v Bennett*, 2008 ONCJ 805.

**Parent.** Under the *Family Law Act*, “parent” includes a person who has “demonstrated a settled intention to treat a child as a child of his or her family.”

## 2.8.2 Children

Pursuant to s. 20 of the *Children’s Law Reform Act*, “the father and the mother” of a child are equally entitled to custody, and someone with custody of a child has “the rights and responsibilities of a parent.” Under s. 21, a parent or “any other person” may apply for an order for custody of or access to a child, however, persons other than parents must file a criminal records check and a child protection records check for the purposes of their application pursuant to ss. 21.1 and 21.2, and the court registry will produce information regarding any current or previous family law proceedings involving the person pursuant to s. 21.3.

Under s. 28(1), the court may make an order granting custody of or access to a child to “one or more persons” upon application under s. 21.

Under s. 47, a parent or “any other person” may apply to be appointed as a guardian of the child’s property.<sup>124</sup> Pursuant to s. 48, the parents of a child are equally entitled to be guardians, and their entitlement is to be preferred over persons other than parents seeking to be appointed.

## 2.8.3 Child support and spousal support

Under ss. 30 and 31, every parent has an obligation to support his or her child and every spouse has an obligation to support him- or herself as well as the other spouse. Under s. 33, the court may make an order requiring a person to pay support.

People involved in polygamous relationships have the express right to apply for spousal support pursuant to the definition of spouse at s. 1, and the right to apply for child support pursuant to the definition of child at s. 1. With respect to persons involved in polyamorous relationships, nothing in the act appears to prevent applications for child or spousal support being brought against multiple payors.

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<sup>124</sup> Pursuant to s. 75(1) of the act, guardianship of the person of a child is to be construed as custody.

## 2.8.4 Division of property

Pursuant to s. 5 of the *Family Law Act*, only married spouses have a presumptive interest in the difference between the spouses' respective net family property and, pursuant to ss. 7 and 9, only spouses and former spouses, may apply for an order respecting division of the family property.

Pursuant to s. 19, only spouses have a presumptive interest in the matrimonial home, defined as the property ordinarily occupied by a person and his or her spouse as the family residence. Accordingly, only spouses, including people involved in polygamous relationships as a result of the definition of spouse at s. 1, may apply for orders under ss. 23 and 24 for the possession or sale of the matrimonial home.

## 2.9 Prince Edward Island

The primary legislation on family law matters in Prince Edward Island are: the *Custody Jurisdiction and Enforcement Act*,<sup>125</sup> concerning the care of children; and, the *Family Law Act*,<sup>126</sup> concerning child support, spousal support and the division of property.

### 2.9.1 Definitions

**Spouse.** "Spouse" is defined at s. 1(1) of the *Family Law Act* in the circular manner used in the Manitoba legislation:

- (g) "spouse" means an individual who, in respect of another person,
  - (i) is married to the other person ...

The meaning of spouse is expanded by s-s. (2) to include the parties to polygamous marriages:

- (2) In this Act, a reference to marriage includes a marriage that is actually or potentially polygamous, if it was celebrated in a jurisdiction whose system of law recognizes it as valid.

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<sup>125</sup> *Custody Jurisdiction and Enforcement Act*, RSPEI 1988, c. C-33

<sup>126</sup> *Family Law Act*, RSPEI 1988, c. F-2.1

For the purposes of Part III of the *Family Law Act* on child support and spousal support, “spouse” is expanded at s. 29(1)(b) to additionally include an individual who:

(iii) is not married to the other person but is cohabiting with him or her in a conjugal relationship and has done so continuously for a period of at least three years, or

(iv) is not married to the other person but is cohabiting with him or her in a conjugal relationship and together they are the natural or adoptive parents of a child.

It is this broader definition of “spouse” which otherwise generally applies within Prince Edward Island.<sup>127</sup>

“Cohabit” is defined as “to live together in a conjugal relationship, whether within or outside marriage.”

**Parent.** Under the *Family Law Act*, a “parent” includes a person who has “demonstrated a settled intention to treat a child as a child of his or her family.”

**Child.** Child is likewise defined as including a person whom a parent has “demonstrated a settled intention to treat as a child of his or her family.”

## 2.9.2 Children

Pursuant to s. 3 of the *Custody Jurisdiction and Enforcement Act*, “the father and the mother” of a child are joint guardians of the child and are equally entitled to guardianship of the child.<sup>128</sup> A person with custody of a child has the right to care and control of the child and the right to make parenting decisions on behalf of the child.

