



Polygamy In Family Court: A Resource For Judges Dealing With An Unfamiliar Family Structure

By Billy Gage Raley

ABSTRACT

Cases concerning polygamous households can present difficult challenges for family courts. Though a growing number of Americans practice polygamy, the lifestyle still remains shrouded in mystery. Many polygamists are religious (and sometimes racial) minorities that have suffered from discrimination. The most influential judicial precedents concerning polygamy come from the nineteenth century and are tinged with religious and racial stereotypes, which can make judges uncomfortable with citing those decisions. There is a need for reliable, unprejudiced, and up-to-date information about polygamy that judges can cite while maintaining an image of objectivity and impartiality. This Article seeks to provide that resource. It provides information about the evolutionary influences that shape polygamy, how polygamy is practiced in the modern world, and common problems affecting polygamous households that judges should be aware of.

Key words: polygamy, spousal relations, stepparents, paternal support, child neglect and abuse.

INTRODUCTION

Though polygamous marriages are not legally-recognized in any state, there are many Americans who believe polygamy is permissible under a higher law. The U.S. has a substantial population of fundamentalist Muslims and Mormons who practice polygamy.¹

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¹ See Kirsten Scharnberg & Manya A. Brachear, *Polygamy (Utah's open little secret)*, CHICAGO TRIB., Sept. 24, 2006, http://articles.chicagotribune.com/2006-09-24/news/0609240351_1_warren-jeffs-polygamists-utah-man (stating that Utah's attorney general and other experts estimate there are 40,000 Mormon polygamists across the Western U.S.); Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR, May 27, 2008, <http://www.npr.org/templates/story/story.php?storyId=90857818> ("No one knows how many Muslims in the U.S. live in polygamous families. But according to academics researching the issue, estimates range from 50,000 to 100,000 people.").

Considering that Islam and Mormonism are the two fastest-growing religions in the United States,² this number will likely continue to grow in the future.

Despite the surging growth of polygamy in recent years,³ “[p]ractitioners of plural marriages tend to live in the shadows.”⁴ This is largely due to the fact that “the practice of polygamy has a long-standing and unsurprising reputation as distasteful”⁵ in the United States, starting with the persecution of Mormons in the mid-nineteenth century.⁶ Though attitudes towards polygamy have softened somewhat in recent years⁷ and criminal sanctions against polygamy are now largely unenforced,⁸ many polygamists still feel that they are subject to discrimination.⁹

Even apart from the practice itself, many polygamists face discrimination due to their religion and race. In regard to religion, Mormons are still viewed with suspicion by many Americans,¹⁰ and Muslims are also subject to discrimination.¹¹ In regard to race/

² Amelia Thomson-DeVeaux, *Study Shows that Mormons Are the Fastest-Growing Religious Group in the U.S.*, PRRI, May 2, 2012, <http://www.prii.org/spotlight/study-shows-that-mormons-are-the-fastest-growing-religious-group-in-the-u-s/> (stating that, according to the organization’s most recent 10-year survey, “Mormonism [was] the fastest-growing religious group in the United States” with 2 million new adherents, and “Muslims came in second, with growth of 1 million adherents”).

³ See, e.g., James Brook, *Utah Struggles With a Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998 (stating that “the number of Utahans living in polygamous families has increased tenfold in the last 50 years”); Barbara Bradley Hagerty, *Philly’s Black Muslims Increasingly Turn to Polygamy*, NPR, May 28, 2008, <http://www.npr.org/templates/story/story.php?storyId=90886407> (“Several scholars say [polygamy is] growing among black Muslims in the inner city — and particularly in Philadelphia, which is known for its large orthodox black Muslim community.”).

⁴ Tom Gorman, *Utah Drags Polygamy Out of Shadows and Into Court*, L.A. TIMES, May 16, 2001, <http://articles.latimes.com/2001/may/16/news/mn-64178>.

⁵ Hope Marie Deutsch, *Marrying Polygamy into Title VII*, 16 RUTGERS J. L. & RELIGION 145, 146 (2014).

⁶ “The birth of polygamy in the United States can be traced back to 1830,” the year the Mormon church was established. “Public opposition to the practice quickly formed,” ultimately culminating in “violent clashes” and the flight of Mormons to “desolate territories” in the west. Deutsch, *id.* at 147-48. For a comprehensive review of anti-Mormon initiatives in the nineteenth century, see generally R. Lex Sears, *Punishing the Saints for Their Peculiar Institution: Congress on the Constitutional Dilemmas*, 2001 UTAH L. REV. 581 (2001).

⁷ See, e.g., Frank Newport, *Americans Continue to Shift Left on Key Moral Issues*, GALLUP, May 26, 2015, <http://www.gallup.com/poll/183413/americans-continue-shift-left-key-moral-issues.aspx> (finding that the percentage of Americans who say that polygamy is “morally acceptable” has increased from 7% in 2001 to 16% in 2015).

⁸ See, e.g., James Brook, *Utah Struggles With a Revival of Polygamy*, N.Y. TIMES, Aug. 23, 1998 (stating that, despite the fact that 40,000 Utahans live in polygamist households, a policy of “‘don’t ask, don’t tell’ means that sheriffs and judges turn a blind eye to polygamy, a felony that has not been prosecuted in almost half a century”); Andrea Useem, *What To Expect When You’re Expecting a Co-Wife*, SLATE, July 24, 2007, http://www.slate.com/articles/life/faithbased/2007/07/what_to_expect_when_youre_expectng_a_cowife.html (“American Muslim polygamists are unafraid of prosecution, and they sometimes seem almost puzzlingly unconcerned with the illegality of their conjugal life.”).

⁹ Elisabeth A. Sheff, *Children, Stigma, and Polyamorous Families*, PSY. TODAY, Oct. 24, 2013, <https://www.psychologytoday.com/blog/the-polyamorists-next-door/201310/children-stigma-and-polyamorous-families>.

¹⁰ See, e.g., Rich Barlow, *Why We’re Afraid of Mormons: BU-trained scholar says uninformed prejudice abounds*, BU TODAY, July 5, 2012, <https://www.bu.edu/today/2012/afraid-of-mormons/>.

¹¹ See, e.g., PEW RESEARCH CENTER, *LOW APPROVAL OF TRUMP’S TRANSITION BUT OUTLOOK FOR HIS PRESIDENCY IMPROVES 25* (2016), available at <http://assets.pewresearch.org/wp-content/uploads/sites/5/2016/12/08135748/12-08-16-December-political-release.pdf> (“A large majority of Americans (82%) say Muslims in the United States face discrimination — with 57% saying they face ‘a lot’ of discrimination.”).

ethnicity, most Muslim polygamists are African-American¹² or Middle Eastern¹³ and as such face a heightened risk of discrimination,¹⁴ and even white Mormons have long been ostracized as “race traitors” and “metaphorically nonwhite.”¹⁵

As polygamy spreads, family courts will begin to encounter practitioners in their courtrooms. For example, practicing polygamists may be party to child placement or child custody proceedings. In such cases, “the existence of a polygamous relationship [. . .] must be considered a significant, although not necessarily a determinative, factor,”¹⁶ and judges may have wide discretion in deciding how significant that factor will be.¹⁷

Existing religious and racial prejudices may cast a shadow over polygamy cases. It is thus imperative that judges project an image of informed impartiality in cases involving polygamy. But because the practice remains shrouded in mystery, judges may feel they are ill-equipped to adjudicate such an abstruse issue.

To make matters worse, the most influential judicial precedents concerning polygamy come from the nineteenth century and are tinged with religious and racial stereotypes. The 1878 case *Reynolds v. United States*¹⁸ and the 1890 case *Latter-Day Saints v. United States*¹⁹ are the two leading U.S. Supreme Court cases addressing polygamy. *Reynolds* and *Latter-Day Saints* have been criticized for their racial overtones,²⁰ particularly

¹² Useem, *supra* note 8 (stating that American Muslim “practitioners [of polygamy] are most often African-American Muslims or recent immigrants from West Africa”).

