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A POLYGAMIST PROPOSAL: HOW DISPUTE RESOLUTION TECHNIQUES PROVIDE SOLUTIONS IN THE POLYGAMY DEBATE

Ellie Martinez*

I. INTRODUCTION

As the world becomes further interconnected and globalized, we are exposed to a wide range of family structures: nuclear, single-parent, blended, same-sex, and even polygamy.¹ While U.S. state law rarely criminalizes a specific family structure, this was the case

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¹ See generally Lisa D. Pearce et al., *The Increasing Diversity and Complexity of Family Structures for Adolescents*, 28 J. RSCH. ON ADOLESCENCE 591 (2018); Frank Furstenberg, *Fifty Years of Family Change: From Consensus to Complexity*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 14 (2014). A nuclear family is comprised of a mother and father, typically married, and their biological children. *Id.* at 3. A single-parent family is comprised of one mother or one father responsible for all children. *Id.* A same-sex couple is comprised of children living with two parents of the same sex. *Id.* at 4. A polygamous family is comprised of multiple marital partners, many of whom share biological children. Andrew Solomon, *How Polyamorists & Polygamists are Challenging Family Norms*, NEW YORKER (Mar. 15, 2021), <https://www.newyorker.com/magazine/2021/03/22/how-polyamorists-and-polygamists-are-challenging-family-norms>.

in Utah until recently.² For more than a century, polygamy remained a criminal offense in Utah, punishable by up to five years in prison.³ Longstanding tensions between Mainstream Mormons and Fundamentalist Mormons drove this harsh policy.⁴ In 2020, Utah passed a bill decriminalizing polygamy.⁵ However, this legislation only addresses the peripheral interests of polygamous families as many are still disadvantaged.⁶ There must be a better way.

This comment argues the application of dispute resolution techniques would have resulted in a better solution than the current legislation by increasing value-creation for everyone involved.⁷ Part II sets the foundation by delving into the treacherous history of polygamy at both the state level in Utah and the Federal level in the United States. Part III details the passing of the Bigamy Amendments. Part IV identifies relevant parties—many of whom were left out of consideration when Utah passed the bill—and their unique interests in the dispute resolution process. Part V looks at dispute resolution techniques within the legislative process and explores how legislators can apply them to polygamy legislation. Finally, Part VI assesses the process of public dispute resolution and how it may be useful in addressing the many unresolved interests of polygamists and monogamists alike.

² See Christine Hauser, *Utah Lowers Penalty for Polygamy, No Longer a Felony*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/05/13/us/utah-bigamy-law.html>.

³ Jessie L. Embry, *Polygamy*, UTAH HIST. ENCYCLOPEDIA (1994), https://www.uen.org/utah_history_encyclopedia/p/POLYGAMY.

⁴ *Id.* The Mainstream Church of Jesus Christ of Latter-Day Saints, commonly referred to as Mainstream Mormons, has forbidden polygamy since 1904. Solomon, *supra* note 1. Fundamentalist Mormons are originalist Mormon communities that still practice polygamy. *Id.*

⁵ See Bigamy Amendments, Utah. SB 102 (2020); Hauser, *supra* note 2.

⁶ See generally Solomon, *supra* note 1.

⁷ Value-creation includes more than simply creating a win-win situation; rather, it involves maximizing value for all parties and “increasing the size of the pie.” DEEPAK MALHOTRA & MAX H. BRAZEMAN, *NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND* 58 (2007). Value-creation can be accomplished in a variety of ways, including adding more issues to the table or implementing Pareto improvements (improvements that make only one party better off without making any party worse off). *Id.*