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<sup>127</sup> *Interpretation Act*, RSPEI 1988, c. I-8, s. 26(e.2.1). The narrower meaning of “spouse” applies in Parts I, II and IV of the *Family Law Act* on the division and use of family property and family home and family law agreements as a result of the specific definition of the term at s. 1(1)(g) of the act and the confinement of the broader meaning to Part III on child support and spousal support by s. 29(1). See the discussion on statutory interpretation at fn 59, *supra*.

<sup>128</sup> This is the only reference to guardianship in the act other than in connection with child protection proceedings; orders for both custody and guardianship are nonetheless made, see for example *G.E.R. v H.J.R.*, 2012 PESC 24, *D.E.M. v J.M.M.*, 2010 PESC 39 and *H.D. v G.D.*, 2007 PESCTD 9. Although “guardianship” is defined in neither the *Custody Jurisdiction and Enforcement Act* nor the *Interpretation Act*,

Under s. 4, a parent “or any other person” may apply for orders for custody of or access to a child and the court may, under s. 5(1) grant custody of or access to a child to “one or more persons.” The parties to such applications are prescribed by s. 7:

- (3) The parties to an application under this Act in respect of a child shall include
  - (a) the mother and the father of the child;
  - (b) a person who has demonstrated a settled intention to treat the child as a child of his or her family;
  - (c) a person who had the actual care and upbringing of the child immediately before the application; and
  - (d) any other person whose presence as a party is necessary to determine the matters in issue.

Accordingly, not only may a parent or another member of a polyamorous *ménage* apply to share custody of a child, other members of the *ménage* involved in the care of the child would appear to also have standing in any application for custody and access.

### 2.9.3 Child support and spousal support

Under ss. 30 and 31 of the *Family Law Act*, every parent has an obligation to support his or her child and every spouse has an obligation to support him- or herself as well as the other spouse. Under s. 33(1), the court may make an order requiring a person to pay support, and under s-s. (5) a respondent may add any other person who may have an obligation to pay support as a party.

People involved in polygamous relationships have the express right to apply for spousal support pursuant to the definition of spouse at s. 1, and the right to apply for child support pursuant to the definition of child at s. 1. With respect to persons involved in polyamorous relationships, nothing in the act appears to prevent applications for child or spousal support being brought against multiple payors.

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s. 1(p) of the *Child Protection Act*, RSPEI 1988, c. C-5.1 describes the term as the “legal responsibility and authority for making decisions respecting the person of a child.”

#### 2.9.4 Division of property

Pursuant to s. 6 of the *Family Law Act*, only married spouses have a presumptive interest in the difference between the spouses' respective net family property and, pursuant to ss. 7 and 9, only spouses and former spouses may apply for an order respecting division of the family property.

Pursuant to s. 19 only spouses have a presumptive interest in the matrimonial home, defined as the property ordinarily occupied by a person and his or her spouse as the family residence. Accordingly, only spouses, including people involved in polygamous relationships as a result of the definition of spouse at s. 1, may apply for orders under ss. 24 and 25 for the possession or sale of the matrimonial home.

### 2.10 Saskatchewan

The primary legislation on family law matters in Saskatchewan are: *The Children's Law Act*,<sup>129</sup> concerning the care of children; *The Family Maintenance Act*,<sup>130</sup> concerning child support and spousal support; and, *The Family Property Act*,<sup>131</sup> concerning the possession and division of the family home and family property.

#### 2.10.1 Definitions

**Spouse.** Under Part I of *The Family Property Act*, a "spouse," for all purposes of the act, is:

- a) someone who is married to another person; and,
- b) someone who is or has lived with someone else as spouses for at least two years.