¹³ JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 109 (2011), *citing* NANCY F. COTT, PUBLIC VOWS 4 (2009). For specific examples, *see* *Reynolds v. United States*, 98 U.S. 145 (1878) (“Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”); CLYDE R. FORSBERG JR., DIVINE RITE OF KINGS: LAND, RACE, SAME SEX, AND EMPIRE IN MORMONISM AND THE ESOTERIC TRADITION 132 (2016) (“[T]he Klan had added Mormons to its list of ‘race traitors,’ contending that polygamy lowered the Saints to the same ‘subspecies’ as Africans.”).

¹⁴ *See, e.g.*, Pew Research Center, *supra* note 11 (providing poll results showing that 76% of Americans agree that blacks “face at least some discrimination”); Germaine H. Awad, *The Impact of Acculturation and Religious Identification on Perceived Discrimination for Arab/Middle Eastern Americans*, 16 CULT. DIVERSITY & ETHNIC MINORITY PSYCH. 59 (2010) (noting that “discrimination toward Arabs and individuals of Middle Eastern descent in the United States was reported as early as the 1900s,” and that “the events of September 11th, 2001, led to a sharp increase in prejudice and discrimination toward persons of Arab and Middle Eastern descent”).

¹⁵ JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 109 (2011), *citing* NANCY F. COTT, PUBLIC VOWS 4 (2009). For specific examples, *see, e.g.*, *Reynolds v. United States*, 98 U.S. 145 (1878) (“Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”); CLYDE R. FORSBERG JR., DIVINE RITE OF KINGS: LAND, RACE, SAME SEX, AND EMPIRE IN MORMONISM AND THE ESOTERIC TRADITION 132 (2016) (“[T]he Klan had added Mormons to its list of ‘race traitors,’ contending that polygamy lowered the Saints to the same ‘subspecies’ as Africans.”).

¹⁶ *Matter of Adoption of WAT*, 808 P.2d 1083, 1087 (Utah 1991).

¹⁷ *See id.* (in which the Court recognizes that it has “not defined a precise, workable standard [for determining how much weight to give the polygamy factor in adoption cases], but this is the kind of case in which a trial judge should not be bound by such rigid standards that one’s best wisdom in the exercise of highly equitable powers must be abandoned. The lack of specificity places a premium on the trial judge’s judgment”).

¹⁸ *Reynolds v. United States*, 98 U.S. 145 (1878).

¹⁹ *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

²⁰ *See* *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1189 (D. Utah 2013) (describing *Reynolds* as being based on “morally repugnant reasoning”); Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 289 (2010) (providing historical context in showing that *Reynolds* and *Latter-Day Saints* were based on “white supremacist values”).

their characterizations of polygamy as a “barbarous practice”²¹ associated with “Asiatic” and “African people.”²²

There is a great need for reliable, unprejudiced, and up-to-date information that judges can reference in cases involving polygamy. This Article seeks to provide such a resource. It provides information about the evolutionary influences that shape polygamy, how polygamy is practiced in the modern world, and common problems affecting polygamous households that judges should be aware of.

Significantly, this Article will address both polygyny (marriages with multiple wives) and polyandry (marriages with multiple husbands). Though polyandry is considered “vanishingly rare”²³ in comparison to monogamy and polygyny, it is not inconceivable that a judge will encounter a polyandrous family in court. Relationships between one woman and multiple men are increasing in the United States. “Polyamory” (meaning “multiple lovers”), a movement made up of those who oppose mainstream monogamous mores, is spreading in liberal enclaves such as Portland,²⁴ and the most common type of permanent relationship in this movement involves one woman and two men.²⁵ There are also a fair number of Tibetans and Inuits in the U.S.,²⁶ who come from cultures where polyandry is practiced.²⁷ Judges who are called on to adjudicate problems arising in polyandrous households will face a dearth of available information about such relationships, so this Article will attempt to help fill that gap.

It should be noted at the outset that this Article does not address the macro-level effects of polygamy or whether society should legally-sanction such relationships, as these issues have been discussed at length in other works.²⁸ This Article simply seeks to provide judges with information that might be useful for adjudicating individual cases. It should also be noted that while this Article focuses on heterosexual relationships (as

²¹ *Latter-Day Saints*, 136 U.S. at 49.

²² *Reynolds*, 98 U.S. at 164.

²³ DORIS ZUMPE & RICHARD P. MICHAEL, NOTES ON THE ELEMENTS OF BEHAVIORAL SCIENCE 299 (2012). See also GEORGE PETER MURDOCK, ETHNOGRAPHIC ATLAS (1967) (finding that, of the 1,167 societies evaluated, polyandry was normative in only four); but see KATHRINE E. STARKWEATHER, EXPLORATION INTO HUMAN POLYANDRY: AN EVOLUTIONARY EXAMINATION OF THE NON-CLASSICAL CASES 1 (2010) (disputing Murdock’s conclusions and arguing that polygyny, while still rare, is “more common than the literature [. . .] has suggested”).

²⁴ See, e.g., Melanie Sevcenko, *Polyamorous in Portland: the city making open relationships easy*, GUARDIAN, July 19, 2016 <https://www.theguardian.com/lifeandstyle/2016/jul/19/portland-polyamorous-relationships-consensual-non-monogamy>.

²⁵ See ELISABETH SHEFF, THE POLYAMORISTS NEXT DOOR: INSIDE MULTIPLE-PARTNER RELATIONSHIPS AND FAMILIES 281 (2013) (“The most lasting triads appeared to be women who were sexually connected to two men”); *id.* at 28-30 (providing explanations for why “[o]ne of the most distinguishing characteristics of polyamory is that it allows women multiple partners,” including the fact that men outnumber women in the movement).

²⁶ See HUPING LING & ALLAN W. AUSTIN, ASIAN AMERICAN HISTORY AND CULTURE: AN ENCYCLOPEDIA 571 (stating that in the early 2000s, approximately 10,000 people of Tibetan ancestry were living in the United States); PETER BJERREGAARD, HEALTH TRANSITIONS IN ARCTIC POPULATIONS 126 (2008) (stating that 54,760 Inuits lived in the United States in 2000).

²⁷ See *infra* §II.

²⁸ See, e.g., Billy Gage Raley, *The More Perfect Union: Monogamy and the Right to Marriage*, 19 GEO. J. GENDER & L. ___ (2018) (forthcoming).

the vast majority of practicing polygamists in America are religiously-conservative heterosexuals²⁹), some of the information presented herein may also be useful in adjudicating issues facing homosexual polygamists.

Part I discusses the importance of the paternal role in polygamous families. It shows how paternity establishment concerns are the reason polyandry is rare, and paternal investment concerns are the reason polygyny is widespread. This brief section lays the groundwork for understanding the problems examined in the following two sections.

Part II addresses co-spousal relations in polygamous marriages. It explains how sexual competition frequently arises between co-husbands, and how material competition frequently arises between co-wives. It then discusses how physical separation of co-spouses can be crucial to maintaining marital harmony.

Part III examines parent- and stepparent-child relations in polygamous households. It first discusses how polygamy can increase the risk of paternal neglect, and how the dynamics of paternal neglect differ in polyandrous and polygynous families. It then addresses potential causes of child abuse in polyandrous and polygynous households.

The Article concludes by offering some practical take-away considerations that judges can apply when adjudicating cases involving polygamist families.

I. IMPORTANCE OF THE PATERNAL ROLE IN POLYGAMOUS MARRIAGES

The paternal role is of paramount importance in both polyandrous and polygynous marriages. The paternal identification and provisioning objectives influence how polygamous marriages are formed and structured.

Evolutionary psychologists believe that many aspects of marriage can be explained as mating strategies.³⁰ As *The Oxford Handbook of Sexual Conflict* puts it, “[m]arriage is fundamentally a reproductive union fraught with adaptive challenges.”³¹ This is particularly true when it comes to polygamous marriages.

²⁹ Most American practitioners of polygamy, as noted above, are fundamentalist Muslims or Mormons. See *supra* note 1. Neither of these faiths embrace homosexuality. See, e.g., Eliza Wood, *Are Mormons Closer to Muslims or Christians?* HUFF. POST, July 27, 2012, http://www.huffingtonpost.com/eliza-wood/differences-between-mormonism-islam-and-christianity_b_1693095.html (“Both Islam and Mormonism allowed four wives but both forbid homosexuality and bisexuality.”).