II. HISTORY OF POLYGAMY IN UTAH

The history of polygamy in Utah dates back to the 1800s, as the Mormon Church began to openly practice polygamy in 1852.⁸ From 1852 to 1890, Mormon Church leaders promoted the practice of polygamy, specifically encouraging leaders within the church to take additional wives.⁹ At this time, Mormon leaders dominated the Utah legislature and utilized their positional power to enact legislation protecting the practice of polygamy.¹⁰ However, these legislators took special care to avoid using the word “polygamy” outright in an effort to maintain congruency with other states’ laws.¹¹ These early efforts to legally protect polygamy were successful for four main reasons: (1) the appointing of Mormon Church President, Brigham Young, as the first governor; (2) the election of an all-Mormon legislature; (3) probate courts staffed with polygamy-sympathetic Mormon judges had concurrent jurisdiction with the District Courts, giving Mormons more options to settle their disputes in comparison with the District Courts staffed by non-Mormon officers; and (4) the legislature rejected the common law, which, among other things, prohibited bigamy.¹²

However, these protections did not last long as those outside the church responded negatively.¹³ In the words of the Republican Party in 1854, “polygamy and slavery [are] the ‘twin relics of barbarism.’”¹⁴ Despite negative responses like this, the legal protection of polygamy was fairly solid until the passage of two federal acts: the Morrill Anti-Bigamy Act of 1862¹⁵ (the first Federal law to explicitly prohibit bigamy) and the Poland Act of 1874¹⁶ (Federal law that restricted the jurisdiction of the Utah probate courts).¹⁷ In 1979 Brigham Young’s private secretary brought a challenge to the Morrill Act, where the Supreme Court upheld the Act stating, “laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinion, they

⁸ Embry, *supra* note 3.

⁹ *Id.*

¹⁰ Carol Cornwall Madsen, “*At Their Peril*”: *Utah Law and the Case of Plural Wives, 1850–1900*, 21 W. HIST. Q. 425, 425–26.

¹¹ *Id.* at 425. The use of the word “polygamy” in a state’s law would likely trigger special scrutiny from Congress, thus Utah legislators made efforts to avoid scrutiny of polygamy protection. *Id.*

¹² *Id.* at 425–26.

¹³ *See generally* Embry, *supra* note 3.

¹⁴ *Id.*

¹⁵ Ch. 126, § 2, 12 Stat. 501 (1862).

¹⁶ Ch. 468, 18 Stat. 253 (1874).

¹⁷ Madsen, *supra* note 10, at 426.

may with practices.”¹⁸ In 1882, Congress passed the Edmunds Act, which amended the Morrill Act and reaffirmed polygamy as a felony.¹⁹ In a further blow to the practice of polygamy, in 1890 the new president of the Church of Jesus Christ of Latter–Day Saints, Willford Woodruff, publicly denounced polygamy in the “Manifesto” which read, “I publicly declare that my advice to the Latter-Day Saints is to refrain from contracting any marriages forbidden by the law of the land.”²⁰ This initiated an ambiguous period for Mormons; some men left their plural wives while others believed the Manifesto only applied to new marriages.²¹ Over time, the mainstream Mormon Church started to highly discourage polygamy, leading fundamentalist groups to leave the church altogether and form separate communities, believing their peers only denounced polygamy due to governmental pressure.²²

III. THE DECRIMINALIZATION BILL

After more than a century of tension between both polygamy proponents and opponents, the Utah legislature signed Senate Bill 102 into law in 2020.²³ This new law eliminates language deeming bigamy a felony and instead reduces the practice to an infraction “as long as each spouse enters into the marriage voluntarily.”²⁴ The representatives who helped create the bill emphasize this does not legalize bigamy.²⁵ Instead, the law removes “the fear of otherwise law-abiding polygamists of being jailed or having their children taken away from them.”²⁶ However, this is not a holistic solution as it fails to address many of the relevant parties’ interests. Instead, applying a variety of alternative dispute resolution techniques to this

¹⁸ Embry, *supra* note 3; Ch. 126, § 2, 12 Stat. 501

¹⁹ *Id.*; The Edmunds Act, ch. 47, § 1, 3, 22 Stat. 30, 30-31 (1882) (codified at 48 U.S.C. § 1461) (repealed 1983).