Under *The Family Maintenance Act*, "spouse" also includes:

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<sup>129</sup> *The Children's Law Act*, 1997, SS 1997, c. C-8.2

<sup>130</sup> *The Family Maintenance Act*, 1997, SS 1997, c. F-6.2

<sup>131</sup> *The Family Property Act*, SS 1997, c. F-6.3

- c) someone who has lived with another person in “a relationship of some permanence,” if the persons are the parents of a child.<sup>132</sup>

**Parent.** Under Part I of *The Children’s Law Act*, a “parent” is “the father or mother” of a child. Under *The Family Maintenance Act*, “parent” also includes “a person who has demonstrated a settled intention to treat a child as a child of his or her family” where the child is under the age of majority.<sup>133</sup>

**Child.** Under s. 2(1) of *The Family Property Act*, “child” is defined as including:

- (c) any person to whom both spouses stand in the place of a parent; or
- (d) any person of whom either spouse is a parent and to whom the other spouse stands in the place of a parent;

### 2.10.2 Children

Pursuant to s. 3 of *The Children’s Law Act*, parents who cohabit after the birth of their child are presumed to have joint custody of the child.<sup>134</sup> Pursuant to s. 30, parents are presumed to be joint guardians of the property of the child.

Parents may make agreements giving access to a child to “any other person” under s. 3(3)(c). Under ss. 3(3)(d) and 30(5), parents may make an agreement authorizing one of

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<sup>132</sup> As in Ontario, the phrase “some permanence” requires an analysis of both the duration of the parties’ relationship, their behaviour during their relationship and their expectations for the future of their relationship, see *Lygouriatitis v Gohm*, 2006 SKQB 488, for example, or the judgment of McIntyre J. in *Davidson v Reynolds*, 2000 SKQB 567:

[65] ... It is clear the legislature did not feel that any minimum length of time ought to be prescribed. However, there must be a quality to the relationship, which can include consideration of the length of the relationship, which satisfies the Court it was a relationship of some permanence. Entitlement to claim spousal support, or meeting the threshold, does not arise just from the fact a child was conceived and a couple have shared a residence for a period of time. One must still examine the nature of the relationship for it is the nature of the relationship which may give rise to the entitlement to claim spousal support. In this instance, Paul and Lisa resided together because of the fact they had conceived a child but I am not satisfied that the nature of the relationship satisfies the threshold criteria under *The Family Maintenance Act*, 1997.

<sup>133</sup> *The Family Maintenance Act*, 1997, ss. 2 and 4(1)

<sup>134</sup> “Custody” is defined at s. 2 of the act as guardianship of the person of a child. Persons responsible for children’s estates, as described at s. 32, are “guardians of the property of a child.”



them to appoint “one or more other persons” as the custodian and guardian of the child.

Pursuant to s. 6, the court may make orders granting custody of or access to the child to “one or more persons.”<sup>135</sup> Under s. 7, the court may order that:

(2) ... notice of the application be served on any person having an interest in the custody, care and upbringing of the child, and that person may be heard at the hearing of the application.

The court may appoint “one or more guardians of the property of a child” under s. 30. Nothing in the act appears to limit the number of persons who parents may agree or the court may order have custody of or access to a child, or be a guardian of the estate of a child.

### 2.10.3 Child support

Under s. 3(1) of *The Family Maintenance Act*, “every parent” is obliged to support his or her child, and the court may make child support orders pursuant to ss. 3(3) and 9 upon the application of “any person.” The act does not limit the number of potential payors.

### 2.10.4 Spousal support

The court may make an order requiring “a person” to provide spousal support under ss. 5 and 9 of *The Family Maintenance Act*. Nothing in the act limits the number of spouses a person may concurrently have, nor the number of persons against whom an order for spousal support may be sought.

### 2.10.5 Division of property

A spouse may apply for the distribution of family property, defined as any real or personal property owned by one spouse, both spouses, or by one or both spouses and a third party at the time of the application, pursuant to s. 21 of *The Family Property Act*. Under s. 4, “both spouses” have an equal right to possession of the family home, and

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<sup>135</sup> In hearing such applications, the court must not, pursuant to s. 8(b), take into account “the past conduct of any person,” unless that conduct is relevant to the person’s capacity to parent.

spouses are presumed to have an “equal” interest in family property acquired after the commencement of the spousal relationship and the family home under ss. 21, 22 and 23.

Pursuant to the definition of “spouse” at s. 2(1), the provisions of *The Family Property Act* apply to both married and unmarried spouses; nothing in the act limits the number of spouses a person may concurrently have.

## 2.11 Summary

In keeping with the child-first statutory approach to child support described by Bastarache J. in *D.B.S. v S.R.G.*,<sup>136</sup> the statutes of Canada’s common law provinces all impose a liability for child support on persons standing *in loco parentis* or as a stepparent to a child, whether another person is subject to a concurrent child support liability in respect of that child or not. As a result, all members of a polyamorous *ménage* are potentially liable to pay support for a member’s child, particularly where the child’s primary residence was the polyamorous household.

