

A WHOLE VILLAGE: POLYAMOROUS FAMILIES AND THE BEST INTERESTS OF THE CHILD STANDARD

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As the nuclear family increasingly fails to represent the majority of families in the United States, courts are grappling with the question of what arrangement of adults (and potentially children) constitutes a “family.” In addition to a host of more recognized variations, another form of family is emerging in public and academic discussions: families with polyamorous parents (“polyamorous families”). Polyamory and other forms of consensual non-monogamy are becoming increasingly common in the United States, particularly among lesbian, gay, and bisexual identified persons. Polyamorous families represent a significant challenge for the legal system’s traditional construction of family; operating outside of common familial, relationship structure, and sexuality norms (e.g., monogamous, different-sex parents), polyamorous families appear legally unintelligible to the judiciary. Research demonstrates that there are significant, generalized social stigmas and biases against polyamorous persons, polyamorous parents, and polyamorous families. This Article uses empirical data to examine children’s physical, material, and

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emotional well-being in polyamorous families and relates those outcomes to state statutorily mandated standards for the judicial adjudication of child custody cases. This Article applies the “Best Interests of the Child” (“BIOC”) test used by state courts to make custody determinations. In light of novel Polyamorous Family Study data, sociological and psychological data support the finding that polyamorous families are capable of fulfilling BIOC state standards. Proposed solutions for improving the legal standing of polyamorous families in child custody law are discussed and proposed.

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“We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supportive loving environment we believe children should inhabit.” In re Adoption of a Child by J.M.G., 632 A.2d 550, 551 (N.J. Super. Ct. Ch. Div. 1993).

“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” Troxel v. Granville, 530 U.S. 57, 63 (2000).

INTRODUCTION

As the nuclear family increasingly fails to represent most families in the United States, courts are grappling with the question of what arrangement of adults (and potentially children) constitute a “family.”¹ Are they

¹ See MICHAEL J. ROSENFELD, THE AGE OF INDEPENDENCE: INTERRACIAL UNIONS, SAME SEX UNIONS, AND THE CHANGING AMERICAN FAMILY 68, 77, 156–58 (2007).

to be biologically related? If not, then, related through the institution of marriage? If neither marriage nor biology, then what precisely defines a family, socially and legally? The “traditional” nuclear family, composed of children and their two biological parents, was never universal. As of 2015, less than half of all children in the United States under 18 years of age live in a family with two married parents in their first marriage.² Rising rates of divorce and the increasing publicity and prevalence of non-traditional families—single parent, step families, same-sex parents, transgender parents or children, children produced with assisted reproductive technology, open adoptions, multi-generational family parenting, extended kinship care, etc.—have rendered the diversity of U.S. households and families more visible.³

In addition to these more recognized non-traditional families, another form of family is emerging in public and academic discussions: families with polyamorous parents (“polyamorous families”).⁴ Polyamory is a relationship orientation, identity, or behavior⁵ in which it is acceptable to love more than one person and/or to engage in more than one concurrent romantic and/or intimate relationship.⁶ Polyamory is not an equivalent term to polygamy, which is a custom or tradition for individuals to be married to more than one other person. Polygamy in the United States is inextricably connected to a long religious history,⁷ at times laden with heteronormative, patriarchal domination and gendered

² *Parenting in America: Outlook, Worries, Aspirations are Strongly Linked to Financial Situation*, PEW RSCH. CTR. (Dec. 17, 2015), <https://www.pewresearch.org/social-trends/2015/12/17/parenting-in-america/>.

³ Andrew Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE FAM. 403, 403–04 (2012).

⁴ This Article utilizes the term “polyamorous families” to refer to families and households in which a polyamorous adult is raising children. We rely on this term for simplicity in readership but acknowledge and specifically note that the term is not intended to reflect the relationships of the children within the family and/or household. Further, the use of this more restricted term, “polyamorous families,” is not intended to diminish the families and households of polyamorous adults without children. See e.g., ELISABETH SHEFF, *THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES* 217 (2014) [hereinafter SHEFF, *THE POLYAMORISTS NEXT DOOR*]; MARIA PALLOTTA-CHIAROLLI, ELISABETH SHEFF, & RUBY MOUNTFORD, *Polyamorous Parenting in Contemporary Research: Developments and Future Directions*, in *LGBTQ-PARENT FAMILIES* (Abbie Goldberg & Katherine Allen eds., 2020).

⁵ A debate on whether polyamory constitutes a relationship or sexual orientation is beyond the scope of this Article and as such, will not be addressed here.

⁶ This Article will employ this definition for polyamory throughout, however, other consensual non-monogamy (“CNM”) relationship styles will be explicitly noted when the findings reported or evidence relied upon specifically pertains to only certain subsets of non-monogamy or to the larger umbrella term of CNM (which polyamory sits within). See SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 1, for a general definition of polyamory.

⁷ See, e.g., *Bronson v. Swensen*, 394 F. Supp. 2d 1329, 1330 (D. Utah 2005); *Potter v. Murray City*, 760 F.2d 1065, 1066–70 (10th Cir. 1985); *Reynolds v. U.S.*, 98 U.S. 145, 161–67 (1878).

abuse.⁸ Polyamory is, instead, a largely secular practice of consensual non-monogamy (“CNM”)—a term covering a diverse array of relationship structures whereby all adult parties consent to some form of non-monogamous interactions, similar to swinging and open relationships.⁹

Polyamory and other forms of consensual non-monogamy are becoming increasingly visible and common in the United States, particularly among LGB-identified persons.¹⁰ Scholars estimate that 4-5% of American adults are currently engaged in consensually non-monogamous relationships, and that 20% have done so in the course of their lifetime.¹¹ Large percentages of LGB-identified persons may likely engage in some form of consensual non-monogamy.¹² Bisexuality, especially, has been linked with an increased likelihood to participate in polyamorous relationships.¹³ Some polyamorous people live in families or households composed of multiple adults linked through multiple romantic and platonic relationships who may or may not be legally married, sometimes with children.¹⁴ Despite increasing demographic prevalence and public interest in learning about polyamory,¹⁵ however, research demonstrates

⁸ See generally, Catherine Blake, *The Sexual Victimization of Teenage Girls in Utah: Polygamous Marriages. Versus Internet Sex Predators*, 7 J. L. & FAM. STUD. 289 (2005); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353 (2003).

⁹ See generally Terri D. Conley, Amy C. Moors, Jes L. Mastick, & Ali Ziegler, *The Fewer the Merrier?: Assessing Stigma Surrounding Consensually Non-monogamous Romantic Relationships*, 13 ANALYSIS SOC. ISS. PUB. POL'Y 1, 1–30 (2013) [hereinafter Conley et al., *The Fewer the Merrier?*].

¹⁰ E.g., Amy C. Moors, Jennifer D. Rubin, Jes L. Mastick, Ali Ziegler, & Terri D. Conley, *It's Not Just a Gay Male Thing: Sexual Minority Women and Men are Equally Attracted to Consensual Non-Monogamy*, 22 Journal für Psychologie. 1 (2014) [hereinafter *It's Not Just a Gay Male Thing*]; see generally Ethan Czuy Levine, Debby Herbenick, Omar Martinez, Tsung-Chieh Fu, & Brian Dodge, *Open Relationships, Nonconsensual Nonmonogamy, and Monogamy Among U.S. Adults: Findings from the 2012 National Survey of Sexual Health and Behavior*, 47 ARCH. SEX. BEH. 1439, 1439–50 (2018).

¹¹ See *It's Not Just a Gay Male Thing*, *supra* note 10, at 3; Rhonda N. Balzarini et al., *Demographic Comparison of American Individuals in Polyamorous and Monogamous Relationships*, 56 J. SEX. RES. 681, 682 (2019).

¹² See Marcia Munson & Judith P. Stelboum, *Introduction: The Lesbian Polyamory Reader: Open Relationships, Non-Monogamy, & Casual Sex*, 3 J. LESBIAN STUD. 1, 2–4 (1999); see also M.L. Hauptert et al., *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings From Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 431–32 (2017).

¹³ See Maria Pallotta-Chiarolli & Sara Lubowitz, *Outside Belonging: Multi-Sexual Relationships as Border Existence*, 3 J. BISEXUALITY 53 (2003); see also Hauptert, *supra* note 12, at 431–32.

¹⁴ See SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 4, at 217.

¹⁵ See Amy C. Moors, *Has the American Public's Interest in Information Related to Relationships Beyond "The Couple" Increased Over Time?*, 54 J. SEX RES. 677, 681–82 (2017).

significant, generalized social stigma and bias against polyamorous persons, parents, and families.¹⁶

Operating outside of common familial, relationship structure, and sexuality norms (*e.g.*, monogamous, different-sex parents), polyamorous families often appear legally unintelligible to the judiciary, presenting a significant challenge for the legal system's traditional construction of family as two parents, married and of different sexes with biologically related children. This is apparent in judicial child custody determinations of polyamorous parented families. For child custody disputes, judges apply the best interests of the child standard, reviewing—by way of considering a list of mandated or suggested factors (*e.g.*, moral fitness of parents, parent's childcare ability)—what custody arrangements would be in the child's interests. Historically, courts have applied BIOC standards to several different categories of legal adjudications: child custody, child relocation, termination of parental rights, juvenile court, and cases where the court must intervene in an intact parent-child relationship.¹⁷ All states currently require judges to apply BIOC standards to child custody. A review of child custody case law indicates that many lower court family judges have determined that polyamorous parents or polyamorous parented families, merely by virtue of their engagement in polyamory, do not meet BIOC standards and therefore, it could not be in the child's best interest for a polyamorous parent to retain custody of their child (or children). This Article's primary task is to address whether polyamorous parented families *per se* cannot meet U.S. states' BIOC standards, based on a review of available research on these families and the well-being of their children.

This Article uses empirical data to examine children's physical, material, and emotional well-being in polyamorous families, and relates those outcomes to state statutorily mandated standards for the judicial adjudication of child custody cases. First, this Article contextualizes polyamorous families within the U.S. legal landscape and broadly reviews BIOC standards and its history of application to diverse family structures, including but also beyond polyamorous families. In reviewing the historical and contemporary treatment of non-normative families by the legal institution, the Article explores the ways in which the best interest of the child standard has been (and continues to be) leveraged and

¹⁶ See Terri D. Conley, Ali Ziegler, Amy C. Moors, Jes L. Matsick, & Brandon Valentine, *A Critical Examination of Popular Assumptions about the Benefits and Outcomes of Monogamous Relationships*, 17 PERSONALITY & SOC. PSYCH. REV. 124, 125 (2012) [hereinafter *A Critical Examination of Popular Assumptions*]; see also *The Fewer the Merrier?*, *supra* note 9, at 15–19.

¹⁷ See June Carbone, *Legal Applications of the "Best Interest of the Child" Standard: Judicial Rationalization or a Measure of Institutional Competence?*, 134 PEDIATRICS S. 111, 111–14 (2014).

wielded against families parented by gender and sexuality minorities, and the best interests of their children. A parent's engagement in same-sex sexual behaviors or relationships, or even mere desire to do so, has historically been cause for courts to conclude (without further investigation) that the parent was unfit to parent; this Article first presents similar treatment of polyamorous parents by family trial courts. Next, the Article identifies commonalities amongst the range of state factors considered in BIOC decisions in the United States, recognizing and denoting the factors considered by many or most jurisdictions. Then, this Article presents and analyzes the novel data from Sheff's *Polyamorous Family Study* – an ongoing twenty-five-year ethnographic study of polyamorous families with children. Waves III and IV of this study concentrate on the children's lived experiences of growing up within polyamorous families and provide the primary focus of this analysis. Then, this Article draws both the state BIOC factor and the *Polyamorous Family Study* data together, concluding that the sociological and psychological data support the finding that polyamorous families may and can fulfill the BIOC factors identified as common amongst states. Conversely, the removal or limitation of a polyamorous family's custody or visitation with their children may not be in the best interests of the child, as identified through commonly applied factors (in addition to going against the constitutionally protected right to parent). In conclusion, this Article discusses the implications of these findings for judicial BIOC determinations and proposes potential policy solutions in keeping with the data on polyamorous families.

Polyamorous families inhabit a complex legal and social position, less visible than the more socially recognizable lesbian and gay families but vulnerable to stigma and societal discrimination nevertheless.¹⁸ Consensually non-monogamous relationships in general are powerfully stigmatized in comparison to monogamous relationships.¹⁹ A documented prevalence of stigmatizing social perceptions of polyamory and polyamorous people disadvantages polyamorous families, both within courts and society more generally.²⁰ A recent study found that more than half of consensually non-monogamous persons experience some form of discrimination, harassment, or violence related to their CNM engagement;²¹

¹⁸ See *The Fewer the Merrier?*, *supra* note 9; SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 4.