²⁰ *Id.*; *Doctrines and Covenants*, THE CHURCH OF JESUS CHRIST OF LATTER–DAY SAINTS, <https://www.churchofjesuschrist.org/study/scriptures/dc-testament/od/1?lang=eng> (last visited April 20, 2024) (hereinafter “*Doctrines and Covenants*”).

²¹ *Id.*

²² *Id.*

²³ Hauser, *supra* note 2. This period of tension was marked by general confusion among the Mormon community regarding the sanctity and morality of practicing polygamy with strong feelings on both sides. Embry, *supra* note 3. This tension eventually led to fundamentalist groups breaking off the mainstream church. *Id.*; UTAH CODE ANN. § 76-7-101.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

conflict has potential to address more interests than the decriminalization statute.

IV. RELEVANT PARTIES & INTERESTS

One effective way to create value in any dispute resolution experience is by identifying the relevant parties' interests.²⁷ There may be interests that are important to one party but indifferent to another, or the parties may even discover mutual interests through the process.²⁸ Each side should make an effort to understand the other parties' interests because it will help to collectively "generate options that are mutually advantageous."²⁹ Although this dispute may appear to be two-dimensional with pro-polygamists on one side and anti-polygamists on the other, there are a multitude of interested parties, each with their own concerns.³⁰ The most obvious party are Fundamentalist Mormons who practice polygamy; however, even within this group there are distinct subgroups with their own unique, underlying interests, including plural wives, plural families, and children in plural families.³¹ Other parties in this dispute include mainstream Mormons, non-Mormon polygamists, people who have left polygamy, and the Government.³²

A. PLURAL WIVES

Plural wives have particularly compelling interests regarding their economic and legal status at death and divorce.³³ Some of these interests include intestacy rights and parenting rights, testifying immunity, recourse for domestic violence, and need for community.³⁴ Before the church publicly denounced polygamy, plural wives were able to obtain divorces quickly, fairly, and confidentially; however, now these women do not have a concrete process for dissolution.³⁵ Inheritance rights are also severely impaired for plural wives as the law is silent on plural wives' potential inheritance from their intestate husbands and instead only

²⁷ MALHOTRA & BRAZEMAN, *supra* note 7, at 66. Interests are *all* things that a party values, not merely the surface-level issues on the table. *Id.* at 64.

²⁸ *Id.* at 68.

²⁹ ROGER FISHER & WILLIAM URY, *GETTING TO YES* 20 (3d ed. 2011).

³⁰ *See generally* Solomon, *supra* note 1.

³¹ *See generally* Madsen, *supra* note 10.

³² *See* Solomon, *supra* note 1.

³³ Madsen, *supra* note 10, at 432–37.

³⁴ *Id.*

³⁵ *Id.* at 432.

addresses the children's rights.³⁶ In the words of Brigham Young's widow:

[Everything] is left to the mercy of his [sic] children . . .
They are given preeminence, while the wife and mother is
ignored. Even my home, that I hold the deed of . . . is given
to my children and I am not allowed the right to own
anything but am fed with a spoon like a baby.³⁷

These women are further disadvantaged in their ability to feel safe, both inside and outside the home.³⁸ Prior to passage of the decriminalization bill, plural wives were less likely to seek help for matters like child abuse and domestic violence due to fear of prosecution.³⁹

Plural wives also have severely restricted parenting rights under the law.⁴⁰ Professor Douglas NeJaime at Yale Law School stated, "as things stand now, once you're a parent you get everything, and if you're a nonparent you get practically nothing."⁴¹ Despite serving as mothers for children not biologically theirs, plural wives do not have legal rights over any of these children.⁴² Diana Adams, a family lawyer in New York whose work focuses on helping polygamous families, advocates for intention, rather than DNA, to define parenting.⁴³ Such a framework would allow for increased parenting rights for plural wives.⁴⁴

Finally, plural wives frequently cite the importance of having community at home in a way that cannot be achieved through monogamous family arrangements.⁴⁵ A woman who left the Fundamentalist Latter-Day Saints (FLDS) reported feeling an unaccustomed loneliness, stating that "[w]omen are quite social pack creatures," and "[w]e need women."⁴⁶

Alternative dispute resolution (ADR) is an attractive solution to help these women meet their interests. ADR is recommended when a particular "judicial system is unlikely to be

³⁶ *Id.* at 437.