A dependent adult family member may be entitled to spousal support from another member of a *ménage* where:

- a) the person is a married spouse of another member; or,
- b) the person qualifies as an adult interdependent partner (Alberta), an unmarried spouse (British Columbia, Ontario, Prince Edward Island, Saskatchewan), a partner (Newfoundland and Labrador) or a common-law partner (Manitoba, New Brunswick, Nova Scotia) of another member.

A dependent adult family member may be entitled to spousal support from more than one member of a *ménage* where the legislation is not drafted so as to preclude the possibility of concurrent spousal relationships, as it is in Alberta, and the person qualifies as an unmarried spouse or partner of those members.

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<sup>136</sup> *D.B.S. v S.R.G.*, *L.J.W. v T.A.R.*, *Henry v Henry*, *Hiemstra v Hiemstra*, 2006 SCC 37 at para. 43

In all provinces but Alberta and Manitoba, a child's parents may share custody of the child, as well as the associated rights to receive information about the child and make decisions concerning the child, with:

- a) other family members who fall within the statutory definition of guardian (British Columbia, Nova Scotia) or parent (New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island); and,
- b) any other family members where the legislation does not require a family relationship to apply for custody (British Columbia, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan).

The legislation of British Columbia and Newfoundland and Labrador additionally allow more people than the natural parents of a child to be the legal parents of that child where the child is conceived through assisted reproduction.

In all provinces except Manitoba, a child's parents may share guardianship of the child, and the associated obligations as trustees of the child's property, with one or more other members of a *ménage*.

With the exception of British Columbia, Manitoba and Saskatchewan, statutory rights to the possession and ownership of property is restricted to married spouses, limiting the relief available to the unmarried members of a *ménage* to: the legislation generally applicable to co-owned real and personal property; and, whichever principles of equity and the common law might apply in the circumstances of the relationship, usually unjust enrichment and the constructive trust, and perhaps the resulting trust. The statutory rights available in British Columbia, Manitoba and Saskatchewan arise from the application of the legislation to unmarried spouses (British Columbia, Saskatchewan) and common-law partners (Manitoba), and the failure of the legislation to preclude the possibility of concurrent spousal relationships.

The *Family Law Act* of Ontario and the *Family Law Act* of Prince Edward Island are unique in Canada in explicitly recognizing spouses within polygamous marriages celebrated outside of Canada as "spouses" for the purposes of the division of property, the payment of child support and the payment of spousal support.

The following table summarizes the rights and obligations described above:

	Parenting and care of children			Support	Property	
	<i>May be a parent</i>	<i>May have custody (person of child)</i>	<i>May be a guardian (estate of child)</i>	<i>May seek child support</i>	<i>May seek spousal support</i>	<i>May make statutory claim to property</i>
<b>AB</b>		Yes*	Yes**	Yes		
<b>BC</b>	Yes, if assisted reproduction is used	Yes*	Yes**	Yes	Yes	Yes, subject to interpretation of legislation
<b>MB</b>		Yes, but at cost of parents' custody rights	Yes, but at cost of parents' rights as guardians	Yes	Yes	Yes
<b>NB</b>	Yes***	Yes	Yes	Yes	Yes	
<b>NL</b>	Yes, and also when assisted reproduction is used***	Yes	Yes	Yes	Yes	
<b>NS</b>		Yes	Yes	Yes	Yes	
<b>ON</b>	Yes***	Yes	Yes	Yes	Yes	
<b>PEI</b>	Yes***	Yes	Yes	Yes	Yes	
<b>SK</b>	Yes***	Yes	Yes	Yes	Yes	Yes
<p>* Guardians have guardianship of the person of the child.  ** Standing as guardian does not presumptively entail guardianship of the estate of the child except for property with a value less than that fixed by regulation.  *** Persons standing <i>in loco parentis</i> to child are included in the definition of parent.</p>						

## 3.0 FAMILY LAW AGREEMENTS AND POLYAMOROUS RELATIONSHIPS

As discussed, the legal issues awaiting the parties to a polyamorous *ménage* potentially include the following matters when the household dissolves or diminishes:

- a) the care of children and the management of children's property;
- b) liability for child support and the payment of children's special expenses;
- c) entitlement to and liability for spousal support;
- d) the division of real and personal property, including jointly-owned property and claims made in respect of property owned by only one or some members of the household; and,
- e) the allocation of debt.