¹⁹ See *A Critical Examination of Popular Assumptions*, *supra* note 16; *The Fewer the Merrier?*, *supra* note 9.

²⁰ See Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J. L. & SOC. DEVIANCE 150, 152–54 (2013); *A Critical Examination of Popular*, *supra* note 16; Susan Wright, *Second National Survey of Violence and Discrimination Against Sexual Minorities*, NAT'L COALITION FOR SEXUAL FREEDOM (2008), https://evolvyourman.com/wp-content/uploads/2020/09/2008_bdsm_survey_analysis_final.pdf.

²¹ See R.G. Witherspoon et al., *Predictors of Perceived Stigmatization and Discrimination within a Consensually Non-Monogamous Sample* (forthcoming).

this was particularly the case for polyamorous participants.²² State child custody laws offer judges vast discretion in undertaking custody decisions, potentially allowing for socially prevalent and judicially internalized biases to infiltrate court proceedings, court dicta, and case outcomes for minority-litigant groups.²³ As stigma and discrimination against polyamorous persons appear widespread in society, it stands to reason that such attitudes may also exist amongst family court judges, highlighting the considerable flexibility and discretion awarded to judges in reviewing child custody disputes as potentially problematic when involving polyamorous or other sexually or relationally unconventional parents.

A review of the available case law reveals a common family court tendency to bemoan and disfavor plural partnerships, concluding that polyamorous people are less moral, less stable, and less appropriate when compared to monogamous people.²⁴ Further, some family courts demonstrate a lack of understanding of what constitutes polyamory within their decisions, leading to confusion and uninformed judgements.²⁵ Consider the case of *Cross v. Cross*, where the Common Pleas Court in adjudicating a child custody dispute found that the partners had “engaged in a practice called ‘polyamory,’ commonly known as wife swapping, in which the parties and another couple . . . convened at the marital residence and engaged in consensual sexual acts with each other.”²⁶ Inherent in this statement are two fundamental assumptions: first, that polyamorous relationships necessarily involve swapping of sexual partners, and second, that polyamory can be boiled down to sexual relationships alone; available data on polyamorous persons and their relationships supports neither assumption.²⁷ The court makes the unsupported assumption that all polyamorous relationships, including those of the litigants, are solely based in sexual interactions; this, particularly despite the fact that one of the marital partners in the case had even moved states to live and be with one of her other partners, evidencing a relationship and commitment likely beyond solely sexual interactions. Rather,

²² See *id.*

²³ See, e.g., Charles Cohen, *Losing Your Children: The Failure to Extend Civil Protections to Transgender Parents*, 85 GEO. WASH. L. REV. 536, 544–45 (2017) (explaining discriminatory treatment of transgender litigants by courts).

²⁴ See, e.g., *V.B. v. J.E.B.*, 55 A.3d 1193, 1195–98 (Pa. Super. Ct. 2012); *Cross v. Cross*, 5 Pa. D. & C.5th 12 (C. P. 2008).

²⁵ See *Cross v. Cross*, 5 Pa. D. & C. 5th 12 (C. P. 2008); *In re Aleksandree M.M.*, No. M2010-01084, 2010 WL 3749423, at *7 n. 6 (Tenn. Ct. App. Filed Sept. 27, 2010).

²⁶ *Cross*, 5 Pa. D. & C. 5th at 14.

²⁷ See generally Christian Klesse, *Polyamorous Parenting: Stigma, Social Regulation, and Queer Bonds of Resistance*, 24 SOCIO. RSCH. ONLINE 625 (2019); MARIA PALLOTTA-CHIAROLLI ET AL., “*These Are Our Children*”: *Polyamorous Parenting*, in LGBT-PARENT FAMILIES (Abbie E. Goldberg & Katherine R. Allen eds., 2019) [hereinafter PALLOTTA-CHIAROLLI ET AL., *These are Our Children*].

the court consistently demeans both polyamory more generally, as well as the specific polyamorous relationships of the litigants, labeling the litigants' engagement in polyamory as "grossly inappropriate conduct" which is "at best, difficult to explain and is likely a source of embarrassment for the [m]inor children."²⁸

A review of the child custody case law involving polyamorous parents reveals that some family trial courts have assumed that parental participation in polyamory, both past and present, is unquestionably detrimental to the child's best interests. In Pennsylvania, a trial court found that a father's participation in polyamory— something the court deemed to be an "unorthodox lifestyle" — was "detrimental to his children in that case."²⁹ On appeal, the court overturned the lower court's determination, finding that the trial judge's bias against polyamorous persons and families was an unsupported prejudice that had erroneously factored into the court's findings of parental fitness and the final child custody determination.³⁰ In 2015, the Georgia Court of Appeals overturned a similar lower court decision that had withheld a mother's custody based on her participation in polyamory.³¹ In its disagreement with the lower court's reasoning, the Court of Appeals found that there was no evidence that the children were harmed as a result of the mother's polyamorous lifestyle.³² The number of cases for which family courts' decisions have been impacted or controlled by judicial bias against polyamorous persons and families is currently unquantifiable, as the vast majority of family law cases go unpublished, unreported, and unknown (except to the families, of course, who may lose custody or have limited custody over their children). The majority of cases that are available for review are at the appellate level only; many of these appellate cases overturned lower court decisions against polyamorous persons, finding that there is no evidence to support the lower court's finding that polyamory makes a parent unfit to exercise the rights of parenthood.³³ There is little to no record of the case and therefore no current, reliable estimate of the potentially rampant discriminatory juridical treatment of polyamorous families in lower level family courts.

As seen *above*, research indicates significant negative social perceptions of polyamory and other forms of consensual non-monogamy;³⁴ such antagonistic attitudes can be especially potent against polyamorous

²⁸ *Cross*, 5 Pa. D. & C. 5th at 14.

²⁹ *V.B. v. J.E.B.*, 55 A.3d at 1201.

³⁰ *See id.*

³¹ *See In the Interest of R. E.* 775 S.E.2d 542, 545–46 (Ga. Ct. App. 2015).

³² *See id.*

³³ *E.g., id.*; *V.B. v. J.E.B.*, 55 A.3d 1193, 1196–97 (Pa. Super. Ct. 2012).

³⁴ *See The Fewer the Merrier?*, *supra* note 9.

parents.³⁵ Given the pervasive stigma against CNM, judges may be at an increased likelihood to remove children entirely from such families by severing parental rights, or to place greater restrictions on polyamorous parents' interactions with their children. However, novel data (presented *below*) indicates that polyamorous families offer considerable benefits to their children, including more abundant financial, emotional, and physical resources, which accrue, in part, as a result of the increased numbers of potential parents, guardians, or other stable adult caretakers.³⁶

Family law is changing, but not fast enough to keep pace with the rising visibility and growing diversity of family structures, including polyamorous families.³⁷ Historically, parentage was defined by marital status or biological relationship, but today there is an increasing judicial charge or elective focus to look beyond these restrictive criteria and instead also consider whether the adult requesting custody has functioned as and intends to be a parent to the child.³⁸ As a result, the legal system may now recognize parental responsibilities (*i.e.*, all rights, duties, and authorities, which by law a parent has in relation to the child and his property) of persons not biologically related to the child, even in the absence of formal legal adoption.³⁹ In other words, biological parentage no longer directly equates with social or legal parentage. Despite the changing societal demographics of “parent” and this expanded legal recognition to cover non-biological parents, parental authority and custody nevertheless remain governed by a traditional standard: the best interests of the child (BIOC).⁴⁰

I. BIOC STANDARDS, JUDICIAL DISCRETION, AND HISTORICAL APPLICATION TO ALTERNATIVE FAMILY STRUCTURES

Historically, courts have applied BIOC standards to several different categories of legal adjudications: child custody, child relocation, termination of parental rights, juvenile court, and cases where the court must intervene in an intact parent-child relationship.⁴¹ BIOC standards

³⁵ See Klesse, *supra* note 27; PALLOTTA-CHIAROLLI ET AL., *These Are Our Children*, *supra* note 27.

³⁶ See Goldfeder & Sheff, *supra* note 20.

³⁷ See Jason M. Merrill, *Two Steps Behind: The Law's Struggle to Keep Pace with the Changing Dynamics of the American Family*, 2009 UTAH L. REV. 557, 557 (2009).

³⁸ Iris Siadatifard, *You, Me, and Dad?: An Update on the Progression of Multi-Parent Families and the Governing Hand of a Child's Best Interest*, 33 J. AM. ACAD. MATRIM. L. 249, 249–56 (2020).

³⁹ See Mary Kay Kisthardt & Richard A. Roane, *Who Is a Parent and Who Is a Child in a Same-Sex Family – Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: The U.S. Perspective*, 30 J. AM. ACAD. MATRIM. L. 55, 59–64 (2017).

⁴⁰ See Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 268 (1987).

⁴¹ See Carbone, *supra* note 17, at 113–15.

still govern the majority of these disputes today in the United States. All states, territories, and the District of Columbia have statutes requiring courts to consider a child's best interests in cases addressing custody, placement, or other critical issues in children's lives.⁴² Today, BIOC operates as a vague standard, providing judges considerable discretion in their determinations.⁴³ Although all states have enumerated specific factors (*e.g.*, financial capacity of parent, child care availability) that judges are mandated or suggested to consider, judges retain substantial discretion over how they interpret these factors as well as the relative weight awarded to each factor. In addition, in many states (*e.g.*, California, Georgia, Michigan, North Dakota), judges are authorized to also consider "any factor the court finds relevant."⁴⁴ Further, the formulation and implementation of state BIOC standards is constantly in flux as societal norms (of family, gender, disability, sexual orientation, race, etc.) adjust over time, making the standard largely unpredictable.⁴⁵ In sum, there exists no singular, uniform BIOC standard as state standards currently vary across jurisdictions, time, and judicial application. Reform efforts by non-profit and state-sponsored organizations to create a uniform standard have had limited success.⁴⁶

The vague and flexible nature of state BIOC standards makes them especially complex: On the one hand, these attributes allow space for judicial flexibility in addressing the exceptionally diverse circumstances presented by child custody disputes. On the other hand, the application of such a deferential standard is vulnerable to the mercy of varying judicial temperaments and biases, producing often unknown and unchallenged inequalities and unpredictability.⁴⁷ "The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best. Even the most basic factors are left for the judge to figure out."⁴⁸ A recent review by Idaho's Child Welfare System found that BIOC standards are applied in alarm-

⁴² See Sandra Keen McGlothlin, *No More "Rag Dolls in the Corner": A Proposal to Give Children in Custody Disputes a Voice, Respect, Dignity, and Hope*, 11 J. L. & FAM. STUD. 67, 80 (2008) (In a custody proceeding, the courts in all states use the "best interests of the child standard.").

⁴³ See Charlow, *supra* note 40, at 267–72; Carl Funderburk, *Best Interest of the Child Should Not Be an Ambiguous Term*, 33 CHILD. LEGAL RTS. J. 229, 229–30 (2013).

⁴⁴ CAL. FAM. CODE § 3011; GA. ANN. CODE § 15-11-26(20); MICH. COMP. LAWS § 722.23; North Dakota Cent. Code § 14-09-06.2(1).

⁴⁵ See Erin Bajackson, *Best Interests of the Child – A Legislative Journey Still in Motion*, 25 AM. ACAD. MATRIM. L. J. 311, 311 (2013); Janet L. Dolgin, *Why Has the Best Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 7–8 (1996).

⁴⁶ *E.g.*, UNIF. PARENTAGE ACT § 613 (UNIF. LAW COMM'N) (articulating a consistent, uniform BIOC standard with specific factors for judicial consideration).

⁴⁷ See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* 38–40 (2009); See Charlow, *supra* note 40, at 267–72.