³⁰ See, e.g., Martin Daly & Margo Wilson, *Discriminative Parental Solicitude: A Biological Perspective*, 42 J. MARRIAGE & FAM. 277, 279-80 (1980) (stating that research regarding “cross-culturally consistent aspects of the relationship between women and men” shows that “a number of facts about mate selection, marriage laws, and concern with spousal fidelity match expectations from evolutionary principles”); David M. Buss & David Schmitt, *Sexual Strategies Theory: An Evolutionary Perspective on Human Mating*, 100 PSYCH. REV. 204 (1993) (stating that “marriages are usually regarded as formal reproductive alliances that contain the features of (a) mutual obligation between husband and wife, (b) rights of sexual access, (c) an expectation that marriage will persist through pregnancy, lactation, and child rearing, and (d) recognition of the legitimate status of the couple’s children”);

³¹ T. Joel Wade, *Mate Expulsion and Sexual Conflict*, in THE OXFORD HANDBOOK OF SEXUAL CONFLICT IN HUMANS 317 (Todd K. Shackelford & Aaron T. Goetz eds., 2012).

“[I]deas about selective pressures accounting for the evolution of mating systems”—including marriage—“pivot around the necessity (or not) of male parental care.”³² Due to the unique constraints of human anatomy, infants are born, in effect, prematurely,³³ and “command more care, even require more care, than a mother alone can provide.”³⁴ Because paternal assistance can greatly increase an infant’s chance of survival, “[w]e number among the small fraction of mammalian species in which males play important roles in raising offspring.”³⁵

Paternal investment, however, is complicated by the fact that natural selection weeds out men who expend their parental capital on another man’s child.³⁶ An evolutionary rule-of-thumb is that males will invest in offspring only if their confidence of paternity is high.³⁷ In a species that requires paternal investment, “adaptations should evolve to help guarantee that the female’s offspring are also [the investing male’s] own.”³⁸

Monoandry (marriages with only one husband) emerged as the solution to this dilemma. Monoandrous relationships can “provide the male with a high enough probability of paternity to make it selectively advantageous for the male” to raise the wife’s offspring.³⁹ Polyandry is very rare because it undermines paternity confidence and, by extension, male provisioning.⁴⁰

Polygyny, on the other hand, is fairly common. Polygyny can even thrive in situations where wealthy men can offer significantly more paternal investment than their less well-off male competitors. Women in these situations may rationally chose to become a secondary wife of a wealthy man, as they may be able to secure more paternal investment by sharing a

³² Patricia Adair Gowaty, *Battles of the Sexes and Origins of Monogamy*, in *PARTNERSHIPS IN BIRDS: THE STUDY OF MONOGAMY* 23 (1996, Jeffrey M. Black ed.).

³³ Humans have two anatomical features that complicate pregnancy: bipedalism and high encephalization (brain mass as compared to body mass). A narrow pelvis promotes efficient bipedal locomotion, but also results in a smaller birth canal. The bipedal pelvis is not conducive to humans’ high encephalization, however, as a fetus’ skull must be small enough to pass through the narrow birth canal. This is known as the “obstetrical dilemma.” See, e.g., A. B. Wittman & L. L. Wall, *The evolutionary origins of obstructed labor: bipedalism, encephalization, and the human obstetric dilemma*, 62 *OBSTET. GYNECOL. SURV.* 739 (2007). To solve this dilemma, evolution has delayed much of human brain development until after birth. To illustrate how extreme this developmental delay is, “a newborn chimp’s brain is nearly 60% of its adult size, [while] a newborn human’s brain is only 25% of its adult size.” DANIEL SCHACTER ET AL., *PSYCHOLOGY: SECOND EUROPEAN EDITION* 437 (2015).

³⁴ PETER B. GRAY & KERMYT G. ANDERSON, *FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR* 20 (2010). This was especially true during the evolutionary adaptive period of the Paleolithic. “When a foraging woman is pregnant, nursing, and bringing up children, she and the children are vulnerable to hunger, protein deficiency, predation, rape, kidnapping, and murder.” STEVEN PINKER, *HOW THE MIND WORKS* 480 (1997).

³⁵ Gray & Anderson, *supra* note 34 at 30. See also David C. Geary, *Evolution and Proximate Expression of Human Paternal Investment*, 126 *PSYCHOLOGICAL BULLETIN* 55 (2000) (“In more than 95% of mammalian species, males provide little direct investment in the well-being of their offspring. Humans are one notable exception to this pattern.”)

³⁶ See, e.g., ROBERT WRIGHT, *THE MORAL ANIMAL* 65 (1994) (“Not long for this world are the genes of a man who spends his time rearing children who aren’t his”).

³⁷ Carel P. van Schaik et al., *Paternity Confusion and the Ovarian Cycles of Female Primates*, in *INFANTICIDE BY MALES AND ITS IMPLICATIONS* 361, 362 (Carel P. van Schaik et al. eds., 2000). See also MICHAEL P. MUEHLENBEIN, *HUMAN EVOLUTIONARY BIOLOGY* 356 (2010) (“The level of paternal investment is directly correlated with [. . .] paternity confidence.”).

³⁸ Wright, *supra* note 36.

³⁹ *Id.*

⁴⁰ See *infra* text accompanying notes 41-66.

rich man's provisioning with other wives than by monopolizing a poor man's provisioning.⁴¹

Paternity establishment and paternal provisioning, therefore, are key issues in both types of polygamous marriages, and many of the conflicts that plague polygamous households are, at root, battles to achieve these important objectives. The following two sections will explain in greater detail how paternal identification and provisioning matters are an underlying source of instability in polygamous households.

II. POLYGAMY AND CO-SPOUSAL RELATIONS

A major source of tension in polygamous households is the relationship between co-spouses. In both polyandrous and polygynous marriages, jealous rivalries between co-spouses can arise. Physical separation may be necessary to keep co-spouse competition from escalating into conflicts which may require court intervention.

The source of co-spouse jealousy differs depending on whether a marriage is polygynous or polyandrous. As noted cognitive scientist Steve Pinker explains, "males compete for fertile females willing to copulate, females compete for flush males willing to invest."⁴² Co-husband rivalry tends to be sexual in nature and arises out of paternity establishment concerns, while co-wife rivalry tends to be more material in nature and arises out of paternal investment concerns.

Men are naturally inclined to exhibit sexual jealousy, and women are naturally inclined to act in ways that pacify this jealousy.⁴³ In addition to evolved preferences for monoandry, many traditional marital norms are built around the

⁴¹ See, e.g., Douglas R. White & Michael L. Burton, *Causes of Polygyny: Ecology, Economy, Kinship, and Warfare*, 90 *Am. Anthropologist* 871 (1988) ("As inequality among men increases, polygyny increases, since women will choose to marry wealthy men who already have several wives."); Caroline Thomas Harnsberger, Bernard Shaw: Selections of His Wit and Wisdom 191 (1965) ("The maternal instinct leads a woman to prefer a tenth share in a first-rate man to the exclusive possession of a third-rate one.").

⁴² Pinker, *supra* note 34 at 466.

⁴³ During the "Environment of Evolutionary Adaptedness" (EEA), it was difficult—if not impossible—to determine paternity. Men and women who acted in ways that increased paternity confidence would be at a selective advantage, as this would incentivize paternal investment in offspring. While, in this age of DNA paternity testing, it may seem odd to think that human relationships are heavily-influenced by paternity-establishment instincts, it should be remembered that adaptive traits such as male jealousy and female fidelity signaling were ingrained in human behavior over a 2.5-million-year period, while DNA testing has been available for less than half a century—not nearly long enough to change innate aversions to polyandry. See, e.g., P.B. Gray et al., *Hormonal correlates of human paternal interactions*, 52 *HORMONES & BEHAV.* 499 (2007) ("Most evolutionary models suggest that human paternal care arose among our Homo ancestors within approximately the past 2.5 million years."); A. JAMIE CUTICCHIA, *GENETICS: A HANDBOOK FOR LAWYERS* 51-58 (2009) (discussing the emergence of genetic paternity testing in the 1970s); Josef Uyeda, *Lasting evolutionary change takes about one million years*, OREGON ST. U., Aug. 22, 2011, http://oregonstate.edu/ua/ncs/arc_hives/2011/aug/lasting-evolutionary-change-takes-about-one-million-years ("[S]cientists have discovered that although evolution is a constant and sometimes rapid process, the changes that hit and stick tend to take a long time. Give or take a little, one million years seems to be the magic number.").

assumption of male sexual jealousy. While these natural instincts and social mores work well in monoandrous contexts, they can serve to undermine polyandrous relationships.