Married and unmarried spouses, particularly those who have previously experienced conflict following the breakdown of a long-term relationship, commonly attempt to address these issues before they arise through marriage and cohabitation agreements entered into before or shortly after marriage or cohabitation, and are equally useful to those involved in polyamorous relationships. In addition to anticipating and attempting to resolve future disputes, these agreements may also attempt to regulate the parties' behaviour, rights and obligations while their relationship endures.

### 3.1 Relationship agreements

Although cohabitation and marriage agreements dealing with the management of family obligations in intact relationships are occasionally entered into by dyadic couples, they are by no means universal and are the exception rather than the rule. However, such agreements are, or at least should be, essential for participants in polyamorous *ménages*.

A relationship or cohabitation agreement prepared for the members of a polyamorous household must address the legal issues arising from the breakdown of the relationship and should also cover matters relevant to the smooth functioning of subsisting relationships, such as these:

- a) ownership of real and personal property, including property bought during the relationship and property brought into the relationship;
- b) responsibility for debts, including debts incurred during and debts brought into the relationship;
- c) responsibility for the cost of groceries, utilities, rent or mortgage, and the other usual bills associated with the occupation and maintenance of a home;
- d) responsibility for domestic chores;
- e) responsibility for parenting, including the parenting of children brought into the relationship and children born during the relationship;
- f) participation in social events and the outward characterization of the family;
- g) sexual relations within the household and expectations regarding sexual fidelity; and,
- h) the admission of new persons to the relationship and their role in the household commonweal.

Such agreements might also address the departure of persons from the relationship and the disposition of: their property interests; their obligations for shared debt obligations; and, their legal interests and entitlements with respect to the past, remaining and future members of the *ménage*.<sup>137</sup>

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<sup>137</sup> I can imagine managing property interests and debt obligations within a polyamorous family as a small company, for example, in which the members of the family buy into the partnership and receive an interest in common property and a liability for the common debt in proportion to their initial contribution. When a member leaves the *ménage*, the remaining members pay out his or her proportionate interest in the common property less the member's share of the common debt; when a *ménage* dissolves, each member would be presumptively entitled to his or her share of the common property and be liable for his or her share of the common debt. Although a strict regime of separate property and separate debt

In short, relationship or cohabitation agreements prepared for polyamorous families should cover not only the legal disputes likely to arise upon separation but the full range of emotional, economic and functional disputes likely to cause friction during the relationship. Drafting such agreements will require family law counsel used to preparing agreements for dyadic families to be particularly creative and spend significant time with the client exploring the anticipated structure and functioning of his or her relationship; consideration of the usual family law subjects alone will not suffice.

### 3.2 Special considerations in drafting and executing relationship agreements

The interpretation and enforcement of family law agreements are governed by the common law of contracts<sup>138</sup> as amended and expanded by any applicable legislation.<sup>139</sup> In general, family law agreements are binding without consideration,<sup>140</sup> may concern existing or future legal disputes<sup>141</sup> and will survive the inclusion of one or more void terms.<sup>142</sup>

The degree of deference given to family law agreements by the court will depend on the subject matter,<sup>143</sup> the terms of the local legislation, local custom and practice, the adequacy of disclosure made and the fairness of the bargaining process.<sup>144</sup> Local

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might be easier to manage, such might limit the ability of the *ménage* to pool their resources for the good of the whole, as might be required for the purchase of a family home or family business.

<sup>138</sup> *Schlenker v Schlenker* (1999), 1 RFL (5th) 436 (BCSC) at para. 7

<sup>139</sup> See, for example, ss. 44, 50, 58, 92, 93, 148, 163 and 164 of British Columbia's *Family Law Act*.

<sup>140</sup> British Columbia's *Family Law Act*, s. 6(4); Saskatchewan's *The Family Property Act*, s. 38(1)

<sup>141</sup> Alberta's *Matrimonial Property Act*, s. 37(3); British Columbia's *Family Law Act*, s. 6(1); New Brunswick's *Marital Property Act*, ss. 34(1) and 35(1); Nova Scotia's *Matrimonial Property Act*, s. 23; Newfoundland and Labrador's *Family Law Act*, ss. 62 and 63(1); Ontario's *Family Law Act*, ss. 52(1) and 53(1); Prince Edward Island's *Family Law Act*, ss. 51(1) and 52(1); Saskatchewan's *The Family Property Act*, s. 38(4)

<sup>142</sup> Saskatchewan's *The Family Property Act*, s. 38(3)

<sup>143</sup> Agreements on the division of property are typically given the most weight, providing they are fairly negotiated, and agreements on child support the least. Local legislation may also impact the deference to be given to an agreement; under s. 44 of British Columbia's *Family Law Act*, for example, an agreement on parenting may be set aside if the court is satisfied that the agreement is not in the child's best interest, while an agreement on property and debt may not be displaced absent proof of a defect in the bargaining process under s. 93(3) or proof of significant unfairness under s. 93(5).