⁴⁸ See GUGGENHEIM, *supra* note 47, at 40.

ingly inconsistent ways, concluding that state family and juvenile courts often utilized multiple, inconsistent BIOC standards, both intra- and inter-state, producing conflicting results.⁴⁹ The review notes that, though the BIOC allows courts the flexibility needed to address the variety of cases presented, “it also leaves much to the interpretation of individual judges and provides no guidance around what factors to prioritize.”⁵⁰

The American Law Institute has also criticized BIOC standards for being unpredictable, impossible to adjudicate, and unjust.⁵¹ Some legal scholars are calling for a complete overhaul of BIOC standards in order to enhance predictability and uniformity of child custody dispute litigations.⁵² In 2017, recognizing the rising prevalence and visibility of non-traditional families, the Uniform Law Commission recommended uniform BIOC standards that would expand the ways non-biological parents may establish parentage, remove gender-based distinctions, allow for a broader interpretation of the term “parent,” and recognize non-traditional families (including LGBTQ families); however, the majority of states have not (at the time of this Article’s publication) adopted uniform standards and other recommended, additional legislation.⁵³

Judicial biases may be easily incorporated into their application of the discretionary state BIOC standards. This may be especially pernicious for polyamorous people (and practitioners of other types of CNM), who face a legal and social environment shaped by compulsory monogamy.⁵⁴ Research demonstrates significant stigma and bias against consensual non-monogamy among the general public⁵⁵ and legal scholars,⁵⁶ in contrast to a favorable perception of monogamy.⁵⁷ Problems stemming from potential judicial personal bias and extensive discretion are further compounded by the deferential nature of appeal court review, whereby the appellate court must defer to the findings of fact of the lower family

⁴⁹ See OFFICE OF PERFORMANCE EVALUATIONS IDAHO LEGISLATURE, BEST INTEREST OF THE CHILD 1 (2017), <https://legislature.idaho.gov/wp-content/uploads/OPE/Reports/r1701%20Best%20Interest%20of%20the%20Child.pdf>.

⁵⁰ *Id.*

⁵¹ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02 (AM. LAW INST. 2002).

⁵² See Charlow, *supra* note 40.

⁵³ See UNIF. LAW COMM’N, *Parentage Act (2017)*, <https://www.uniformlaws.org/committees/community-home?CommunityKey=C4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited, Dec. 15, 2020); Assemb. B. 2684 (Cal. 2018); H. B. 562 (Vt. 2018); S. B. 6037 (Wash. 2018); H. B. 7541 (R.I. 2020).

⁵⁴ See Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 289–91 (2004).

⁵⁵ See *The Fewer the Merrier?*, *supra* note 9.

⁵⁶ See Emens, *supra* note 54.

⁵⁷ See Conley et al., *The Fewer the Merrier?*, *supra* note 9; Terri D. Conley et al., *Monogamous Halo Effects: The Stigma of Non-Monogamy Within Collective Sex Environments*, 48 ARCHIVES SEXUAL BEHAV. 31, 31–32 (2019).

court; this requires that a high threshold (*i.e.* abuse of discretion) be met in order to win on appeal to a higher, reviewing court. Given the discretion inherent in the standard, only the most blatantly unsupported decisions are vulnerable to successful appeal. The combination of a discretionary standard for trial court decisions and deferential standards of appeal review hinders checks on the prejudice of trial court family judges in child custody disputes.

United States legal history is peppered with trends and instances in which BIOC standards have impacted those families perceived as non-traditional or non-normative and has hampered their access to full child custody rights.⁵⁸ Although social conceptions often cast the courthouse as an immutable pillar of objectivity, the history of family law in the United States instead shows a court system imbued with unstable majoritarian subjective beliefs concerning family, gender, sexuality, and race.⁵⁹ Such beliefs inevitably leak into the decisions these courts issue,⁶⁰ impacting non-traditional families' access to their legal rights. For example, the prevailing racial biases of the mid-20th century are obvious in courts' review and application of anti-miscegenation laws.⁶¹ Throughout the 19th and 20th centuries, courts repeatedly upheld laws criminalizing interracial marriages as constitutional and anti-miscegenation laws were not officially declared unconstitutional until decades of social activism and legal battles had increased social acceptance of interracial marriages.⁶² A similar story emerges in the progression towards the legalization of same-sex intimate behavior and same-sex marriage, despite prior cases upholding anti-sodomy and anti-same sex marriage laws. LGB⁶³ persons, same-sex couples, and families with same-sex parents recently gained a modicum of legal protections (*e.g.*, right to legal marriage in *Obergefell v. Hodges*,⁶⁴ freedom from discrimination on the basis of their

⁵⁸ See D.P. Russman, *Alternative Families: In Whose Best Interests*, 27 SUFFOLK U. L. REV. 31, 31 (1993).

⁵⁹ See Juliet A. Cox, *Judicial Enforcement of Moral Imperatives: Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity*, 59 MO. L. REV. 775, 775 (1994).

⁶⁰ See *id.*; see also Emens, *supra* note 54, at 277.

⁶¹ See Ashok Bhusal, *The Rhetoric of Racism and Anti-Miscegenation Laws in the United States*, J. OF ARTS & HUMANITIES (2017); see also Peter Wallenstein, *Race, Marriage, and the Supreme Court from Pace v. Alabama (1883) to Loving v. Virginia (1967)*, 1998 J. SUP. CT. HIST. 65, 65–67 (1998).

⁶² James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 93–94 (1993); D.S. Dooley, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395, 416 (1990).

⁶³ The shortened acronym LGB has been used throughout this Article in spaces wherein the authors discuss research or legal cases that specifically apply only or predominantly to lesbian, gay, or bisexual identifying people and not the broader population of LGBTIQ. Where such research or legal cases do more broadly apply, the larger acronym LGBTIQ is utilized.

⁶⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

sexual orientation in *Bostock v. Clayton Cnty.*⁶⁵) but still lack other types of legal safeguards today (e.g., freedom from discrimination by private agencies in foster care placements, denied in *Fulton v. City of Philadelphia*⁶⁶).⁶⁷

In addition to blatant and insidious discrimination against families outside of conventional gender and sexuality norms, some historical and contemporary state BIOC standards require courts to consider the moral character or “fitness” of the parent/guardian.⁶⁸ Because morality is essentially nebulous and subjective, judges retain state-sanctioned authority to wield their own personal, discretionary judgment as to what parents/guardians they deem immoral.⁶⁹ Morality is often controlled by the identarian or ideological majority and may serve as a tool of hegemonic power to control, punish, or withhold resources from groups occupying non-normative or minority spaces.⁷⁰ As such, morality may be, and often is, deployed to stigmatize persons and families lying outside of social norms.

Historically, family court systems have negatively applied the moral fitness of the parents BIOC factor to cast unconventional families as unfit and inappropriate familial environments for child rearing, particularly when parents have unconventional genders or sexualities.⁷¹ Studies show that courts have mistakenly found that unconventional genders (e.g., transgender)⁷² and sexualities (e.g., lesbian)⁷³ of the parents were indicative of poor parenting skills and unsafe home environments, and therefore, their custodial access to their children.⁷⁴ These arguments continue

⁶⁵ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

⁶⁶ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

⁶⁷ See Mary Kay Kisthardt & Richard A. Roane, *Who Is a Parent and Who is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part II: the U.S. Perspective*, 30 J. AM. ACAD. MATRIM. LAW 55, 55–61.

⁶⁸ Steven Mintz, *Children, Families, and the State: American Family Law in Historical Perspective*, 69 DEN. UNI. L. REV. 635, 645 (1992).

⁶⁹ See, e.g., COX, *supra* note 59, at 775; see also Helen Y. Chang, *My Father is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 SANTA CLARA L. REV. 649 (2003).

⁷⁰ See CHARLES DERBER & YALE R. MAGRASS, *MORALITY WARS: HOW EMPIRES, THE BORN AGAIN, AND THE POLITICALLY CORRECT DO EVIL IN THE NAME OF GOOD* 5–8 (2008).

⁷¹ See Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 L. & SOC’Y REV. 285, 285–324 (2002).

⁷² See Chang, *supra* note 69, at 658–59.

⁷³ E.g., *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831 (Cal. Ct. App. 1991); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 623 (1996).

⁷⁴ Shapiro, *supra* note 73, at 623; Christina M. Tenuta, *Can You Really Be a Good Role Model to Your Child if You Can’t Braid Her Hair? The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations*, 14 CUNY L. REV. 351, 351 (2011).

to be made against LGBTQ parents.⁷⁵ Further, litigators and judges have used similar arguments against parents found to have engaged in sexual activities outside of marriage or with more than one partner (e.g., “promiscuous”).⁷⁶

Sexual prejudice produces deleterious effects for LGB families wishing to obtain legal custody in family court. Courts have generally relied on two legal tests in child custody disputes to evaluate the moral fitness of lesbian, gay, and bisexual parents. The minority of jurisdictions have relied on a “*per se* rule,” creating an irrebuttable presumption that parents who engage in same-sex sexual and/or romantic practices were *per se* unfit to be parents.⁷⁷ This presumption paved the way for the court’s placement of children in custody cases with their heterosexual parent or guardian.⁷⁸ Beginning in the 1990s, most states transitioned to the nexus test.⁷⁹ The nexus test requires that, for the sexual orientation of the parent to be considered in a child custody dispute, a relationship must be shown between a parent’s sexual orientation and actual or potential harm to the child. The burden to demonstrate the nexus is on the party who alleges it.⁸⁰ Extant evidence indicates that children growing up in same-sex parented households are not adversely impacted. They appear quite similar to children raised by different-sex parents across all health and well-being measures.⁸¹ Some states have outright prohibited or severely limited family court judges’ authority to consider sexual orientation within their child custody determinations.⁸² However, those courts operating within states that have not explicitly prohibited consideration

⁷⁵ See Amy Maitner, *Judicial Bias Against LGBT Parents in Custody Disputes*, 30 U. FLA. J.L. & PUB. POL’Y 109, 113–14 (2019).

⁷⁶ Suzanne A. Kim, *The Neutered Parent*, 24 YALE J.L. & FEMINISM 1, 32 (2012).

⁷⁷ James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 111-12 (1993); Shapiro, *supra* note 73, at 637; see generally Anna Burke et al., *Twenty-First Annual Review of Gender and the Law: Annual Review Article: Child Custody, Visitation, and Termination of Parental Rights*, 21 GEO. J. GENDER & L. 201 (2020).

⁷⁸ See David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*. 33 FAM. L. Q. 523, 534–35 (1999).

⁷⁹ E.g., Sonia K. Katyal & Ilona M. Turner, *Transparenthood*, 117 MICH. L. REV. 1593, 1600 (2019).

⁸⁰ See Burke et al., *supra* note 77, at 218.

⁸¹ See generally Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 77 J. MARRIAGE & FAM. 3 (2010); ABIE E. GOLDBERG & ADAM P. ROMERO, *LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE* (2018); Henny M. W. Bos., Lisette Kuyper & Nanette K. Gartrell, *Population-Based Comparison of Female and Male Same-Sex Parent and Different-Sex Parent Households*, 57 FAM. PROCESS 148 (2018); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 64 AM. PSYCHOL. 727 (2006); Jesse A. Raley, *Factors to Explore in Doing Child Custody Evaluations Involving Gay and Lesbian Parents*, 7 J. CHILD CUSTODY 176 (2010).

⁸² E.g., District of Columbia, D.C. Code Ann. § 16-914(a)(1)(A); *In re Marriage of Bird-sall*, 197 Cal. App. 3d 1024 (1988).

of parental sexual orientation have discretionary authority to do so.⁸³ Some courts have construed the nexus approach quite broadly, determining a parent's non-normative gender identity or sexuality to nevertheless be equivalent to proof of harm to the child; thus, producing the same result as though they had applied the *per se* approach.⁸⁴ Compounding these prejudicial presumptions and legal tests, same-sex couples (residing in states that had not already recognized the right)⁸⁵ were prohibited (until 2015)⁸⁶ from legal marriage and thus, in the absence of a biological relationship to one parent, the non-biological parent had no assumed legal relationship between themselves and their own children.⁸⁷ Despite the Supreme Court's recognition of same-sex marital relationships, some states nevertheless still refuse to fully recognize the rights of the non-biologically related parent or parents in same-sex relationships for child custody purposes.⁸⁸

The repercussions of this historical and contemporary judicial disinclination to place children with LGB parents are vast. Consider the California case of *Nancy S. v. Michele G.*, where the court refused to provide parental rights to a non-biologically related, lesbian parent after the dissolution of the relationship that defined the child's family.⁸⁹ Although decades of social activism and legal precedent (*e.g.*, recognition of same-sex marriage) have increased the ability for parents in same sex relationships to seek and retain custody, LGB parents continue to face judicial discrimination and legal obstacles in family courts.⁹⁰

Transgender parents confront issues similar to LGB parents when seeking custody of their children.⁹¹ One study found that, of the transgender respondents surveyed, 13% reported that they had experienced judges limiting their time with their children and/or preventing them from seeing their children due to their gender identity.⁹² In the case of

⁸³ See Burke et al., *supra* note 77, at 207.