For example, on the part of males, sexual jealousy and mate-guarding behaviors are paternity-related adaptations that are reflected by marriage norms.⁴⁴ The marital presumption of paternity, the once-common legal (and still common social) double-standard regarding adultery and premarital chastity, and the near-universal rejection of polyandry show how marriage norms are built on the assumption that husbands will exhibit sexual-jealousy and will mate-guard their wives.⁴⁵ Several female fidelity-signaling adaptations⁴⁶ designed to increase their male partner's paternal confidence are also associated with marriage, including an aversion to indiscreet sex with multiple males,⁴⁷

⁴⁴ See, e.g., Dirk Bethmann & Michael Kvasnicka, *The institution of marriage*, 24 J. POPUL. ECON. 1005, 1010-11 (2011) ("There is ample evidence for the importance of paternity and paternity confidence for male mating and parenting behavior, as well as for societal arrangements that govern mating markets in societies. Corroborative pieces of evidence include higher mate guarding among men [and] male jealousy."). For a general overview of how paternity establishment has played a central role in the evolution of the institution of marriage, see Gage Raley, *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Claims*, 19 VA. J. SOC. POL'Y & L. 133, 139-60 (2011).

⁴⁵ See, e.g., Bethmann & Kvasnicka, *supra* note 43 ("[T]he once exclusive definition of adultery with respect to the marital status of women in many societies, the general importance attached to female premarital chastity, the commonness of polygyny but rareness of polyandry, and the universality of the paternity presumption in marital arrangements across societies all bear witness to the predominantly reproductive nature of marriage as an institution and the pivotal role of paternal uncertainty for human mating markets.").

⁴⁶ See DAVID M. BUSS, *THE EVOLUTION OF DESIRE – REVISED* 114 (2008) ("In light of men's emphasis on fidelity in a committed relationship, displays of fidelity should in evolutionary terms be paramount in women's tactics of attraction.").

⁴⁷ Since mating with multiple male partners undermines paternity confidence and "is not conducive to the development of a long-term committed relationship with a mate who will provision and support the female and her offspring," the authors of a study on human mating strategies "anticipated that males would be more likely than females to mate with multiple concurrent opposite-sex partners." Susan M. Hughes et al., *Sex differences in mating strategies: Mate guarding, infidelity and multiple concurrent sex partners*, 6 SEX. EVOL. & GENDER 3 (2004). Consistent with this theory, only 17% of female college students expressed a willingness to engage in a threesome with two male partners, while 76% of male students expressed a willingness to engage in a threesome with two females. *Id.* at 9. The incorporation of female sexual exclusivity into the institution of marriage is evidenced by the rarity of polyandry and the historically-common sex-based double-standard regarding adultery. See, e.g., J. Patrick Gray, *Ethnographic Atlas Codebook*, 10 WORLD CULTURES 86, 90 (1998) (finding that, of the 1,231 societies evaluated, examples of polyandry could be found in only four); MARTIN DALY & MARGO WILSON, *HOMICIDE* 191-92 (1988) (finding that, due to paternity establishment concerns, adultery with or by a married woman was universally subjected to harsher sanction than adultery by or with a married man before modern times, and that this is even reflected in the word itself, as "[t]he 'adulteration' in adultery—the 'extraneous or improper ingredient'—is the risk of successful insemination.").

preference for sleeping together with a male partner,⁴⁸ deference to a male partner's authority,⁴⁹ and orgasm.⁵⁰

Obviously, these natural instincts and social norms pose problems for polyandry. Male jealousy and its derivative influences will present an ever-present challenge for polyandrous relationships, as “[s]exual jealousy functions to defend paternity confidence and is therefore [. . .] a ubiquitous aspect of male psychology.”⁵¹ Researchers have identified male sexual jealousy as the primary reason polyandry “is a less stable marital form than monogamy or polygyny.”⁵²

The only type of polyandrous marriage that has had some (albeit limited) success in overcoming the male jealousy hurdle is fraternal polyandry,⁵³ where “a wife of one brother becomes the wife of all.”⁵⁴ This type of “fraternal arrangement moderates the jealousy of the males and ensures that the offspring are related to them,”⁵⁵ as “each man is guaranteed to be at least an uncle.”⁵⁶ Fraternal polyandry is most widely found in the

⁴⁸ In finding that females have a stronger preference for sleeping with their partner following sex and imitated the practice more often than males, researchers speculated that it is “possible that females use sleeping together to accommodate and minimize male suspicions of cuckoldry. That is, a female who remains in close proximity to her mate after retiring at night may reassure her fidelity. By promoting greater paternity confidence, this, in turn, would increase the likelihood that the male will provision and care for her and her offspring.” Susan M. Hughes et al., *Sex differences in mating strategies: Mate guarding, infidelity and multiple concurrent sex partners*, 6 *SEX. EVOL. & GENDER* 3 (2004). Sleeping together is, of course, a common characteristic of marriage. See, e.g., Wendy M. Troxel et al., *Marital quality and the marital bed: Examining the covariation between relationship quality and sleep*, 11 *SLEEP MED REV.* 389 (2007) (“most married adults sleep with their spouse”); NATIONAL SLEEP FOUNDATION, 2013 INTERNATIONAL BEDROOM POLL 21 (2013) (finding that, in every country surveyed, a strong majority of people who were married or otherwise cohabitating slept with their significant other).

⁴⁹ In investigating the origins of gender inequality, evolutionary theorists have speculated that the historically-common practice of female deference to a male partner's authority may be a female strategy to increase the male's paternity confidence and secure his provisioning for her offspring. See, e.g., Richard Machalek & Michael W. Martin, *Neo-Darwinian Evolutionary Theory and Socialogy*, in *HANDBOOK ON EVOLUTION AND SOCIETY: TOWARD AN EVOLUTIONARY SOCIAL SCIENCE* 14 (Alexandra Maryanski et al. eds., 2015) (stating that “females might signal their ‘controllability’ and therefore provide assurance to prospective mates of their fidelity”). Male authority mating strategies were reflected in Western marriage law until relatively recently, as “[u]nder the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity.” *Obergefell v. Hodges*, 135 S.Ct. 2584, 2596 (2015).

⁵⁰ “The paternity confidence hypothesis proposes that female orgasm evolved to enable ancestral women to signal a partner that she was satisfied with him, thereby motivating him to remain with her to help support their forthcoming young.” Helen E. Fisher & J. Anderson Thomson, Jr., *Lust, Romance, Attachment*, in *EVOLUTIONARY COGNITIVE NEUROSCIENCE* 264 (Steven M. Platek et al. eds., 2007). Consistent with this theory, women “report greater frequency of orgasm in long-term, committed relationships, and the onset of anorgasmia in the middle of a long-term mateship may jeopardize the stability of this relationship.” *Id.*

⁵¹ Martin Daly et al., *Male Sexual Jealousy*, 3 *ETHOLOGY & SOCIOBIOLOGY* 11 (1982).

⁵² Katherine E. Starkweather & Raymond Hames, *A Survey of Non-Classical Polyandry*, 23 *HUM. NAT.* 149, 165 (2012).

⁵³ See, e.g., LARRY ARNHART, *DARWINIAN NATURAL RIGHT: THE BIOLOGICAL ETHICS OF HUMAN NATURE* 264 (1998) (“In the few cases where it does occur, polyandry is fraternal.”).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ DAVID P. BARASH, *OUT OF EDEN: THE SURPRISING CONSEQUENCES OF POLYGAMY* 105 (2016).