<sup>144</sup> Alberta's *Adult Interdependent Relationships Act*, s. 8(1); British Columbia's *Family Law Act*, s. 93(3); Ontario's *Family Law Act*, ss. 56(4)

legislation may additionally require an agreement to be in writing, signed and witnessed by other persons.<sup>145</sup>

Although family law agreements are binding without the receipt of legal advice prior to their execution,<sup>146</sup> legal advice will help to protect an impugned agreement against claims of unconscionability, duress, undue influence and mistake.<sup>147</sup> It is therefore critical to ensure that all parties to a cohabitation or relationship agreement prepared in anticipation of a polyamorous relationship receive competent legal advice,<sup>148</sup> preferably from counsel familiar with such relationships. Other essentials include:

- a) obtaining a psychiatric opinion when there are doubts as to the capacity of a party;
- b) conducting negotiations partly or wholly through counsel, and making counselling support available to the parties, to mitigate potential claims of undue influence;

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<sup>145</sup> British Columbia's *Family Law Act*, s. 93(1); Manitoba's *Family Property Act*, s. 1(1); New Brunswick's *Marital Property Act*, ss. 37; Nova Scotia's *Matrimonial Property Act*, s. 24; Newfoundland and Labrador's *Family Law Act*, s. 65; Ontario's *Family Law Act*, ss. 55; Prince Edward Island's *Family Law Act*, ss. 54; Saskatchewan's *The Family Property Act*, ss. 38(2) and 40

<sup>146</sup> See, for example: *Gwynn (Forsythe) v Forsythe* (1985), 45 RFL (2d) 86 (BCCA); *Schlenker v Schlenker*, *supra*, fn 138 at para. 10; *D.H. Estate v. Do.T.* (2006), 27 RFL (6th) 317 (ONSC) at para. 45; and, *Strifler v Strifler*, 2014 ONCJ 69 at para. 67.

<sup>147</sup> See, for example: *Hartshorne v Hartshorne*, 2004 SCC 22; *MacDonnell v MacDonnell*, 2005 NSSC 227; *Chandra v Chandra* (1997), 27 RFL (4th) 114 (NLSCTD); *Swiderski v Swiderski* (1998), 15 RFL (3d) 295 (SKQB); *Boutilier v Boutilier* (1996), 151 NSR (2d) 126 (NSSC); and, *Randle v Randle*, 2005 BCSC 1135.

<sup>148</sup> The duty of counsel providing independent legal advice is set out in *Gurney v Gurney*, 2000 BCSC 6 at para. 29, adopted in *D.K.N. v M.J.O.*, 2003 BCCA 502, *LeVan v LeVan* (2006), 32 RFL (6th) 291 (ONSC) and *Hyatt v Ralph*, 2015 ONSC 580:

[29] In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course.



- c) negotiating terms that are fundamentally equitable, and bear some relationship to the likely result that would likely obtain if the matters at issue were to be litigated, to mitigate claims of unconscionability;
- d) ensuring that all parties provide adequate disclosure, of the standard required for the litigation of property and support claims, before negotiating and executing the agreement; and,
- e) ensuring that a generous amount of time will elapse between the execution of the agreement and the commencement of cohabitation, to mitigate potential claims of duress.

In addition, counsel for all parties should attach certificates of independent legal advice to cohabitation or relationship agreements prepared for the purposes of a polyamorous relationship, and each party's signature be witnessed by counsel or, failing counsel, by a third party not connected to the *ménage*. Proof of receipt of independent legal advice, and the presumptions that attach when counsel witnesses his or her client's signature, may be integral to the future defence of the contract.