⁸⁴ See *id.* at 219.

⁸⁵ See Brian Stephens, *Where Were the States? Same-Sex Marriage Before Obergefell*, in INTERNATIONAL HANDBOOK ON THE DEMOGRAPHY OF MARRIAGE AND FAMILY 273, 277 (D. N. Farris & A. J. J. Bourque eds., 2020).

⁸⁶ See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁸⁷ See Benjamin S. Paulsen, *A Stranger in the Eyes of the Court: How the Judicial System is Failing to Protect Nonbiological LGBTQ Parents*, 2018 U. ILL. L. REV. 311, 311 (2018), <https://illinoislawreview.org/print/vol-2018-no-1/a-stranger-in-the-eyes-of-the-court/>.

⁸⁸ See Burke et al., *supra* note 77, at 225.

⁸⁹ See *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 831 (1991).

⁹⁰ See generally Andrew Lehman, *Inappropriate Injury: The Case for Barring Consideration of a Parent's Homosexuality in Custody Actions*, 44 FAM. L. Q. 115 (2010); Joel Viramontes-Gallegos, *Same-Sex Families and Adoption Discrimination Post Marriage Equality*, 21 PUB. INT. L. REP. 107 (2016).

⁹¹ See Katyal & Turner, *supra* note 79.

⁹² See generally JAIME M. GRANT, LISA A. MOTTET, & JUSTIN TANIS, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), <https://www.hivlawandpolicy.org/sites/default/files/Injustice%20at%20Every%20Turn.pdf>.

Cisek v. Cisek the court terminated the transgender parent's child custody and visitation rights (at least partly on the basis of the parent's trans-identity), going so far as to query whether the parent's sex change wasn't "simply an indulgence in some fantasy."⁹³ In some extreme cases, parents' parental rights were wholly terminated by the court as a direct consequence of the parent's transgender identity.⁹⁴ Further, in the cases in which the transgender parent is able to retain full parental rights, it is often only as a result of their attempts to shield their transgender identity from their child, in this way acquiescing (under the duress of potentially losing their child) to the morality standards of the family court's aversion to non-normative genders.⁹⁵

Judicial bias against unconventional genders (including assumptions of child harm caused by parental gender transition) creates a situation in which transgender parents frequently encounter an indifferent or hostile family court.⁹⁶ In more progressive courts, however, judges have specifically rejected the use of a parent's gender or trans-identity in BIOC determinations, finding that such information is irrelevant to whether the transgender person could be a "fit, loving and capable parent."⁹⁷ As evident in the *above* review of judicial BIOC evaluations of LGBT parents, family courts and their judges are not objective, neutral arbiters removed from their own (or society's) beliefs about family, gender, and sexual orientation.

Like other marginalized families that have been historically and contemporaneously confronted with social and judicial stigmas, polyamorous families today face strenuous battles in child custody disputes. Many polyamorous families experience judicial misunderstandings of, or biases against, their relationship structure, leading to judicial findings that such families do not meet BIOC standards.⁹⁸ However, prior studies, coupled with the recent data on polyamorous families, indicate that the multi-parental structure of polyamorous families may provide considerable benefits to children that should be acknowledged and considered in a fair, objective application of state BIOC standards.

Since the factors considered in BIOC standards vary from state-to-state, an analysis of whether polyamorous families meet BIOC standards

⁹³ *Cisek v. Cisek*, No. 80-CA-113, 1982 WL 6161, at *2 (Ohio Ct. App. July 20, 1982).

⁹⁴ *E.g.*, *M.B. v. D.W.*, 236 S.W.3d 31, 35 (Ky. Ct. App. 2007).

⁹⁵ *E.g.*, *In re Marriage of D.F.D.*, 862 P.2d 368, 371–76 (Mont. 1993).

⁹⁶ *See generally* SHANNON PRICE MINTER, *Legal Issues in Divorce for Transgender Individuals*, *LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL IMPLICATIONS FOR PRACTICE* (Abbie E. Goldberg & Adam P. Romero, eds., 2019).

⁹⁷ *E.g.*, *Mayfield v. Mayfield*, No. 96-AP-030032, 1996 WL 489043, at *2 (Ohio Ct. App. Aug. 14, 1996); *In re Marriage of Magnuson*, 170 P.3d 65, 67 (Wash. Ct. App. 2007).

⁹⁸ *See* Maria Pallotta-Chiarolli, *Polyparents Having Children, Raising Children, Schooling Children*, 7 *LESBIAN & GAY PSYCH. REV.* 47, 49 (2006).

requires a cross-state comparison of BIOC factors. In an effort to provide a concise, generalized analysis that may be applied across states, this section aggregates the most common state BIOC factors. Of these, only those factors that are specifically applicable are detailed *below*, and all other factors that are no more relevant to polyamorous families as to the traditional monogamous two-parent household are excluded.

II. COMMONALITIES AMONG STATE BIOC STANDARDS

Despite substantial diversity among state standards, there are eight common BIOC factors that states rely on when determining children's best interests: 1) the child's wishes; 2) the parents' preferences and agreements; 3) the resources or capacities of the parents to provide materially, emotionally, and physically to the child; 4) the presence of domestic violence or sexual abuse; 5) the moral fitness of the parents; 6) the stability of the child's schooling, community network, and residence; 7) the parent's emotional, loving relationship to the child, and 8) the child's relationship to any other adult (not primary care givers nor parents alone) who may significantly impact the child's best interests.

In this paper, we focus on the factors that are not only instrumental to children's well-being, but are also specifically relevant to available data on polyamorous families' custody of their children. This sample therefore excludes both the parents' preferences and agreements (because it is a fact-specific inquiry about which no generalizations may be made) as well as the parent's emotional, loving relationship to the child (because there is no evidence to indicate that polyamorous parents love or provide love differently to their children than conventional families).

Most states⁹⁹ mandate or recommend that judges consider the child's wishes when determining the best interests of the child. For most states, the degree to which these preferences are considered is dependent on the age and maturity of the child. For example, Hawaii requires that if the child is "of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to custody shall be considered and be given due weight by the court."¹⁰⁰ Indiana adopts a more specific stance, requiring that courts grant greater consideration to the child's wishes if the child is at least 14 years old.¹⁰¹ New Hampshire

⁹⁹ Arkansas, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington.

¹⁰⁰ HAW. REV. STAT. § 571-46 (2020).

¹⁰¹ See IND. CODE § 31-17-2-8 (2020).

goes so far as to award “substantial weight” to the preferences of a mature child.¹⁰²

Nineteen states¹⁰³ (through statutes or controlling case law) require courts to consider a combination of the financial, material, emotional, and/or care availability resources or capacities of the parents in their BIOC evaluations for child custody decisions. For example, Illinois looks to past parental investment when considering the best interests of the child; specifically, the state examines “the amount of time each parent spent performing caretaking functions with respect to the child in the 24 months preceding the filing of any petition for allocation of parental responsibilities or, if the child is under two years of age, since the child’s birth.”¹⁰⁴ Georgia specifies multiple types of parental resources as relevant to the BIOC review, requiring courts to consider the “capacity and disposition of each parent to provide the child with food, clothing, medical care, and day-to-day needs” and the “stability of the family unit of each parent and the strength of each parent’s support system.”¹⁰⁵ Pennsylvania’s BIOC standards prioritize the childcare availability of the parent/guardian when determining child custody arrangements, including the “availability to care for the child or ability to make appropriate childcare arrangements” and considering the “party more likely to attend to the daily physical, emotional, developmental, educational, and special needs of the child”¹⁰⁶ In Wyoming, the BIOC requires consideration of the “ability and willingness of each parent to provide adequate care for each child, including arranging for each child’s care by others as needed.”¹⁰⁷ These nineteen state BIOC standards prioritize the material, emotional, financial, and time capacities and resources of the parents.

Over half of U.S. states¹⁰⁸ require or recommend that family court judges consider evidence of sexual, domestic, substance, or child abuse in the home. For example, Alaska requires that judges conducting BIOC determinations consider “any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents.”¹⁰⁹ Georgia also requires that judges broadly

¹⁰² See N.H. Rev. Stat. Ann. § 461:A (2020).

¹⁰³ District of Columbia, Georgia, Illinois, Louisiana, Maryland, Michigan, Minnesota, Mississippi, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming.

¹⁰⁴ 750 ILL. COMP. STAT. 5/602.7 (2020).

¹⁰⁵ GA. CODE ANN. §§ 19-9-3(a)(3),(5) (2020).

¹⁰⁶ 23 PA. CONS. STAT. § 5328 (2020).

¹⁰⁷ WYO. STAT. ANN. § 20-2-20 (2020).

¹⁰⁸ Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin.

¹⁰⁹ ARK. CODE ANN. § 25-24-150 (2020).

consider “any evidence of family violence or sexual, mental, or physical child abuse or criminal history of either parent.”¹¹⁰ Similarly, Illinois mandates that judges undergoing BIOC determinations consider “the occurrence of abuse against the child or other member of the child’s household.”¹¹¹ Thirteen states either recommend, or include as a mandatory factor, that courts consider the moral fitness of the parents.¹¹² In divorce cases in Alabama, a judge may consider the “moral character and prudence of the parents. . . .”¹¹³ And in Mississippi, the court may “[u]pon a finding by the court that both of the parents of the child have abandoned or deserted such child or that both such parents are mentally, morally or otherwise unfit to rear and train the child the court may award physical and legal custody to: (i) The person in whose home the child has been living in a wholesome and stable environment.”¹¹⁴ However, state statutes do not typically elaborate on their meaning of moral fitness, instead providing considerable discretion to judges to interpret this factor. In addition, Nebraska’s BIOC standard separately requires courts to consider the “parents’ sexual conduct.”¹¹⁵

In consideration of children’s best interests, over half of U.S. states¹¹⁶ prioritize the ongoing stability of children’s homes, educational, and community lives, including the continued involvement of children’s extended families, adult support networks, and communities. For example, courts in Georgia must consider and prioritize “the importance of continuity in the child’s life” as well as “the stability of the family unit of each of the parents and the presence or absence of each parent’s support systems within the community to benefit the child.”¹¹⁷ Idaho similarly requires family court judges to consider “the need to promote continuity and stability in the life of the child.”¹¹⁸ Montana explicitly requires judges to consider both stability generally and “the child’s adjustment to home, school, and community.”¹¹⁹ Similarly, Pennsylvania requires that

¹¹⁰ GA. CODE ANN. §19-9-3 (2020).

¹¹¹ 750 ILL. COMP. STAT. 5/602.7 (2020).

¹¹² Alabama, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Rhode Island, South Dakota, and Utah.

¹¹³ ALA. CODE §30-3-1 (2020).

¹¹⁴ MS. CODE § 93-5-24 (2020).

¹¹⁵ *Schrag v. Spear*, 858 N.W. 2d 865, 877 (Neb. 2015).

¹¹⁶ Alaska, District of Columbia, Florida, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin.

¹¹⁷ GA. CODE ANN. §§ 19-9-3(G),(H) (2020).

¹¹⁸ IDAHO CODE § 32-717 (2020).

¹¹⁹ MONT. CODE ANN. §§ 40-4-212(d),(h) (2020).

judges consider “the need for stability and continuity in the child’s education, family life and community life.”¹²⁰

Half of all U.S. states¹²¹ consider the interaction and interrelationship of the child with siblings and “any other person who may significantly affect his/her best interest” when making child custody determinations.¹²² In Arizona, state BIOC standards require courts to consider, for all child custody determinations, the “interactions and interrelationships between ANY PERSON who may significantly affect the child’s best interest, including relationships between parent and child (present, past, potential)” (emphasis added).¹²³ Colorado BIOC standards require courts to consider the “relationship of the child with parents, siblings and ANY OTHER PERSON who may significantly affect the best interests” (emphasis added).¹²⁴ Delaware also holds a similar preference for judges to consider the “interrelationship of child with parents, grandparents, siblings, and OTHER HOUSEHOLD RESIDENTS OR OTHER PEOPLE WHO MAY SIGNIFICANTLY AFFECT THE CHILD’S BEST INTERESTS” (emphasis added).¹²⁵ This factor expands the pool of adults in the court’s consideration beyond immediate biological and non-biological parents to encompass other important adults in the child’s life, including extended family or adult members of larger kinship structures. West Virginia’s BIOC standards, in particular, regard non-parental adults’ love and involvement in children’s lives, requiring the court to consider the “care-taking relationships by adults who love the child, know how to provide a child’s needs and who place a high priority on doing so.”¹²⁶ Similarly, Texas emphasizes the importance of extended family, including as a relevant factor “whether an adequate social support system consisting of an extended family and friends is available to the child.”¹²⁷

As seen above, there are definitive commonalities amongst the diverse state BIOC standards. These BIOC factors are applied to polyamorous multi-parent families, as well as other diverse family structures. The following section provides an evaluation and application of the aforementioned common BIOC factors to available data on polyamorous families and their children’s wellbeing.