Himalayas, where it is practiced to keep small family land plots from being divided as they are passed down through the generations.⁵⁷

But even when co-husbands share biological ties, sexual jealousy can still destabilize the marriage. Researchers have reported “numerous and violent quarrels between brothers,” which “may be the reverberations of repressed sexual hostility.”⁵⁸ Wives in these marriages have remarked that “[j]ealousy is really common” in regard to sex, and that co-husbands often “fight and leave.”⁵⁹

In the extremely-rare cases of polyandry between non-related males, the marriages “are unstable and sometimes explosive.”⁶⁰ Since “[c]oercive constraint of female sexuality by the use or threat of male violence appears to be cross-culturally universal,”⁶¹ there is a very real danger that sexual rivalry between unrelated husbands can escalate into bloodshed. One of the most well-known examples of non-fraternal polyandry is found in Inuit society,⁶² and in these households, “the co-husbands are always jealous and one often murders the other.”⁶³

Physical-separation of co-husbands, whether they are related or not, is crucial to the success of polyandrous unions. In polyandrous societies, co-husbands often engage in different types of seasonal work, leaving only one husband in the house

⁵⁷ Lydia Polgreen, *One Bride for 2 Brothers: A Custom Fades in India*, N.Y. TIMES, July 16, 2010, <http://www.nytimes.com/2010/07/17/world/asia/17polyandry.html> (explaining that Himalayan polyandry is a “practical solution to a set of geographic [. . .] problems. People here survived off small farms hewed from the mountainsides at an altitude of 11,000 feet, and dividing property among several sons would leave each with too little land to feed a family”).

⁵⁸ David G. Mandelbaum, *Polyandry in Kora Society*, 18 MAN IN INDIA 49 (1938). See also Nancy E. Levine & Joan B. Silk, *Why Polyandry Fails: Sources of Instability in Polyandrous Marriages*, 38 CURRENT ANTHROPOLOGY 375, 386 (1997) (“In Tibetan households, the eldest brother has greater authority and may take advantage of his position to [. . .] sexually monopolize the common wife. It is plausible that strong-willed younger siblings resent this.”); Starkweather, *supra* note 24 at 24 (finding that the oldest brother often allow the younger brothers sexual access to the common wife only when she is not thought to be ovulating, if at all).

⁵⁹ WILLIAM R. JANKOWIAK, INTIMACIES: LOVE AND SEX ACROSS CULTURES 131 (2013). Younger brothers in particular tend to “leave when new marital prospects materialize.” Kathrine E. Starkweather & Raymond Hames, *Exploration into Human Polyandry: An Evolutionary Examination of the Non-Classical Cases*, 23 HUMAN NATURE 149, 165 (2012); see also Pinker, *supra* note 35 at 477 (stating that “[t]he junior brother” in fraternal polyandrous marriages usually “aspires to have a wife of his own.”).

⁶⁰ L.R. Hiatt, *Polyandry in Sri Lanka: A Test Case for Parental Investment Theory*, 15 MAN 583, 587 (1980). See also Levine & Silk, *supra* note 57 at 386 (“In Sri Lanka, where polyandry is not always fraternal, co-husbands who are brothers have more stable marriages than unrelated men.”); Starkweather, *supra* note 23 at 96 (stating that among Amazonian Yanomamö tribe, non-fraternal polyandry “caused a great deal more intra-marital conflict than did fraternal polyandry”).

⁶¹ Martin Daly et al., *supra* note 51.

⁶² Starkweather, *supra* note 23 at 72 (stating that among the Netsilik Inuit of northern Canada, “[w]hen polyandry occurs, it is typically non-fraternal and very unstable, relative to other types of Netsilik unions”).

⁶³ Pinker, *supra* note 34 at 476-77.

at a given time.⁶⁴ Situations where co-husbands take turns being absent from home are so common that researchers have developed a “Prolonged Male Absence Hypothesis” of polyandry,⁶⁵ which holds that prolonged husband absences both necessitate polyandry and help maintain harmony by keeping potentially-rivalrous co-husbands apart.

Besides the sharing of blood ties or a roof, several other factors can influence the risks of jealousy-based conflicts in polyandrous marriages. “Marriages with more men are said to be prone to discord and difficult to sustain,” as there are more husbands competing for access to the common wife.⁶⁶ Female fidelity-signaling can also cause problems, as a wife may feel an instinctual urge to increase a particular husband’s paternity confidence by rejecting the sexual advances of other husbands.⁶⁷

While women generally do not exhibit the same levels of sexual jealousy that men do because they “do not risk investing inadvertently in unrelated offspring,” women do “experience jealousy as a response reducing or eliminating the threat of resource loss,” as they “risk losing access to resources critical for reproduction if men divert resources to attract other women.”⁶⁸ “Co-wife conflict is ubiquitous in polygynous households,”⁶⁹ and conflict and competition are especially common “in situations where wives are

⁶⁴ For example, the Tibetan “subsistence economy requires males to travel a lot,” Melvyn C. Goldstein, *When Brothers Share a Wife*, 96 NAT. HIST. 38, 43 (1987), so in polyandrous households, “one brother might be in charge of farming the field, while a second brother takes charge of herding the family’s sheep, and a third brother engages in trade. Such a division of labor creates a situation in which each brother will have different periods of the year in which he is absent from the house, thus making it possible, in principle, for all the brothers to have sexual access to their wife without great tension.” Likewise, in Inuit society, “polyandry seems to be an adaptation to long male absences.” Katherine E. Starkweather & Raymond Hames, *A Survey of Non-Classical Polyandry*, 23 HUM. NAT. 149, 152 (2012). When a husband must go on long hunting expeditions, “a fear of wife abduction or unfaithfulness” leads him to “arrange a second husband (again, frequently his brother) for his wife because he knows that, when he must be absent, the second husband will protect his wife—and thus his interests. And if she gets impregnated while Husband #1 is gone, it will be by someone of whom he has approved in advance.” Alice Dreger, *When Taking Multiple Husbands Makes Sense*, ATLANTIC, Feb. 1, 2013, <https://www.theatlantic.com/health/archive/2013/02/when-taking-multiple-husbands-makes-sense/272726/>.

⁶⁵ See Starkweather, *supra* note 23 at 37 (explaining that, under this theory, “prolonged absences of husbands from home should be a predictor of polyandry”).

⁶⁶ Levine & Silk, *supra* note 57 at 379. To avoid this problem, Tibetan families employ “[v]arious mechanisms [. . .] to limit the number of marrying brothers,” including “sending sons off to join a monastery [or] to find their fortunes elsewhere.” *Id.*

⁶⁷ In Tibetan polyandrous families, for example, “[w]omen usually develop special romantic attachments to one or another of their husbands,” leading “one or more of the brothers [to feel] that she has neglected him.” Nancy E. Levine, *Nyinba Polyandry and the Allocation of Paternity*, 11 J. COMP. FAM. STUD. 283, 288 (1980). See also Goldstein, *supra* note 63 (explaining that wives sometimes exhibit “sexual favoritism” based on age, such as sleeping exclusively with the oldest brother or finding a younger brother more attractive due to his youth).

⁶⁸ Jonathan Stieglitz et al., *Infidelity, jealousy, and wife abuse among Tsimane forager-farmers: Testing evolutionary hypotheses of marital conflict*, 33 EVOL. HUM. BEHAV. 438, 441 (2012). Interestingly, the risk of female competition over shared resources is one reason Tibetan brothers choose polyandry over monogamy. These brothers, who must share small plots of inherited family land, turn to polyandry because they “value their unity, which would be impossible to maintain with a number of sisters-in-law under the same roof.” SARVA DAMAN SINGH, *POLYANDRY IN ANCIENT INDIA* 172 (1978).