## 4.0 CONCLUSION

Polyamorous relationships are surprisingly well accommodated by the family law legislation of Canada's common law provinces, largely as a result of statutory regimes that: anticipate multiple persons, usually parents and stepparents, being simultaneously obliged to pay child support; allow persons other than parents to apply for custody and access; and, do not limit the number of spousal relationships a person may concurrently maintain. Of the provinces surveyed in this paper, the legal issues arising from the dissolution of polyamorous families are best managed in British Columbia, where the *Family Law Act*:

- a) allows a child to have up to six legal parents, where the child is conceived as a result of a process of assisted reproduction;
- b) allows a child to have an unlimited number of custodians<sup>149</sup> and benefit from the payment of support by multiple parents and stepparents; and,
- c) allows an adult to engage in more than one spousal relationship at any given time, and to pursue orders for spousal support, the division of family property and the allocation of family debt against those spouses.

Alberta's legislative regime is the least hospitable to polyamorous families. Although a child may have more than one property guardian and benefit from the payment of child support by multiple parents, the definitions of "spouse" and "adult interdependent partner" are worded so as to preclude an adult from having more than one spouse at a time, more than one adult interdependent partner at a time and from having one spouse and one adult interdependent partner at the same time. As a result, an individual involved in a polyamorous relationship in Alberta is unable to seek spousal support from more than one other person or apply for the possession of the family home and division of matrimonial property against anyone other than his or her married spouse.

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<sup>149</sup> The term used in the *Family Law Act* is "guardian," however the bulk of the legislation reviewed in this paper distinguishes parents who have custody (guardianship of the person of the child) from parents who are trustees of their children's property (guardianship of the estate of the child). The British Columbia legislation uses "guardian" in the sense of guardianship of the person of the child.

Polyamorous relationships will likely become increasingly common in the coming years as our understanding and conceptualization of *family* continues to evolve.<sup>150</sup> Although legislative amendments to expressly accommodate polyamorous *ménages* are a long way off – a number of provincial statutes have yet to catch up to the implications of the *Civil Marriage Act*<sup>151</sup> – people generally choose to love how and as they wish, and are unlikely to wait for the permission or endorsement of the state, as the preliminary findings of the Institute’s study show. Prudent family law counsel should review their local legislation from the lens of a client involved in a polyamorous relationship and consider how the needs of such clients can be creatively addressed within the existing statutory and common law regime, and the advice that such a client might be given.

Counsel should bear in mind that the needs of persons involved in polyamorous families will be broader than the narrow range of issues traditionally associated with family law, and may include areas such as:

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<sup>150</sup> There is but one published series of judgments involving a polyamorous family in Canada, *B.D.G. v C.M.B.* (25 June 2013), Nanaimo F66763 (BCPC) (trial), *C.M.B. v B.D.G.*, 2014 BCSC 780 (appeal) and *B.D.G. v C.M.B.*, 2016 BCPC 97 (retrial), involving a parent’s wish to relocate with a child. Despite the respondent’s *ex post facto* denunciation of polyamory, the fact that the parties lived in a polyamorous relationship had no discernable impact in the two trial decisions. The court’s conclusions on the issue at retrial are as follows:

[122] [The parenting assessor] states: [the respondent] asserts she is uncomfortable with the level of dysfunction in [the applicant’s] home. She described the relationship they were in together as horrible and abusive in a number of ways. According to her, the relationship was “polygamy” but she says [the applicant] labels it as “polyamory”. She described [the applicant] as chronically unemployed and says he is an alcoholic who abuses prescription drugs on occasion.

[123] It seems that [the assessor] did not put these assertions to [the applicant] and simply accepted them at face value. Had she done so she may have had a different view. On all of the evidence, I do not find that [the applicant] was coercive or that he bullied or threatened [the respondent].

[124] It is clear that [the assessor] believes that being raised in a polyamorous family may have negative consequences for [the parties’ children]; however, there is no evidence to support that concern.

[125] There is no evidence that [the parties’ children] have been negatively affected by spending half their time for the past two and one half years in a polyamorous household.

[126] Furthermore, there is no evidence that being raised in a polyamorous family has had a negative effect on either [the claimant’s children with other members of the ménage]. The evidence is that both boys are well-adjusted and happy and have good friends who sometimes stay over. [The applicant] and the boys’ respective mothers are open with the parents of the boys’ friends about their polyamorous lifestyle. This has not been an issue.