¹²⁰ 23 PA. CONS. STAT. § 5328(4) (2020).

¹²¹ Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia (limited to extended family members), Washington, and Wisconsin.

¹²² *E.g.*, ARIZ. REV. STAT. ANN. § 25-403 (2013); COL. REV. STAT. ANN. § 14-10-124 (2021); 13 DEL. C. § 722 (2020); D.C. CODE § 16-914 (2020).

¹²³ ARIZ. REV. STAT. ANN. §§ 25-403, 403.04 (2020).

¹²⁴ COL. REV. STAT. ANN. § 14-10-124 (2020).

¹²⁵ DEL. CODE ANN. tit. 13 § 722 (2020).

¹²⁶ W. VA. CODE § 48-9-102(a) (2020).

¹²⁷ TEX. FAM. CODE ANN. § 263.307 (2020).

III. POLYAMOROUS FAMILIES AND BIOC STANDARDS

This section reviews prior studies on polyamorous families and examines novel data from Sheff's *Longitudinal Polyamorous Family Study*, including data on how polyamorous families operate, their internal dynamics, and their general treatment and support of their children. Using these data, we examine whether polyamorous families (in general, beyond the variability in specific individual cases) meet the most common factors considered by state BIOC standards, as presented above.¹²⁸

Prior research indicates that polyamorous families with more than two adults in the familial network expand a child's available pool of adult caregivers, leading to increased financial, emotional, and personal resources for children.¹²⁹ Children who participated in these prior studies have considerable access to superior housing, education, nutrition, and adult supervision as the direct result of more available adults in their lives.¹³⁰ The availability of more committed adults in a family may not only create stronger partnerships among adults, but also allow for greater role specification to meet the needs of the family and the child, thereby allowing for work/family balance and leisure time for each parent.¹³¹ When multiple adults commit to parenting a child, they are often able to develop a specialized division of child care (*i.e.*, division of tasks to the adult who is most competent to complete the task),¹³² decreasing the likelihood of child-care burnout amongst the care-taker adults.

A. *Methods of the Longitudinal Polyamorous Family Study*

Elisabeth Sheff's *Longitudinal Polyamorous Family Study* (LPFS) provides a holistic picture of children living within polyamorous families over time and reveals both the benefits and disadvantages of having more than two adults involved in child rearing within a household.¹³³ The study was completed in several waves. Wave I (1996-2003), Sheff's dissertation research, centered on polyamorous adults (some of whom had children). Wave II (2007-2009) focused more specifically on adults with children, and Wave III (2009-2012) concentrated on children and the adults relevant to their lives. The ongoing Wave IV (2015-2022) includes children, their parents, and community elders. The data presented *below* are from the ongoing fourth wave of data collected through interviews

¹²⁸ See SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 4.

¹²⁹ See *id.*; see generally MARIA PALOTTA-CHIAROLLI, *BORDER SEXUALITIES, BORDER FAMILIES IN SCHOOLS* (2010) [hereinafter PALOTTA-CHIAROLLI, *BORDER SEXUALITIES*].

¹³⁰ See PALLOTTA-CHIAROLLI ET AL., *These Are Our Children*, *supra* note 27.

¹³¹ See Pallotta-Chiarolli, *supra* note 4; Elisabeth Sheff, *Polyamorous Families, Same-Sex Marriage, and the Slippery Slope*, 40 J. CONTEMP. ETHNOGRAPHY 487 (2011).

¹³² See PALLOTTA-CHIAROLLI, SHEFF & MOUNTFORD, *supra* note 4.

¹³³ See SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 4.

and participant observation of polyamorous families with children. After over 25 years, and across the four waves of data collection, there have thus far been 213 interviewees; 33 of the interviewees were children between the ages of five and seventeen, and roughly 6,000 people have been involved in this participant observation and interview study. Respondents have a range of participation levels, with some interviewing only once or twice before losing touch with the study, and others participating in every wave of data collection. The data presented *below* are from the ongoing fourth wave of data collected through interviews and participant observation of polyamorous families with children.

Interviews were semi-structured, lasting from one and one half to two hours, with interviewees initially being presented with a series of demographic questions and later asked (in the second and third rounds of interviews) more specific questions on familial experiences, parenting, and interviewees' definitions of family. Initial interviews with adults always began with questions about their individual definitions of polyamory and how they came to identify as polyamorous, as well as their current relationship configurations. All interviews included questions about the advantages and disadvantages associated with polyamory, and the strategies the respondents used to manage the disadvantages. Subsequent interviews focused on what happened since the last interview, new advantages and disadvantages, and how old ones have persisted, shifted, or faded.¹³⁴

The LPFS is the only longitudinal study to date that examines the experiences of children within polyamorous family structures and provides a detailed depiction of the children's access to material resources, the availability of parental love and support, the emotional and communicative potentialities of such parents, and the internal dynamics of polyamorous families, thereby addressing the common state factors considered in court BIOC evaluations. There are several distinct characteristics of this data sample that are worth examination. First, because this study started in 1996, these families are early adopters of polyamory and are more characteristic of the mainstream polyamorous community of the 1990s—very white, middle-class, highly educated, suburban and

¹³⁴ Initially, Sheff made audio recordings of the interviews and transcribed them, which became cumbersome over the decades and hundreds of hours of audio tape. During the third wave Sheff switched to live transcription during the interviews and began sharing the transcript with the respondent via email to check for accuracy and get any additional comments. Sheff employed grounded theoretical constant comparative methods to analyze fields notes and data, a process involving repeated analysis of the raw data to identify common themes and variations or outlying experiences, construct and assign codes for instances of the themes in the data, expanding and refining those codes with each round of analysis, and grouping individual data points into larger categories, and organizing those categories into frameworks that explain the findings. These processes have been detailed in prior publications on the initial three waves. See Goldfeder & Sheff, *supra* note 20.

urban dwellers.¹³⁵ Second, these are the families that have mostly remained polyamorous across the years and persisted in their research participation. Their happiness in their relationships and persistent polyamorous identity makes them “successful” polyamorists. Difficulty recreating the initial sample and attrition across almost 25 years means that the people who were less happy in their polyamorous relationships or those who no longer identify as polyamorous may have been less likely to continue to participate.¹³⁶ Third, because the adults in the sample are overwhelmingly white, highly educated professionals who tend to cluster in liberal cities, their race and class privileges protect them from some of the negative impacts of polyphobia.¹³⁷ Fourth, the LPFS data are not nationally generalizable as it is not a statistically representative sample of all polyamorous families living within the United States. As is the case for other families of sexual minorities, polyamorous persons and families often live closeted lives, so that a national population of polyamorous persons from which to sample is truly unknown and thus, unable to be randomly sampled.¹³⁸ In short, LPFS respondents might represent the happiest, most advantaged version of polyamorous families, though findings from this data set are invaluable due to the unique longitudinal nature of the study as well as the novel data collected from children raised in polyamorous households. However, others’ findings have replicated some of Sheff’s results.¹³⁹ Below is a summary of findings from the LPFS that are most relevant to the factors considered by state BIOC standards. In brief, data indicates that children from polyamorous families are well cared for, garnered from multi-parent family, resources, communication, and support.

B. Longitudinal Polyamorous Family Study Findings

While children in polyamorous households share a set of experiences despite differences in age, some of their experiences are dependent on age cohort, and interviewees were divided into four separate groups: 1) five to eight years-old, “kids”; 2) nine to 12 years-old, “tweens;” 3) 13 to 17 years-old, teens; and 4) 18 to 30 years-old, young adults.¹⁴⁰ No children under five years old were interviewed due to both

¹³⁵ See SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 4.

¹³⁶ *See id.*

¹³⁷ *See generally* Elisabeth Sheff & Corie Hammers, *The Privilege of Perversities: Race, Class, and Education Amongst Polyamorists and Kinksters*, 2 *PSYCH. & SEX.* 198 (2011).

¹³⁸ *See generally* Ilan H. Meyer & Patrick A. Wilson, *Sampling Lesbian, Gay, and Bisexual Populations*, 56 *J. COUNSELING PSYCH.* 23 (2009).

¹³⁹ *See generally* PALLOTTA-CHIAROLLI, *BORDER SEXUALITIES*, *supra* note 129; Samantha Landry, Erika Arseneau, E., & E. Darling, “*It’s a Little Bit Tricky*”: *Results from the POLY-amorous Childbearing and Birth Experiences Study (POLYBABES)*, 50 *ARCHIVES OF SEXUAL BEHAV.* 1479 (2021).

¹⁴⁰ *See SHEFF, THE POLYAMORISTS NEXT DOOR*, *supra* note 4.

ethical concerns and the difficulty of gaining useful data from a toddler or preschooler. The vast majority of the data comes from children over 10 years old, as they are better able to engage in sustained and thoughtful conversations about their families.

Across all age cohorts, the children had abundant physical, material, and emotional resources, and could be described as healthy and self-confident. Interviewees in all age cohorts identified a variety of advantages to living within a polyamorous household/family, many of which map onto BIOC factors considered by courts in child custody determinations. First, when Dr. Sheff asked each of the children and young adults who participated in the LPFS if they would have preferred to grow up in a different kind of family, they all responded that they would not have wanted to change the structure of their polyamorous families. Wren Hadaway, 16 years-old at the time, responded to Dr. Sheff's query if she would have preferred a different kind of family responded: "No not at all, I wouldn't change what I have for the world. Having all of these different people has made me more as a person, I like having different adults and siblings, how good I am at introducing others into my life." Wren's older brother Adam Hadaway, 24 years-old at the time, reported that:

I wouldn't change anything. . . . I like where I am now, therefore it was ultimately good. Now having a loving and supporting family is huge, being close to them, I like having that support network. Having a wife and a stable job, I feel like through everything I managed to hit all of the points of a successful young adult and I hope that I can see that, not as a struggle to work for the next 50 years until I can finally collect Social Security. I don't see life as a struggle, I don't need to struggle, I can enjoy my life as offered because I have a positive outlook, work experience, a family, a friend network, I'm still in one piece physically and emotionally. I'm going to be able to persevere through life.

Wren and Adam both tied their abilities to make strong social connections and persevere through life directly to the wide range of personal and social skills they had learned growing up in a polyamorous family. While family life for Adam, Wren, and their siblings was not perfect, it provided them with the love, support, and skills to be stable and functional people living happy lives who would "not change what [they] have for the world."¹⁴¹

¹⁴¹ See *id.*

Many of the children take their polyamorous families for granted and as unproblematic. When Dr. Sheff asked Andrea/Andrew Poole (almost 13 years-old at the time and alternates their name in conversation, so we alternate their name here) if they wished they were in a different kind of family, they responded:

Never thought about it, if I wasn't then there would never be anybody around and I would be home alone a lot more. My sister is out with friends, and mom and dad are at work, so living here means I don't have to come home to an empty house after school. I never wished I wasn't in a poly family, don't think about it that much. Probably better but depends on the people.

Andrew Andrea rarely thought about their family as polyamorous, and when they did it seemed better than the alternatives.

Similarly, polyamorous families were not only unproblematic for both Kai and Alice, but also brought specific benefits in adulthood. Kai Wyss, 19 years-old at the time, responded to Dr. Sheff's query about wishing for a different family with "No, that would be silly. Then I would have all the difficulty and anxiety of trying to come out as poly and queer, pagan, now I know my family has my back." Alice Heartland, 19 years-old at the time, asserted that:

I would say it has been more beneficial overall. It has not [been] perfect, but no one's family is perfect. It has made me who I am, and I wouldn't trade it. I am so grateful to them, the lifestyle created who we are together which is honest and loving. If we fight it is only because we said something really straight up to the other person. I am so happy I never have to lie to my parents, I can tell them anything and reach out for help under any circumstances and I know they will help me. I did not necessarily feel that way as a kid, they didn't talk to me about some things and I didn't ask. But now we are totally open about what happened then and what is happening now, I am 100% comfortable about speaking to them about anything.