⁶⁹ Joseph Henrich et al., *The Puzzle of Monogamous Marriage*, 367 PHIL. TRANS. R. SOC. B 657, 665 (2012) (the author goes on to note that “[f]rom anthropology, a review of ethnographic data from 69 non-sororal polygynous societies from around the globe reveals no case where co-wife relations could be described as harmonious”).

materially dependent on the husband.”⁷⁰ Competition between co-wives for material resources can even “boil into violence.”⁷¹

Like polyandry, polygyny is more stable when co-spouses are siblings. Sororal polygyny is very common across the globe;⁷² in fact, it is almost as common as non-sororal polygyny.⁷³ Evolutionary theorists suggest that “competition among co-wives for scarce resources may be one of the reasons why sororal polygyny is very common,”⁷⁴ as kin selection encourages them to cooperate rather than compete. In these marriages, there is “less conflict among the wives because each is an aunt to the other’s children,”⁷⁵ and thus mothers are less resentful about material resources being diverted to the other wives’ children.⁷⁶

Also like polyandrous marriages,⁷⁷ the risk of instability in polygynous marriages increases as the number of wives increases. There are more opportunities for tensions to arise when resources are being divided among a larger number of wives and children.⁷⁸ Astonishingly, “polygynous families with more than two wives are five times more likely to divorce.”⁷⁹

Unlike polyandry, the necessity of physical separation in polygynous households largely depends on whether the co-spouses are siblings or not.⁸⁰ “When co-wives are relatives they can more easily cooperate (humans have an evolved psychology for helping

⁷⁰ BRYAN STRONG & THEODORE F. COHEN *THE MARRIAGE AND FAMILY EXPERIENCE: INTIMATE RELATIONSHIPS IN A CHANGING SOCIETY* 10 (2016).

⁷¹ ROBERT C. BROOKS, *SEX, GENES & ROCK 'N' ROLL: HOW EVOLUTION HAS SHAPED THE MODERN WORLD* 212 (2011). See also DEEPA NARAYAN-PARKER & PATTI L. PETESCH, *FROM MANY LANDS* 105 (2002) (“Violence between women can arise between co-wives over the sharing of things bought by the husband, or such fights may be a carry-over of conflicts between children of different women”); David Levinson, *Family Violence in Cross-Cultural Perspective*, in *HANDBOOK OF FAMILY VIOLENCE* 438 (Alan S. Bellack et al. eds., 2013) (stating that “in polygynous societies violence between co-wives is not uncommon”).

⁷² Bron B. Ingoldsby, *Marital Structure*, in *FAMILIES IN GLOBAL AND MULTICULTURAL PERSPECTIVE* 103 (Bron B. Ingoldsby & Suzanna D. Smith eds., 2006) (stating that “sororal polygyny is very common in polygynous societies”).

⁷³ See, e.g., Bobbi S. Low, *Ecological and socio-cultural impacts on mating and marriage systems*, in *OXFORD HANDBOOK OF EVOLUTIONARY PSYCHOLOGY* 454 (Robin Ian et al. eds., 2007) (stating that across societies, non-sororal polygyny is only “somewhat” more common than sororal polygyny).

⁷⁴ CAREL P. VAN SCHAİK, *THE PRIMATE ORIGINS OF HUMAN NATURE* 184 (2016)

⁷⁵ Barash, *supra* note 55 at 91.

⁷⁶ ALAN MILLER & SATOSHI KANAZAWA, *WHY BEAUTIFUL PEOPLE HAVE MORE DAUGHTERS* 87 (2007) (“[C]onflict and competition for the limited resources of the husband are somewhat alleviated when the co-wives are sisters because they will not object so strongly to the diversion of the resources to the new wife and her children, to whom the senior wife is related.”). It is worth noting that even in some societies that practice non-sororal polygyny, such as fundamentalist Mormon communities, the unrelated wives refer to each other as “sister-wives,” and such terminology may be paying unconscious homage to the effectiveness of sororal polygyny. See, e.g., DOROTHY ALLRED SOLOMON, *THE SISTERHOOD: INSIDE THE LIVES OF MORMON WOMEN* 2 (2007).

⁷⁷ See text accompanying *infra* notes 63-64.

⁷⁸ This risk is one of the reasons polygynous Islamic societies closely-regulate the number of uxorial households a man may maintain. Iranian law, for example, “currently allows Muslim men to have up to four wives, but only after obtaining a court order demonstrating the permission of the first spouse and his ability to treat them all equally.” *Iranian women fight controversial ‘polygamy’ bill*, AMNESTY INT’L, Nov. 30, 2011, <https://www.amnesty.org/en/latest/news/2011/11/iranian-women-fight-controversial-polygamy-bill/>.

⁷⁹ JOSEPH HENRICH ET AL., *ELECTRONIC SUPPLEMENTARY MATERIALS FOR THE PUZZLE OF MONOGAMOUS MARRIAGE* 8 (2012).

⁸⁰ Ingoldsby, *supra* note 76 (“If the co-wives are sisters or other close relatives, then they tend to share the same residence; and if they are not related they are usually given separate households.”).

blood relatives), and tend to live in the same house.”⁸¹ Conversely, “[i]n most cultures in which a man marries a number of women who are unrelated, each wife usually has her own separate dwelling, which helps to minimize conflict among the cowives.”⁸² Anthropological surveys reveal that co-wives who are sisters are more than four times as likely to live together than apart, while non-related wives are less than half as likely to live together than apart.⁸³

III. POLYGAMY AND PARENT-CHILD RELATIONS

Polygamy can affect the parent-child relationship in two major ways: paternal neglect and child abuse. Paternal uncertainty can contribute to paternal neglect in polyandrous homes, while favoritism and fear of perceived favoritism can lead to paternal neglect in polygynous homes. The risk of child abuse increases along with the number of unrelated step-parents in the household, regardless of whether the marriage is polyandrous or polygynous.

Regarding neglect, “[b]oth theory and empirical data suggest polygamous families invest fewer resources into each child.”⁸⁴ The causes of diminished investment vary depending on whether the marriage is polyandrous or polygynous.

Like many features of polyandrous households, the issue of paternal investment is understudied. Theoretically, confusion of paternity could lead to “lowered or lack of investment on the part of the doubting male” in polyandrous households.⁸⁵ Polyandry “select[s] for reduced male care relative to monandry,”⁸⁶ because “[w]hen multiple men are officially married to one woman, who is ‘supposed to’ mate with all of them, the co-husbands have very little reason to believe that a given child of hers is genetically his, and therefore will not be very motivated to invest in it.”⁸⁷

Even in fraternal polyandrous marriages, where every brother has a genetic incentive to help support every child (who, if not his own child, is at least his niece or nephew), families still seek to prevent paternal uncertainty from arising. Polyandrists often have husband “rotation” practices⁸⁸ which can help facilitate paternity establishment. In Tibet, for example, paternity establishment is made possible by the fact it is “uncommon for all of a woman’s husbands to be home simultaneously,” and Tibetan women in polyandrous relationships keep close track of which husband they were sleep-

⁸¹ JOSEPH HENRICH ET AL., *supra* note 78.

⁸² JAMES PEOPLES & GARRICK BAILEY, *HUMANITY: AN INTRODUCTION TO CULTURAL ANTHROPOLOGY* 171 (2008).

⁸³ Henrich et al., *supra* note 78 at 9.

⁸⁴ JASPER F. WIRTSHAFTER, *ARE UNITED STATES ANTI-POLYGAMY LAWS EFFICIENT?* 27 (2016).

⁸⁵ Starkweather, *supra* note 23 at 16.

⁸⁶ LUKE HOLMAN AND HANNA KOKKO, *THE CONSEQUENCES OF POLYANDRY FOR POPULATION VIABILITY, EXTINCTION RISK AND CONSERVATION* 2 (2012).

⁸⁷ Miller & Kanazawa, *supra* note 75, at 86.

⁸⁸ *See, e.g.,* Goldstein, *supra* note 63; TSUNG-LIEN SHÊN & SHÊN-CHI LIU *TIBET AND THE TIBETANS* 142 (1953); ADAM JONES, *MEN OF THE GLOBAL SOUTH: A READER* 76 (2008).

ing with during menstrual cycles.⁸⁹ This increases the chance that the biological father will be able to identify and develop an “especially close and affectionate relationship” with his children.⁹⁰

Even when biological paternity is known in fact, however, instinctive paternal bonding might be impaired in polyandrous families. Philosopher Bertrand Russell wrote that mate-guarding during the period around conception and pregnancy was key to paternal bonding, stating that “[i]f a man is absent from his wife” during this stage, “he will not instinctively feel affection for the child.”⁹¹ This could pose a problem for polyandrous marriages where the biological father becomes absent soon after conception.

The instinctive father-child bond might also fail to develop even when the biological father is not absent, if a co-husband is also present in the household. Paternal investment is directly correlated with a husband’s “assessment of a wife’s fidelity.”⁹² If multiple husbands are living under the same roof around the time of conception, this could lead to subconscious uncertainty of paternity.