<sup>151</sup> *Supra*, fn 41

- a) immigration (can a married spouse, for example, sponsor someone coming into Canada to join his or her relationship?);
- b) public and employment benefits (can Canada Pension Plan benefits, employee health benefits and the like be shared with more than one other person? can all members of a *ménage* be included in the calculation of dependent-specific benefits such as social assistance?);
- c) wills and estates (to what extent does the legislation accommodate concurrent surviving spouses? to what extent can children born within a polyamorous *ménage* inherit from non-biological parents who die intestate?);
- d) adoption and assisted reproduction (how many adults can be the legal parents of a child?);
- e) vital statistics (can vital statistics agencies be compelled to register more adults as the parents of a child than the biological or adoptive parents of the child?); and,
- f) education and health care (to what extent can education and health care providers be compelled to take instructions from the members of a *ménage* other than the child's biological parents?).

It is likely past time for interested family law lawyers to begin forming practice associations, as have coalesced in relation to assisted reproduction for example, to share knowledge and expertise, prepare model retainer agreements and model relationship agreements, monitor amendments to the legislation and developments in the case law, and develop referral networks. Polyamorous clients will benefit enormously from resources and talent shared in this manner, and counsel may find advising on polyamorous relationships to be a profitable and stimulating practice niche.

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## TABLE OF PRINT SOURCE MATERIALS

- Deborah Anapol, *Polyamory in the Twenty-First Century: Love and Intimacy with Multiple Partners* (Lanham, MD: Rowman & Littlefield Publishers Inc., 2010)
- Jessica Bennett, "Polyamory: The Next Sexual Revolution?" *Newsweek* (28 May 2009),
- William Blackstone, *Commentaries on the Laws of England*, 7th ed. (Oxford UK: Clarendon Press, 1776)
- Nora Bohnert, Anne Milan and Heather Lathe, *Enduring Diversity: Living Arrangements of Children in Canada over 100 Years of the Census* (Ottawa ON: Statistics Canada, 2014)
- John-Paul Boyd, "The Interesting Evolution of Married Women's Property Rights" (2005) 63:4 *Advocate* 537
- John-Paul Boyd, "Half-Baked Torts: Uncommon Causes of Action in Family Law Proceedings" (2007) 65:1 *Advocate* 21
- John-Paul Boyd, *Obtaining Reliable and Repeatable SSAG Calculations* (Ottawa ON: Department of Justice, 2009)
- John-Paul Boyd, *Easter Eggs and Bad Eggs: Surprises in the Drafting and Subsequent Interpretation of the Family Law Act* (Calgary AB: Canadian Research Institute for Law and the Family, 2015)
- John-Paul Boyd, *Dividing Property and Allocating Debt under British Columbia's Family Law Act: The Case Law to Date* (Calgary AB: Canadian Research Institute for Law and the Family, 2016)
- John-Paul Boyd, *Economic and Other Issues of Spouses Separating Later in Life* (Calgary AB: Canadian Research Institute for Law and the Family, 2016)
- Peter Bromley, *Family Law*, 5th ed. (London UK: Butterworths, 1976)
- James Cahill, *The Cyclopedic Law Dictionary*, 2nd ed. (Chicago IL: Callaghan and Company, 1922)
- Alexander Cairns, *Eversley's Law of the Domestic Relations*, 4th ed. (London UK: Sweet & Maxwell Limited, 1926)

Daphne Dukelow and Betsy Nurse, *The Dictionary of Canadian Law*, 2nd ed. (Toronto ON: Carswell, 1995)

Francis Schüssler Fiorenza and John Galvin, eds., *Systematic Theology: Roman Catholic Perspectives* (Minneapolis MN: Fortress Press, 1991), vol. 2

Edward Jenks, *Law and Politics in the Middle Ages* (London, UK: John Murray, 1898)

Joseph Nolan and Jacqueline Nolan-Haley, *Black's Law Dictionary*, 6th ed. (St. Paul MN: West Group, 1990)

Carol Rogerson and Rollie Thompson, *Spousal Support Advisory Guidelines* (Ottawa ON: Department of Justice, 2008)

Maura Strassberg, "The Challenge of Post-Modern Polygamy: Considering Polyamory" (2003) 31 *Capital University L R* 439

Della Thompson, ed., *The Concise Oxford Dictionary of Current English*, 9th ed. (Oxford UK: Clarendon Press, 1995)

Cecil Turner, *Kenny's Outlines of Criminal Law*, 17th ed. (Cambridge UK: Cambridge University Press, 1958)