Other respondents from the LPFS did not endorse their family lives so completely, but still came to prefer their polyamorous families to alternatives. Cole Cypress, 23 years-old at the time, thought his polyamorous family was problematic as a child but revised his ideas as he grew up. When Dr. Sheff asked Cole if he wished he had been in a different kind of family, he responded:

Not anymore. I used to for sure. I was already socially awkward before my family became polyamorous and I felt more . . . of an outlier, and had more trouble making friends when I was younger. Now I am more inclined to think I was socially awkward. Poly didn't help, but it wasn't the primary factor in not making lots of friends. Now I'm very well networked and have a lot of intimate relationships, more so than my peers. . . . I like to talk to people but not about sports, not jobs, not weather. So, tell me the deepest darkest secrets you would not tell anyone else. One impact of the broad view [I got from growing up in a polyamorous family] is more empathy, I judge less. It's harder for people to shock me. . . . I have fewer misgivings about talking to people about their insecurities because of the exposure I got to poly communities.

At first, Cole thought that having an atypical family structure made him that much more of an outlier. Over time, however, his polyamorous family provided Cole with the social skills to overcome his awkwardness and establish deep and empathetic connections with his peers. Collectively, this evidence indicates that, if reviewed by a judge looking to the best interests of the child, these children would not wish to grow up without their parents, regardless of their polyamorous lifestyle.

A second advantage children in the LPFS reported was the significant material, emotional, and financial resources these polyamorous families provided through the active involvement of multiple adults in their lives.¹⁴² Some of these advantages were practically and materially useful to the children, including increased access to more adults for rides and assistance with homework. Tweens were especially likely to discuss the utility of having multiple adults available for transport. In general, both adults and children identified this increase in resources as a result of multiple adults pooling energy, time, and money. Numerous interviewees also reported that the increased number of adults involved in parenting provided more time and attention for the children. Further, more adults meant more diversity in types of support offered, as well as varied authority figures to reach out to with personal issues. For example, Cole Cypress, 15 years-old at the time of this earlier interview,¹⁴³ extolled the virtues of having multiple authority figures, especially his parent's girlfriend, Betina, stating, “[Betina] had a different way of going about her

¹⁴² See *id.* and additional novel data presented from Wave IV.

¹⁴³ Cole Cypress was interviewed several times over the span of several years. Interview data has been included from multiple points in his life as a child raised by polyamorous parents. See *also* above from an interview completed when he was 23 years old.

business with me. She would react very calmly and know exactly what to do and the exact right punishment. And it would still be really hard for me, but it helped me learn my lesson better. And it felt more fair.”

Some of the older children in polyamorous households were aware of how much better their economic and educational options were in a polyamorous family. Bree Poole, 19 years-old at the time, noticed the practical, financial, educational, and personal benefits of living in a polyamorous family that had raised her standard of living and provided her and her sibling with access to public schools far superior to their previous educational experiences, as well as better housing opportunities:

For me specifically this house set-up is a great part of polyamory. With mom and me and Andrew/Andrea, I don't know where we would even be able to afford to live. Living here, we go to Costco every week, perks. Specific to me in general I don't know. I didn't get parenting from [my mother's] partners so I didn't get that kind of different parenting perspective. More adults means I don't have to take care of the kids a lot, which, I like them, but I don't want kids and childcare is not my favorite thing.

At 19 years-old, Annabelle looked back on her childhood in a polyamorous family and reported that the primary benefit for her was that:

I definitely got my needs met more than a lot of my friends did. I got the attention I needed, got taken care of when I needed it. A lot of my friends' parents worked a lot and were not there for them all the time. My parents weren't always there either, but at least I had someone there to take care of me. I had more people to talk to, definitely had more people to care about me, my parents were happy, for the most part. Let's be real, relationships are still relationships. That really feels like it would fall into, if there was ever something I needed I got it, it was taken care of by either my parents or the others around me. The best things were being well taken care of and having my needs met.

Younger children noted the increase in a variety of resources, and in particular the gifts they received from parents and other caregivers. When thinking about what he liked best about being in a polyamorous family, 11years-old Elmer stated, “This might sound like I am thinking a lot about myself, but I get a lot more presents at my birthday and Christmas.” Presents were important for 14 years-old Jill as well:

More presents and more people to talk, to hangout with. If one is off doing something, then there is someone who is there. And then my dad is a whole 'nother thing, my dad and Valerie give me presents, and then my mom, Jessica, my brother, lots and lots of presents. My mom's parents are divorced and have their own partners, that is even more presents. I don't care about how many presents, but it is nice to have 18 times 58 people to talk to.

Beyond financial or material benefits, the children also identified emotional and personal benefits, including parental honesty and emotional intimacy with their children about difficult topics. Polyamory, as generally practiced both in and out of the family setting, encourages open dialogue and communication amongst partners;¹⁴⁴ similar benefits trickle down and emerge as well between polyamorous parents and their children. For example, Marcus Amore, 17 years-old at the time, discussed parental honesty as a significant personal advantage stemming from living in a polyamorous family:

One of the main advantages is knowing you have choices. Understanding that I have a choice and that I do not have to conform to society, being able to decide for myself. . . . The freedom of choice is in many ways the definition of being human in my opinion. So, because I've always been presented with the freedom of choice rather than anything about trying to follow a societal norm-and this was open to me because of [my parents'] honesty-I feel that I have had the freedom and as such, all those choices led to a positive life for me.

Similarly, Kethry Wyss (at 14 years-old, now called Kai) believed that polyamorous family structures are beneficial to teenagers because the structure fosters honesty between parents and children, saying that:

[Good parenting] is being willing to listen to your children, to really listen, and to not shun them for being interested in something. I got into anime, and my mama (Kiyowara) has helped me sew costumes and take me thrift shopping for costume pieces. My other friends' mom just does not understand it and keeps my friend from being as involved.

¹⁴⁴ See generally Jingshu Zhu, "We're Not Cheaters": Polyamory, Mixed-Orientation Marriage and the Construction of Radical Honesty, 14 GRADUATE J. SOC. SCI. 57 (2018).

Other older interviewees echoed a similar sentiment when reflecting on their childhood experiences of their polyamorous family. For example, Mina Amore at 21 years-old felt that growing up in a polyamorous family helped shape her into an adult who functioned well, emotionally and practically:

I have very good communication skills which have helped in school, career, and personal relationships. I have a great support system so when I am melting down I just go home and cry. It helps me keep my priorities straight. . . . The polyamorous family helped me learn to structure my life well. I learned from my parents always having to Google calendar their time with their partners that I have great planning skills. How to juggle people and communicate 'hey I am busy, you might not hear from me because I am busy. I feel like I learned excellent communications skills from my family.

Kai Wyss (formerly Kethry), later reflected at 19 years-old that the greatest advantage to polyamorous family was:

Probably just time, I mean, that sounds weird, but I have always had the opportunity to spend time with each of my parents. There is usually something that we do together that is just me and one of my parents, even as those rituals have changed across the years there was always time to spend with them. If I was left to my own devices then it was because I wanted to be, not because they were all busy. Always being able to have multiple opinions, you could elicit multiple opinions, though sometimes they were not what you wanted to hear. [My four parents] were unanimous about no wheelie shoes, though they did buy me roller skates so it worked out. But Albert said no to a rat and Kioyowara said no to the snake, so we compromised and got a dog and some hermit crabs. They are all very oriented towards respectful communication. They never treated me like I was a stupid kid. If I didn't know something I could just ask or if I wasn't allowed to do something I could ask why, not just get 'no, because I said so.' Being in a poly relationship requires such a flexible way of thinking and being able to compromise, it influenced the way they communicated with me.

Kai found that the poly parental support was not limited to childhood, and when Kai encountered significant emotional distress the first semester at college all four of the parents responded with love and support:

I said I needed help and my parents were supportive in finding a therapist and helping me get on that track. Probably a reflection of their own experiences with therapy and bent to talk about things. We went through a list and called to make appointments with several for interviews. . . . When I left college, they said ‘come home and let’s find something that works better. Take your time to re-center and figure out what you want to do for a year,’ and now they are encouraging me to find out what I want to do.

In sum, the recent Wave IV data, coupled with prior literature and LPFS data, reveal that being able to pool resources from multiple adults allows some polyamorous and other multiple-adult families to sustain safe households that meet children’s material, emotional, physical, and educational needs.

Children who participated in the LPFS also noted the importance of relationships with adult care-givers beyond their immediate, biological parents, as an important advantage to a polyamorous family. For example, 18 years-old Zina Campo looked back at the benefits of growing up in a polyamorous family:

When I was younger it was great to have a whole network of adults I could go to if I didn’t want to talk to my parents about something, or wanted to talk to others about my parents and knew they cared about my parents and I could talk to them. They’re still there for me, but I don’t really need that outlet anymore. I’m really good at asking for what I need and talking about things with my own support system now, so I no longer need a bunch of adults to go to like teachers, friends’ parents, or others with the same role as mom’s partner or community member. Now I am fully capable of finding people on my own.

Zina also saw these other relationships as helping to smooth over her relationship with her mother when they went through a difficult phase together:

Primarily awesome having all those people as a support, and also my mom living in a separate household. My mom and I went through that mother/daughter phase of hating each other’s guts and we both got through it rela-

tively unharmed because we could take breaks from each other, cool off, have our own space, and make the choice to see each other instead of being trapped together all the time.

Further, some interviewees noted additional benefits to having grown up supported by a wider adult care-giver network. For example, Cole Cypress, 23 years-old at the time, found that his early experiences growing up in a polyamorous family prepared him for communicating as an adult:

One way it was advantageous growing up in poly community, to shift away from romantic side of things, I got used to having a lot of adult figures who would be there for me and talk to me about things adults usually don't talk to kids about—drugs, money, addiction, mental health disorders, advanced theoretical physics. So, in high school and college . . . I got along great with teachers and it felt normal to talk to them. I was on a first-name basis with them and teachers loved me. I would go into their office and discuss everything under the sun with them, and they were starving for it. I got along great with them, and realized it was because most students usually were not going into their office hours to talk to them, like the profs were intimidating or something. At the same time, I was going to lunch once a month with the dean of students because why not, you're at a tiny school, so why not? Currently I'm at a job where I feel like I can talk to any adult, even though I'm only 23, because of that early maturity and experience.

Further, Joyce Lupine 28 years-old at the time noted the value of the wider support network afforded by having grown up in a polyamorous structured family, including enhancing her relationship building skills:

The sense of community. I'm the happiest when I have a network of people I can rely on. Talk to, be supported by and support back, kind of a give and take thing. I am definitely social by nature and a lot of people in my life to love me makes me the happiest and who I am. A lot of my life in poly family was when I was young. It gave me a sense of freedom to express who I am, options of who to be and how to express myself. Not just one option, not overwhelming or too many. . . It really contributed to basically my skills of relationship building. I build strong bonds with the people in my life, especially . . .

with my siblings and their significant others, my parents in law, having a lot of people in my family growing up made it easier to develop those relationships over time. I have very meaningful relationships with the people in my family.

Despite the significant advantages children in the LPFS reported, the data revealed a few potential disadvantages relevant to BIOC standards to growing up in a polyamorous family, including the potential loss of adult partner relationships once a romantic relationship terminates and societal stigmatization of children of polyamorous families. This is not to say that children from polyamorous families experienced disadvantages specifically as a result of their poly family life – in fact they experienced disadvantages similar to children from other kinds of families.¹⁴⁵ More specifically, none of these disadvantages were unique to polyamorous families, but rather are common disadvantages found in families with single, divorced, LGBTIQ, and monogamously married parents.¹⁴⁶ Notably, data Waves III and IV show that some children of polyamorous families, even those who experience divorce, report retaining social contact with the parent, parent’s ex-partner, or other loving adults who do not remain in the same household. For example, Kethry Wyss (then 14 years-old) noted that the divorce between her polyamorous parents did not change their cooperative approach to parenting:

It was a bit of a change now that there are two houses instead of one, but not really that big of a deal. . . . Dealing with the courts and everything, they became friends again and they can still hang out in the same room. . . . I was dealt a very good hand with parents who are able to become friends again afterwards. They’re still friends.

Similarly, Tyler Warren (then 20 years-old) reflected back on his polyamorous family’s romantic partner transitions during his childhood, finding that though there was an ebb and flow in specific individuals’ involvement, there was a consistent abundance in support and community:

I don’t know why people say poly is unstable. I mean, I can sorta see someone outside looking in would think the poly community is a complicated mess. Two parents divorce and you have everyone taking sides, definite disadvantages to it but there are more advantages.