Though polygynous families do not face the same paternity establishment issues that polygynous families do, diminished paternal investment can still be a tricky matter for polygynists. It has long been recognized that in large polygynous families, fathers can be stretched thin when dividing their resources and attention among the children of multiple wives.⁹³ But even in small polygynous households, paternal investment might be diminished due to family politics.

While rivalry between co-wives is well-covered in research, “less noted is the fact that how a man values his various women has a considerable influence on how he supports their children.”⁹⁴ A “father is likely to choose as his favorite children those of his favorite wife,” and there is a risk that children of favored wives will receive more than their fair share of paternal resources, leaving other children deficient.⁹⁵ Some polygynous men even “rationalize that investing disproportionately” in one particular child “is a good idea, because this sibling will be better positioned to help the younger siblings.”⁹⁶

Attempts to avoid favoritism can also lead to paternal neglect. “Small acts of favoritism, whether real or perceived, infuse polygynous life,”⁹⁷ so to avoid conflict,

⁸⁹ Levine, *supra* note 66, at 290.

⁹⁰ *Id.*

⁹¹ BERTRAND RUSSELL, MARRIAGE AND MORALS 13 (W. W. Norton & Co., 1970) (stating that “if a man remains with his wife during pregnancy and child-birth he has an instinctive tendency to be fond of the child when it is born, and this is the basis of the paternal sentiment”).

⁹² MICHAEL P. MUEHLENBEIN, HUMAN EVOLUTIONARY BIOLOGY 357 (2010).

⁹³ See CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 314 (1751) (arguing that “the father and mother cannot have the same affection for their offspring” in a polygamous marriage, as “a father cannot love twenty children with the same tenderness as a mother can love two”).

⁹⁴ Caroline Bledsoe, *Marginal members: Children of previous unions in Mende households in Sierra Leone*, in SITUATING FERTILITY: ANTHROPOLOGY AND DEMOGRAPHIC INQUIRY 134 (1995).

⁹⁵ Caroline Bledsoe, *Mende education and child fosterage transactions*, in SEX AND GENDER HIERARCHIES 173-74 (Barbara D. Miller ed., 1993) (noting cases where “resentments flare” over the “favoritism accorded one wife and her children,” such as when a “senior, favored wife hoards household resources, or if a man favors his pretty, young wife”).

⁹⁶ *Id.* at 176.

⁹⁷ Bledsoe, *supra* note 94 at 173.

“polygynous men must carefully balance their emotions and behaviors so as not to show favoritism.”⁹⁸ “Because husbands should avoid overt signs of favoritism, many provide their wives and children with a few basics, leaving the women to furnish everything else for their own children.”⁹⁹

Co-wife rivalries can also complicate a father’s efforts to provide specialized investment for children according to their individual strengths.¹⁰⁰ Accusations of favoritism can be particularly problematic when it comes to investing more heavily in the education of a child who exhibits higher academic potential than his or her siblings.¹⁰¹ Some men “go to elaborate ends to hide the fact that they are educating such children” in order to avoid charges of favoritism.¹⁰²

Regarding polygamy and child abuse, research shows that “[c]hildren residing in households with unrelated adults were nearly 50 times as likely to die of inflicted injuries than children residing with 2 biological parents.”¹⁰³ Abuse by stepparents is known as the “Cinderella effect.”¹⁰⁴ The risk of child abuse in polygamous households can be substantial, as multiple unrelated co-spouses may reside under the same roof with their stepchildren.

There is virtually nothing in existing literature concerning the frequency of child abuse in polyandrous marriages. However, we can glean some inferences about child abuse risks in polyandrous families based on general evolutionary theory.

Polyandry “necessarily entail[s] paternal uncertainty among the co-husbands,”¹⁰⁵ but whether uncertainty of paternity leads to a higher or lower risk of abuse is unclear. Some argue that “confusion of paternity could possibly result in negative consequences,” including “infanticide or juvenicide” by the “doubting male.”¹⁰⁶ Others argue that “confusion of paternity leads to a decreased chance of infanticide,” as men do not want to risk harming a child that might be their own.¹⁰⁷

Due to practices such as husband rotation, paternity is not usually a complete mystery in most polyandrous homes.¹⁰⁸ DNA testing also allows a co-husband to

⁹⁸ JOHN MUKUM MBAKU, *CULTURE AND CUSTOMS OF CAMEROON* 156 (2005).

⁹⁹ Bledsoe, *supra* note 94 at 172.

¹⁰⁰ *Id.* at 175-76 (giving the example of a man sending one wife’s intellectually-gifted child to a “prestigious” academically-oriented school and sending another wife’s child to a “less expensive carpentry apprenticeship,” and explaining that “[w]hile such economies make sense to men, they can lead to open conflict among the women.” The author further explains that co-wife conflict over educational spending is motivated not only by “worry about their own children’s education” but also out of a desire to handicap the future earning potential of their rivals’ children).

¹⁰¹ *Id.* at 182.

¹⁰² *Id.*

¹⁰³ Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting From Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 *PEDIATRICS* 687 (2005).

¹⁰⁴ Greg A. Tooley et al., *Generalising the Cinderella Effect to unintentional childhood fatalities*, 27 *EVOL. HUM. BEHAV.* 224 (2006) (stating that research “has demonstrated repeatedly that, relative to children living with both biological parents, step children are at dramatically increased epidemiologic risk of being the victims of physical abuse and homicide,” and that this phenomenon is referred to as the “Cinderella Effect”).

¹⁰⁵ Barash, *supra* note 55 at 115.

¹⁰⁶ Starkweather, *supra* note 23 at 16.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ See *supra* text accompanying notes 87-89.

conclusively determine if he is the biological father of a child of the common wife. Unfortunately, certainty of non-paternity may actually increase the risk of child abuse, as it removes the potential protection of confusion of paternity discussed above.¹⁰⁹ This risk may be heightened in non-fraternal polyandrous households,¹¹⁰ and especially those in which the known biological father is periodically absent for substantial amounts of time.¹¹¹

There may be less potential for abuse when co-husbands are brothers. Due to kin selection, men are less likely to harm children who are genetically-related to them. Fraternal co-husbands can also serve as “insurance” fathers for their nieces and nephews, reducing the wife’s need to seek out a new husband who is unrelated to her children if the biological father dies or leaves.¹¹²

While there is little available research about child abuse in the polyandrous context, there is abundant evidence that it is a major problem in polygynous marriages. Both the historical record and modern anthropology show that co-wives are prone to mistreating and even physically-harming their stepchildren.¹¹³ “[C]onflict and competition [between co-wives] can have appalling effects on the health and survival of the children,”¹¹⁴ including a heightened risk of infanticide.¹¹⁵

Though “stepmothers are often omitted” from child abuse statistics “because small children live with stepmothers so infrequently,” what limited data exists suggests that stepmothers abuse stepchildren at rates comparable to—and perhaps even greater than—stepfathers.¹¹⁶ In particular, stepmothers “represent a substantially greater risk of

¹⁰⁹ See *supra* text accompanying note 106.

¹¹⁰ Unlike fraternal co-husbands, unrelated co-husbands have no genetic stake in the well-being of other husbands’ children.

¹¹¹ See National Fatherhood Initiative, *Why Fatherhood Matters*, <http://www.fatherhood.org/why-fatherhood-matters>, citing CPS INVOLVEMENT IN FAMILIES WITH SOCIAL FATHERS: FRAGILE FAMILIES RESEARCH BRIEF No.46 (2010) (finding that “the absence of a biological father contributes to increased risk of child maltreatment. [. . .] It is believed that in families with a non-biological (social) father figure, there is a higher risk of abuse and neglect to children, despite the social father living in the household”).

¹¹² Starkweather, *supra* note 23 at 35 (“[H]aving two husbands who are more often than not brothers or close relatives, could ensure a rapid replacement of the primary husband by another man who has already been investing in the wife and her children, which means that there will be no lapse in protection or provisioning for by a male and may also decrease the chances of infanticide or juvenicide by the hands of an unrelated male.”).