³⁷ *Id.*

³⁸ Hauser, *supra* note 2.

³⁹ *Id.*

⁴⁰ *See* Solomon, *supra* note 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See id.* Plural families are essentially held together through the intention and actions of all members of the family, rather than any biological or legal connections. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

effective,” as is the case here where plural wives have virtually no inheritance or parenting rights.⁴⁷ The application of ADR is a promising solution for securing plural wives’ legal rights in various contexts.⁴⁸ Other countries, including South Africa, India, and Bangladesh have found success in using ADR programs to bypass “corrupt, biased, or otherwise discredited court systems” that were unable to reasonably achieve justice for citizens whom society has disadvantaged.⁴⁹ In fact, in China, the People’s Mediation Courts have essentially replaced traditional courts, managing approximately seven million civil cases per year, including “family disputes, inheritance issues, land claims, business disputes, and neighbor conflicts.”⁵⁰ Because the decriminalization of polygamy does not address many of the interests relevant to plural wives, the implementation of effective ADR programs within Utah and other states may help achieve justice for plural wives despite their unfavorable treatment under the law.

B. PLURAL FAMILIES

Another subgroup within the Fundamentalist Mormons with relevant interests include plural families.⁵¹ One Utah polygamous family, the Brown family, has been particularly vocal about the struggles they face as a plural family through their reality television show.⁵² In 2011, the Browns filed a suit challenging the Utah statute that criminalized polygamy.⁵³ The Browns alleged the statute prevented their ability “to freely make personal decisions” and exercise their religion.⁵⁴ The Browns claimed they did not fall into

⁴⁷ Scott Brown et al., *Alternative Dispute Resolution Practitioners Guide*, U.S. AGENCY FOR INT’L DEV. 1, 10 https://pdf.usaid.gov/pdf_docs/PNACB895.pdf (last visited Apr. 12, 2024).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ A plural family is created by the “marriage of one man to two or more women.” *Plural Families and Marriage in Early Utah*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/study/manual/gospel-topics-essays/plural-marriage-and-families-in-early-utah?lang=eng> (last visited Apr. 30, 2024).

⁵² *See* John Schwartz, *Polygamy as Lifestyle Choice, and a Reality TV Brand*, N.Y. TIMES (Jan. 8, 2014), <https://www.nytimes.com/2014/01/09/us/polygamy-as-a-lifestyle-choice-and-a-reality-tv-brand-name.html>.

⁵³ *Brown v. Buhman*, 822 F.3d 1151, 1156 (10th Cir. 2016).

⁵⁴ *Id.*

the requisite categories for bigamy prosecutions under Utah law which only includes “those who (1) induce a partner to marry through misrepresentation or (2) are suspected of committing a collateral crime such as fraud or abuse.”⁵⁵ However, fearing prosecution, the Browns subsequently moved to Nevada after filing their suit.⁵⁶ Unfortunately, their move led to the downfall of the case, with the court stating: “We do not address the merits of the Browns’ claims⁵⁷ . . . the Browns’ move to Nevada supports finding mootness.”⁵⁸ The holding in this case completely disregards an important interest of polygamous families—the desire to live in a state of their choice amongst family without fear of prosecution.⁵⁹

Although the decriminalization bill certainly now makes the Browns’ claims moot, it passed almost ten years after filing their original suit.⁶⁰ One potential benefit of using public ADR is the reduction of delay in resolving disputes.⁶¹ The delay in determining the certainty of their future led the Brown family to completely uproot and relocate to another state.⁶² The Browns are representative of many other polygamous families in Utah who share similar interests in reforming legal recourse surrounding polygamy to redress the immediate need for legal protection.⁶³ It is possible that with effective dispute resolution, public or private, the relevant parties could have reached a faster and more particularized agreement.