¹⁴⁵ See SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 4.

¹⁴⁶ See Goldfeder & Sheff, *supra* note 20.

Someone outside looking in probably doesn't see it that way because they don't get the full experience.

It is a lot more stable because instead of three legs on the stool you have 20, and they all lean against each other so none of them fall down. There are a lot more social opportunities because you know more people. The larger community provides stability. The community still exists, despite the numerous divorces that have happened in the last 10 years. And that's not something that would necessarily happen in a smaller community. Big and deep enough that waves do not swamp it, it's like a tree – someone can cut a branch off, but it doesn't kill the tree.

A limited number of children noted that the parent's ex-partners did stop interacting with the children after the termination of the romantic relationship, however, for the majority of children the parent's partner continued friendly contact with the family or the child over time. These children's responses provide evidence contrary to this assumed disadvantage. Further evidence is needed to see whether this holds true across different studies.

In regard to stigma, the data from Waves III and IV show that, though some children in polyamorous families perceived and/or experienced stigma from peers or others, it was usually rather minimal. Characteristic of this tendency for children in polyamorous families to have minimal need to manage information about their multiple parents, 20 years-old Tyler Warren reflected on his past requirements to explain his family:

Whenever someone would ask about my parents or what not, I would just say my mom or my stepmom so I didn't have to explain the whole family situation every time someone asked about my parents. Other than that, it never really came up. I don't think they asked any more than usual, I'm just remembering all the times I didn't tell the whole truth because they didn't need to know the whole truth. Not that big of a deal, not too difficult.

Similarly, 29 years-old Elise Heartland reflected on growing up in a polyamorous family and concluded:

Most people I tell, it has such a shock factor that they don't know what to say. Usually they are like oh, ok, and it never comes up again. I tell people and it used to make me really nervous, but now I realize not as many people

care about it, I probably care way more about it than other people do.

Further, the experience of such stigma (to the extent it was prevalent), depended in large part on the age of the children. For kids, their peers were well used to multiple parents via divorce, so the unique structure of their multi-adult family amongst peer groups was largely unnoticed. Tweens, in contrast, were more likely to be aware of the polyamorous nature of their family, but tween respondents were rarely confronted with situations in which they needed to explain their family structure to their peers, who either assumed divorce and remarriage produced the multiple parents or were easily distracted from asking questions regarding the adults in their environment. John and Kyle West, 10 and 15 years-old brothers, reported that they would tell their peers:

Kyle: I just say my mom lives here and my dad lives here, divorced, lived here and moved here just a while ago and that's it. . . . Some people might know a little bit about it, my best friends know.

John: I just don't tell anybody. Not really like keeping a secret, it's just like if they ask about it I might tell them a little bit.

Kyle: I don't like talking about it.

John: Me either.

Kyle: It's sort of like, not making me uncomfortable now, telling an adult is not that bad, but telling others for no reason, telling someone who is prying into what I've been through in my life, that's edgy, don't talk about it. So, I change the subject, give short and vague answers. Short, sweet, to the point.

Teens were also increasingly knowledgeable about the poly structure of their families and often used their familial structure to either distinguish themselves from their families of origin by claiming interests in monogamy or to distinguish their family from mainstream society. Across the sample, regardless of age, few children reported experiencing negative social interactions with peers or others as a result of their family's polyamorous structure. At 15 years old Kethry (later Kai) Wyss, for instance, compared her family to other alternative families in explaining her relationship to her peers:

Now at my high school there are several kids who are adopted, so their families are just as complicated as

mine so I blend right in. Also, some of my classmates' parents are divorced, but it doesn't stand out. Some of the other kids at my school have two moms and two dads as well, people of all family types and all sexual orientations as well. It's a very welcoming and open place, there is no weirdness with me having four parents.

For other children, the polyamorous structure itself was not inherently at issue in their childhood. Instead, they were concerned with how individual parents navigated communication with them about polyamory. Even those children who were less than thrilled with how their individual parents handled communication about their relationship style nevertheless reported significant emotional advantages from the intimacy they created in their families. 29 years-old Elise Heartland identified as a monogamous heterosexual woman and reflected on her relationship with her parents:

I literally have the best relationship with them, love them to death, I text them daily and we have a great relationship. Just because I tell you how I might feel about it and the downside of polyamory, I turned out ok and my relationship with my parents is really good. . . . I love my parents and would not take anything back or change my upbringing at all, my relationship with them to this day is amazing. It is 20 times better than my relationship with my dad and stepmom who are in a monogamous relationship. . . . They could've handled it better, if they had I wouldn't have as many negative things to say about it.

Others felt that their parents, especially if divorced, were a major source of conflict. The parents of John and Kyle West (then 10 and 15 years-old) were embroiled in a custody battle for the children that brought stigma front and center. Kyle reported that “Doctors and teachers, no other adults ever ask about [polyamory]. [My monogamous] dad and stepmom are where the problems come from, not really others.” Similar to other children in polyamorous families, Kyle and John found that most of the stigma against their polyamorous family came from other people in their family—in this case their father and stepmother—rather than sources external to the family.

C. Impact of the Study's Findings for BIOC Standard Analysis

Longitudinal outcomes from both Waves III and IV, as well as prior studies (described *above*), collaboratively evidence that polyamorous families may indeed meet the common factors considered in state BIOC

standards (regardless of inter-state diversity). Specifically, the third and fourth waves find that the polyamorous families provide children with particular advantages, many of which clearly map onto BIOC state standards. First, the children had abundant financial and material resources—a common factor in BIOC determinations. Second, these data show that the collaborative nature of polyamorous family structure actually increases “care availability” of multiple adults. Third, the data support the finding that polyamorous parents have open and honest relationships between each other and their children, evidencing the kind of strong parental emotional and communicative capabilities that BIOC factors identify as important. Fourth, these data confirm findings from prior studies that children of polyamorous families often have large family, kinship, and supportive networks composed of multiple adults from which they can receive care and guidance.

These four advantages may be analyzed through the lens of the common BIOC factors. First, the data indicate that these children have a wide-reaching support network of other adults important to the child’s well-being, thus fulfilling the BIOC factor that values an adequate social support system of family and friends for the child. Second, these data also flag the common BIOC standard that the court must consider the child’s relationship with any other person who may significantly affect his/her best interest—inclusive of these extended networks—when making child custody determinations. Further, the LPFS found no generalizable evidence to support a judicial determination, under the per se or nexus standard, that children living in polyamorous families experience harm (*e.g.*, competition for attention, violence, exploitation) as a result of their parents’ polyamorous identities or practices.

In sum, the children of these polyamorous families experienced an abundance of attention from a diverse set of communicative and emotionally capable caregivers with a variety of skillsets to assist them in their daily lives. Cumulatively, this evidence indicates that polyamorous families may well fulfill state BIOC standards, and uninformed or biased judicial assumptions pertaining to the unsuitability of polyamorous structured families are unfounded and contradicted by available data. As such, polyamorous families warrant the same consideration as all other families appearing in family court: a case-by-case, family-by-family determination, unencumbered by judicial biases.

D. The Trouble with Morality

As discussed *above*, several states mandate that judges consider the moral fitness or moral character of the parents in BIOC standard determinations. This factor is particularly susceptible to judicial discretion as it may be based entirely on the judge’s own values, perceptions, and as-

sumptions, including their thoughts on the morality of polyamory. There is significant evidence that mainstream society in the United States stigmatizes polyamorous people and their families.¹⁴⁷ Historically, similar negative judgments against other alternative family structures (*e.g.*, mixed race partnerships, LGBTIQ-parented) have spilled over into child custody disputes, producing findings that parents engaged in a range of relationships considered unconventional at the time were immoral as a result.

In a recent study, a team of psychologists conducted qualitative interviews with a random sample of adults (not stratified by relationship structure type), asking respondents to answer open-ended questions regarding the benefits of monogamy, to rate consensually non-monogamous relationships across several relationship factors, and to provide their impressions of monogamous or CNM relationships.¹⁴⁸ Across all three different questions and activities, authors found that respondents ranked monogamy more favorably and perceived monogamous relationship structures more positively, indicating negative prejudice against CNM structured relationships.¹⁴⁹ This social and judicial presumption against polyamory as immoral stands in sharp contrast to the experiences of polyamorous families.¹⁵⁰ Rather than a Judeo-Christian form of morality based in religious visions of right and wrong, polyamorous families provide their children with an extensive ethical framework that supports care for others. Fundamental to this ethical framework are elements of honesty, self-responsibility, and treating others as they would wish to be treated themselves. Parents transmit this ethical code via conversations with children and by setting examples of honest and ethical behavior in their own lives.¹⁵¹

Given both the widespread prevalence of pro-monogamy, anti-CNM bias, and a well-documented tendency for the judiciary to inadvertently allow personal and social biases to impact decision making, it is likely that judges may find polyamorous parents less moral and thereby less preferred than their monogamous counterparts. There are limited legal safeguards currently in place to protect against biased judicial decision making, as well as movements towards restricting judicial biases against stigmatized groups and families in BIOC determinations. In 1984, the U.S. Supreme Court held in *Palmore v. Sidoti* that social, private biases, such as racial prejudice, could not be a controlling factor in a child custody dispute, regardless of whether the child may face social ridicule as a

¹⁴⁷ See Conley et al., *The Fewer the Merrier?*, *supra* note 9.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See Sheff, *The Polyamorists Next Door*, *supra* note 4.

¹⁵¹ See *id.*; PALLOTTA-CHIAROLLI, SHEFF & MOUNTFORD, *supra* note 4.

result of societal prejudice.¹⁵² In *Sidoti*, the father of the child in question argued that the mother should lose custody of their child as she was cohabitating with a Black partner (whom she later married).¹⁵³ The Court rejected the respondent's claim, stating, "[T]he Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect."¹⁵⁴

The 1994 Multiethnic Placement Act prevented adoptive placements based solely on race and instead required adoption agencies to use race as only "one of a number of factors used to determine the best interests of the child."¹⁵⁵ Activists currently seek further legal reform to potentially shield diverse families that defy cultural norms regarding gender, sexual orientation, and sex. Legal organizations such as the American Law Institute have urged state legislatures to adopt laws prohibiting the use of a parent's race, ethnicity, sex, religion, sexual orientation, extra-marital conduct, or financial resources in BIOC determinations for child custody disputes.¹⁵⁶ Despite these proposals, however, there are currently no explicit legal protections for polyamorous families that are found to be immoral or otherwise vilified for their familial composition or relationship structure(s), whether in child custody disputes or other areas of the law (*e.g.*, employment, housing). Satisfying the moral fitness factor may likely present a challenge to polyamorous families seeking legal custody, despite evidence indicating that polyamorous families have considerable benefits that may serve the best interests of the child.

IV. THE ARGUMENT FOR AND FEASIBILITY OF LEGALLY RECOGNIZING POLYAMOROUS FAMILIES

Employing misconceptions regarding the suitability of polyamorous families for child rearing to deny polyamorous parents' custody over their children implicates the constitutionally protected right to parent.¹⁵⁷ In *Troxel v. Granville*, the Supreme Court recognized, legitimated, and delineated the fundamental right of parents to have custody of and care for their children.¹⁵⁸ Granville was the mother of the children, the father was deceased, and the Troxels were the children's paternal grandparents. Granville agreed to have the Troxels visit with the children once a

¹⁵² *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

¹⁵³ *See id.*

¹⁵⁴ *Id.* at 433.

¹⁵⁵ Multiethnic Placement Act, 42 U.S.C. § 5115a(a)(2) (1994).

¹⁵⁶ *See* Ira Mark Ellman, Katharine T. Bartlett, & Grace Ganz Blumberg, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 2002 A.L.I.

¹⁵⁷ *See Troxel v. Granville*, 530 U.S. 57, 57–58 (2000).