¹¹³ See Raley, *supra* note 29, at ___ (“The historical record is replete with examples of abusive relationships between co-wives and stepchildren. Folktales and anecdotal accounts in modern polygynous societies also suggest that it is a major source of domestic violence.”).

¹¹⁴ ROBERT C. BROOKS, *SEX, GENES & ROCK ‘N’ ROLL: HOW EVOLUTION HAS SHAPED THE MODERN WORLD* 212 (2011).

¹¹⁵ See, e.g., Barash, *supra* note 55 at 62 (stating that the risk of infanticide is “probably more pronounced” in polygynous marriages than in monogamous marriages); K. Abbassioun et al., *Intracranial sewing needles: review of 13 cases*, 42 J. NEURO. 1046 (1979) (stating that in Middle Eastern countries where “polygamy was widespread, abuse of children by other wives was common,” and that the “[i]ntroduction of needles into the chest and abdomen” of infants was “commonly reported in the newspapers” to be a clandestine method of infanticide favored by co-wives who desired to kill a rival’s child).

¹¹⁶ MARTIN DALY & MARGO WILSON, *THE “CINDERELLA EFFECT”: ELEVATED MISTREATMENT OF STEPCHILDREN IN COMPARISON TO THOSE LIVING WITH GENETIC PARENTS* 6 (2005) (“[S]tepmothers are often omitted from the data presentation [. . .] because small children live with stepmothers so infrequently[. . .] Nevertheless, all available evidence indicates that excess risk from stepmothers (relative to genetic mothers) is roughly on the same order as excess risk from stepfathers (relative to genetic fathers”).

flicide” than stepfathers, and stepmaternal flicides exhibit more “extreme ongoing abuse and severe neglect” than steppaternal murders.¹¹⁷

Polygynous families are likely at even greater risk of abuse by stepmothers than are monogamous families. Research shows that a child’s regular contact with his or her biological mother is “related to lower quality relationships between stepmothers and stepchild.”¹¹⁸ This suggests that, since co-wives maintain custody of their own children, they are less likely to assume a surrogate mother role and more likely to view their stepchildren as members of a rival family.

Conflicts between senior wives and junior wives are a common cause of child abuse. “In many cultures the senior wife is reported to be overbearing and cruel to an incoming junior wife,” viewing her as an intruder into the marriage.¹¹⁹ “Many domestic battles are waged by senior wives who resent the impertinence of a pretty, young wife,” and children may become collateral damage in such battles.¹²⁰

Disputes over specialized paternal investment is another major source of child abuse in polygynous households. Such investment, as noted earlier, is often perceived as “favoritism” and is an especially-sensitive issue in polygynous households, as it implicitly passes judgment on the abilities and potential of specific children.¹²¹ Conflict over specialized treatment “can result in domestic altercation or even in harm to the child.”¹²²

Though the outcome of children in sororal polygynous marriages is an understudied subject,¹²³ it is reasonable to assume that there less risk for abuse when co-wives are sisters. Thanks to kin selection, co-wives have a “genetic interest in the success of her nieces and nephews.”¹²⁴ This conclusion is backed by a study that found that the risk of infant mortality is lower when co-wives are sisters than when they are unrelated.¹²⁵

It is also reasonable to assume that the risk of child abuse by co-wives is reduced when unrelated wives and their children are separated from each other. When a husband provides each unrelated wife a separate dwelling for herself and her children, this “helps to minimize conflict.”¹²⁶

¹¹⁷ Grant T. Harris et al., *Children killed by genetic parents versus stepparents*, 28 EVOL. HUM. BEHAV. 85, 92 (2007).

¹¹⁸ W. Glenn Clingempeel & Sion Segal, *Stepparent-Stepchild Relationships and the Psychological Adjustment of Children in Stepmother and Stepfather Families*, 57 CHILD DEVELOPMENT 474, 475 (1986)

¹¹⁹ William Jankowiak et al., *Co-Wife Conflict and Co-operation*, 44 ETHNOLOGY 81, 92 (2007).

¹²⁰ Bledsoe, *supra* note 94 at 173.

¹²¹ For example, in regard to extra educational spending on intellectually-gifted children, a father’s “rationale of academic ability does nothing to alleviate the ill feeling of wives whose children are not perceived as clever.” *Id.* at 182.

¹²² *Id.* (emphasis added).

¹²³ Barash, *supra* note 55 at 91 (“There haven’t been many quantitative studies of reproduction in sororal harems.”)

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ GARRICK BAILEY & JAMES PEOPLES, ESSENTIALS OF CULTURAL ANTHROPOLOGY 167 (2013).

IMPLICATIONS

The information presented in this Article can be of use for judges in cases involving polygamous families, particularly in child placement and child custody cases. This Article concludes by offering a short list of practical questions that can help a family court determine whether a particular polygamous household would be a healthy environment for a child:

1. *Are the co-spouses siblings or unrelated?*

The thought of siblings sharing a spouse may strike those unfamiliar with polygamy as disturbing and vaguely incestuous. These types of relationships, however, are very common throughout the world, and that experience shows that polygamous households are more harmonious when co-spouses are siblings. Fraternal polyandry and sororal polyandry both tend to provide a more stable home life for children than marriages where co-spouses are genetic strangers.

A judge, therefore, should consider co-spouse relatedness to be a positive rather than negative factor when it comes to the stability of a polygamous household. Conversely, if the co-spouses are unrelated, the judge should be aware that rivalries are more likely to arise. Judges should be particularly concerned about the presence of unrelated co-husbands, as the literature suggests that these marriages are highly-unstable.

2. *How many co-spouses does the marriage contain?*

The more spouses that are party to a marriage, the more unstable the marriage tends to be. Opportunities for conflict increase with the number of spouses, as does the risk of divorce. The risk of the “Cinderella effect” manifesting itself also increases as the number of co-spouses/stepparents increases.

Judges should view large numbers of co-spouses as a potential red flag. Research indicates that marriages with three or more co-spouses are significantly more unstable than those with just two.¹²⁷ A judge should be on a heightened lookout for signs of trouble when a spouse has multiple co-spouses, or when a child has multiple stepparents.

3. *Do the co-spouses live together?*

Polygamous marriages—especially polyandrous and non-sororal polygynous marriages—tend to be more stable when co-spouses do not share the same roof.

Judges should be aware of how polygamous societies minimize potential conflict through their housing arrangements. Male separation is a fundamental practice of polyandrous societies, so judges might have cause for concern if co-husbands are in day-to-day contact with each other. Unrelated wives also are usually housed in separate facilities, while sororal co-wives tend to share the same roof.

¹²⁷ See Henrich et al., *supra* note 78 (finding that “polygynous families with more than two wives are five times more likely to divorce”); Levine & Silk, *supra* note 57 (finding that polyandrous marriages in Tibet with four husbands ended in partition 58% of the time, those with three husbands partitioned 25% of the time, and households with two husbands partitioned only 10% of the time).

1 4. *Are co-husbands aware of their biological relationship to specific children?*
2

3 The politics of paternity can be tricky in polyandrous marriages. On one hand, a
4 lack of paternal investment may occur when co-husbands are uncertain of paternity, but
5 on the other hand, uncertainty of paternity may mitigate the risks of mistreatment and
6 abuse. Judges, therefore, might find it helpful to inquire into the co-husbands' percep-
7 tion of paternal ties when investigating potential causes of neglect or abuse.

8 5. *Have the co-spouses made accusations of favoritism against the common spouse?*
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10 Sexual jealousy is an ever-present source of tension and defection in polyandrous
11 relationships. A husband may attempt to sexually-monopolize the common wife, and the
12 wife may be inclined to pair-bond with a single husband. The courts, therefore, should
13 take note when a co-husband complains of monopolization of or favoritism by the com-
14 mon wife, as this is a predictable sign of instability in a polyandrous household.

15 Material jealousy is a major cause of conflict in polygynous families. If co-wives
16 have accused the common husband of favoritism in his distribution of his time and
17 resources, judges should become concerned about how such disputes could affect the wel-
18 fare of the children. Accusations of favoritism may cause a father to hesitate about pro-
19 viding individualized investment in his children, and may also increase the risk of child
20 abuse by resentful co-wives.
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