¹⁵⁸ *See id.*

month, but the Troxels wanted more frequent visitation. Under a Washington state statute, “any person” could petition a court for visitation rights with a child, and that court could order visitation whenever it would serve the best interests of the child.¹⁵⁹ The grandparents sued the mother under the state statute, and the Supreme Court struck down the statute as an unconstitutional infringement on the right to parent. The Court held that a fit parent must be presumed to act in the best interests of their children, and a parent is fit if the parent “adequately cares” for their children.¹⁶⁰ Further, the Court addressed the power of family courts, stating that the Constitution “does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.”¹⁶¹ Accordingly, the Court declared that the statute was unconstitutional.¹⁶²

Given the dramatic changes in the composition of American families and the increased social and legal recognition of familial diversity, courts have trended towards the adoption of expansive definitions of both parent and family. This is apparent in family law cases across the country, which demonstrate the feasibility of applying such findings and holdings to polyamorous family configurations. In *Brooke, S.B. v Elizabeth, A.C.C.*, the New York Court of Appeals recognized the parental custody and responsibilities of a non-biological, non-adoptive parent who provided clear and convincing evidence that she and her partner (the biological mother) had agreed to raise a child together.¹⁶³ This case overturned prior court precedent that partners in unmarried arrangements and without biological or adoptive connections (*i.e.*, “biological strangers”) were not considered a child’s parent(s) for all custody determinations by New York courts, even parents who had supported and cared for a child for years.¹⁶⁴ The same-sex couple in *Brooke* jointly raised a child together at a time when they were not allowed to marry within the state; upon the dissolution of their relationship, the non-biological partner sought custody or visitation of their child.¹⁶⁵ The family court and the appellate court both denied the partner any right to the child, as she had not legally adopted the child.¹⁶⁶ Relying on the courts’ “inherent equity powers and authority,” the court overruled these lower court holdings, finding that biology or marriage is an insufficient basis alone for court determinations

¹⁵⁹ *Id.* at 60 (citing WASH. REV. CODE § 26.10.160(3)).

¹⁶⁰ *Id.* at 68.

¹⁶¹ *Id.* at 73.

¹⁶² *See id.* at 67.

¹⁶³ *See Matter of Brooke, S.B. v. Elizabeth, A.C.C.*, 61 N.E.3d 488, 490 (N.Y. 2016).

¹⁶⁴ *See Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

¹⁶⁵ *See Matter of Brooke S.B.*, 61 N.E. 3d at 490–91.

¹⁶⁶ *See id.*

of “who is a parent and what will serve a child’s best interest.”¹⁶⁷ The appellate court recognized the considerable hardship that nontraditional families faced due to court neglect of familial arrangements that are constructed outside of biological or marital ties. Of particular relevance to polyamorous families, the court noted the serious traumatic impact of removing or limiting contact between children and their primary adult attachment figures, regardless of whether the adult is biologically or legally tied to the child.¹⁶⁸ In sum, the court recognized that the right to parent is a fundamental, constitutionally protected right guaranteed to all parents, including non-traditional formulations of family.¹⁶⁹

Many jurisdictions within and outside the United States may and currently do allocate parental rights and responsibilities to more than two parents in at least some circumstances, showing the potential for legal recognition of multi-parented polyamorous families. For example, families with children created using assisted reproductive technologies have challenged the legal tradition of recognizing only two legal parents, and multiple states have responded by establishing statutes explicitly permitting the recognition of more than two parents.¹⁷⁰ At the time of publication, six states, one country, and one province have *explicitly* recognized the parental rights of multiple parents.¹⁷¹ Family courts across the country have allowed multi-parent recognition, though it is difficult to identify all such jurisdictions because the overwhelming majority of family law cases go unpublished.¹⁷² The most recent edition of the Uniform Parentage Act (UPA), which supplies states with a recommended legal framework for establishing parent-child relationships, allows for the legal recognition of more than two parents.¹⁷³ Further, this edition of the UPA includes additional options to establish parentage beyond biology or marriage such as *de facto* parentage, voluntary attestation of parentage, and intended parentage to assist in recognizing multi-parent or non-traditional parented families. As of the date of this Article’s publication, the 2017 edition has been adopted in California, Vermont, Washington,

¹⁶⁷ *Id.* at 497.

¹⁶⁸ *See id.* at 499.

¹⁶⁹ *See id.*

¹⁷⁰ *See* Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. MATRIM. LAWS. 175, 180 (2018).

¹⁷¹ *See* California (CAL. FAM. CODE 3040(d); Maine (Me. Stat. tit. 19-A, § 1853, stating that when a Court recognizes a de facto parent, it “may determine that a child has more than 2 parents”); Washington (adopted newer version of UPA); and Louisiana (La. Civ. Code Ann. Art. 197 & 198, recognizing dual paternity); the Canadian Province of Ontario (Children’s Law Reform Act, *AA v. BB et al.*); and Brazil (recognizing dual paternity).

¹⁷² *See* Quinn, *supra* note 170.

¹⁷³ *See* UNIFORM PARENTAGE ACT § 613 CMT. (UNIF. LAW COMM’N 2017), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1a489a1f-ec9a-ee72-7dbc-10f6d43943b5&forceDialog=0>.

and Rhode Island,¹⁷⁴ thereby allowing for multi-parent recognition in each of these jurisdictions.

The Supreme Court of Newfoundland and Labrador Family Division's recent decision is of particular relevance to multi-parental rights in polyamorous families.¹⁷⁵ The court recognized the parental responsibilities of a polyamorous, three-parent family in which all three adults had sought to be recognized as parents on their child's birth certificate.¹⁷⁶ The Vital Statistics Division had rejected the application, stating that they could not name more than two parents. Family members disagreed and appealed the Division's decision in court. The Supreme Court of Newfoundland relied on the jurisdiction's BIOC standard (quite akin to many U.S. states' BIOC standards), finding a gap in the application of the province's legislation for polyamorous families. This legislative gap, according to the court, could not have possibly been intended by legislature to discriminate against children from diverse families (including polyamorous families). The judge held that all three adults of the polyamorous family could and would be listed as parents of the child, affirming that: "the child, A., has been born into what is believed to be a stable and loving family relationship, which, although outside the traditional family model, provides a safe and nurturing environment."¹⁷⁷

Diverse families are slowly becoming *the* American family, many of which would greatly benefit from multi-parent recognition. Although polyamorous families do not represent the majority of diverse families appearing before family court, they experience treatment strikingly similar to what other non-traditional families have experienced in the past and present. Though opponents to the legal recognition of polyamorous families may argue that recognizing more than two parents would place an unimaginable burden on the court system, the courts are already quite accustomed to adjudicating claims for plural parentage;¹⁷⁸ divorces, remarriages and assisted reproductive technologies regularly introduce more than two adults with legitimate claims to parental authority.¹⁷⁹ Furthermore, there is no evidence indicating that regulating multi-parent households is any more or less administratively costly for the legal system. In fact, failure to do so may well prove more cumbersome later

¹⁷⁴ See *Parentage Act*, UNIF. L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=C4f37d2d-4d20-4be0-8256-22dd73af068f> (last visited Dec. 15, 2020). Specific state legislation: California, S.B. 2684 (2018); Vermont H.B. 562 (2018); Washington S.B. 6037 (2018); Rhode Island H.B. 7541 (2020).

¹⁷⁵ See *C.C. (Re)*, 2018 NLSC 71 (Can. N.F.S.C. Fam.).

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*

¹⁷⁸ See Iris Siadatifard, Comment, *You, Me, and Dad?: An Update on the Progression of Multi-Parent Families and the Governing Hand of a Child's Best Interest*, 33 J. AM. ACAD. MATRIM. L. 249, 262 (2020).

¹⁷⁹ See *id.*

when these multi-parented families interact with other social institutions, such as health care, education, and taxes.

Having more than two parents is not a singular phenomenon experienced by polyamorous families, and poly families may appear as yet another “blended family” among many other types of diverse families.¹⁸⁰ Further, more and more Americans, regardless of whether they are monogamous or polyamorous, are choosing to abstain from marriage and instead bear children outside the legal safety net of marriage. The unmarried but partnered population grew 41% from 2000 to 2010 and, as of 2015, twenty-one million unmarried couples in the United States have children.¹⁸¹ Thus, polyamorous families in which some adults may not be related to the child through marriage or biological ties present no novel question to the courts; and yet, polyamorous families report experiencing discrimination in child custody disputes on the basis of their polyamorous structure.¹⁸² As the traditional family model fails to depict the nature actual families appearing in family court for legal remedies, the systems for recognizing parental legal status require reform to better serve the diversity of American families.

CONCLUSION

Like all other families, polyamorous families can exert positive and negative impacts on their children. Findings from the LPFS indicate that polyamorous families as an observable, familial category with multiple (more than two) adult care givers and financial contributors appear to offer considerable benefits to their children. In contrast, the case law presented *above* demonstrates that, like LGBTIQ-parented families thirty years ago and mixed-race families before that, family courts across the United States have presumed that polyamorous families are maladaptive for child-rearing and are unfit to raise their own children. However, empirical evidence from prior studies and recent novel data presented in this Article demonstrate clearly that polyamorous families offer emotional, physical, and material benefits to children and may provide loving, stable, enriching, and fulfilling environments in which to raise responsible, self-confident, resilient children. This is not to say that every polyamorous family functions in the best interests of their children, just like it

¹⁸⁰ SHEFF, *THE POLYAMORISTS NEXT DOOR*, *supra* note 4.

¹⁸¹ See Jonathan Vespa, Jamie M. Lewis & Rose M. Kreider, *America's Families and Living Arrangements: 2012*, U.S. Census Bureau (2011), <https://www.census.gov/prod/2013pubs/p20-570.pdf>; Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 *FAM. L. Q.* 215–46 (2016), <http://www.jstor.org/stable/44155209>; Daphne Lofquist et al., *Households and Families: 2010*, U.S. CENSUS BUREAU 3 (Apr. 2012), <https://www2.census.gov/library/publications/cen2010/briefs/c2010br-14.pdf>.

¹⁸² Klesse, *supra* note 27.

would be inaccurate to say that every single monogamous family functions in their children's best interests. But what can be unequivocally stated from the data observed is that polyamorous parented households (like those shown in the LPFS) *may* be in the best interests of the children. At minimum, under court review the polyamorous attribute of the adult caregivers and parents should be largely irrelevant unless direct and demonstrable harm is evidenced, much like the monogamous partnering of more normative parents.

In light of these findings, several reforms at the federal, state, and local levels are in order. First, judges should be made aware (either through general social discourse or by way of specific state mandated awareness training programs) of the available research showing that polyamorous families offer certain advantages that readily map on to the common factors considered in state BIOC standards. Family court judges should be given the tools and knowledge needed to make objective and informed child custody judgements. Family court judges should be informed of the pervasive social stigma against polyamorous persons and families and operate reflexively to rid their decisions of such unevidenced, private bias. In cases in which trial family court judges' findings are clearly discriminatory against polyamorous parents and are unevidenced, such decisions should be overturned by state appellate courts for abuse of discretion—just as other unsupported, family court findings routinely are by reviewing courts.¹⁸³

Second, non-discrimination provisions should be adopted at the state level as they have been for other stigmatized identities and statuses (*e.g.*, sexual orientation, gender identity, sex),¹⁸⁴ barring judges from considering parents' engagement in polyamory within their BIOC determinations. It is inaccurate and arguably unconstitutional to continue to deny or limit polyamorous parents' rights to child custody or visitation on the basis of misperceptions of or stigma against this relationship form. BIOC standards were never intended to, and should not now, be wielded against children's best interests on the basis of a judge's private, subjective moral values.

Third, just as courts have progressed from a *per se* presumption against LGB families historically and towards an individual assessment of the specific LGB family without regard to the parent's sexual orientation, family courts should also consider polyamorous families' cases in-

¹⁸³ See Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 J. GENDER, SOCIO. POL'Y & L. 163, 213–15 (2009), for a discussion of abuse of discretion.

¹⁸⁴ *E.g.*, California prohibits judges from considering the sex, gender identity, gender expression, or sexual orientation of a parent, legal guardian, or relative when determining the best interests of the child. CAL. FAM. CODE § 3011(b) (2020).

dividually, on the basis of the facts before them. At absolute minimum courts should adopt a nexus test approach, requiring an objective and evidenced judicial finding that parents' engagement in polyamory has a negative impact on the child's wellbeing before parents' polyamorous relationships may even be considered in judge's BIOC determination. While opponents to this approach may likely wage morality claims against these unconventional families, the perils to child welfare resulting from a court failure to acknowledge evidence of these beneficial parental and adult-caretaking relationships presents an unacceptable risk.

In sum, it is untenable to continue ignoring the well-being of children and the legal rights of their polyamorous parents for the sake of promoting the increasingly rare traditional family model. Judicial personal biases against and presumptions about certain groups of parents or familial configurations, including polyamorous families, should be excluded from court child custody decisions.¹⁸⁵ The evidence demonstrates that living in polyamorous families may and can be in the best interests of children. As such, without an evidenced finding of harm due to parents' polyamory, a court's presumption to the contrary effectively denies these parents their constitutionally protected right to parent.

¹⁸⁵ See generally Funderburk, *supra* note 43.