Another family interviewed by the *New Yorker* shared their struggle regarding access to health insurance.⁶⁴ With only one of the adults in the polygamous family employed with health insurance, all but one spouse were left without coverage.⁶⁵ Additionally, the same family voiced frustration regarding the lack of eligibility for the more than 1,000 forms of federal benefits

⁵⁵ *Id.* at 1155.

⁵⁶ *Id.* at 1156.

⁵⁷ *Id.* at 1163.

⁵⁸ *Id.* at 1172.

⁵⁹ The Browns fled to Nevada for the sole purpose of escaping prosecution in Utah. Schwartz, *supra* note 52.

⁶⁰ UTAH CODE ANN. § 76-7-101.

⁶¹ See Brown et al., *supra* note 47, at 15.

⁶² See Brown v. Buhman, 822 F.3d 1151, 1156 (10th Cir. 2016).

⁶³ *Polygamists Protest Plan to Make Polygamy a Felony Again in Utah*, CBS SACRAMENTO (Mar. 8, 2016), <https://www.cbsnews.com/sacramento/news/polygamists-protest-plan-to-make-polygamy-a-felony-again-in-utah/> (approximately 150 polygamy advocates and their children attended the protest with signs displaying phrases such as “Families not felons,” and “I love my moms”).

⁶⁴ Solomon, *supra* note 1.

⁶⁵ *Id.*

provided to married individuals.⁶⁶ Among these federal protections and privileges are access to a spouse's employment benefits, joint tax returns and exemptions, and the right to cohabit in university or military housing.⁶⁷

The Dargers, another Utah-based polygamous family, have also publicized their family structure, advocating on the frontlines for polygamist rights.⁶⁸ The family has published a book about their lives and encouraged other polygamous families to come out.⁶⁹ In fact, the recent decriminalization bill is largely a result of the Dargers' diligent lobbying campaign.⁷⁰ Additionally, the Darger family recognizes the concerns of opposing groups, acknowledging that "polygamists have an obligation to confront what the practice has enabled,"⁷¹ specifically "child marriage, assigned marriage, lack of education, and poverty."⁷²

C. CHILDREN IN PLURAL FAMILIES

Another subgroup with vital interests are children born into Fundamentalist Mormon plural families.⁷³ One of the most important issues for these children is parental recognition, both socially and legally.⁷⁴ In 2017, the Uniform Law Commission, in furtherance of the view that children can have more than two legal parents initiated a new Uniform Parentage Act to "facilitate multiple-parent recognition."⁷⁵ Current limitations on parental recognition are not in the children's best interests.⁷⁶ Courtney Joslin, a law professor at UC Davis, argues the practice of nonrecognition is inherently harmful to children, no matter the circumstances.⁷⁷

⁶⁶ *Id.*

⁶⁷ *See Defense of Marriage Act (DOMA)*, LEGAL INFO. INST. (Sept. 2022), [https://www.law.cornell.edu/wex/defense_of_marriage_act_\(doma\)](https://www.law.cornell.edu/wex/defense_of_marriage_act_(doma)).

⁶⁸ Solomon, *supra* note 1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.*; *Uniform Parentage Act*, UNIF. L. COMM'N (2017), <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f>.

⁷⁶ Solomon, *supra* note 1.

⁷⁷ *See id.* The practice of nonrecognition involves not providing any legal recognition to relationships within plural families or multiparty relationships. *See generally* Sally F. Goldfarb, *Legal Recognition of Plural Unions: Is a Nonmarital Relationship Status the Answer to the Dilemma?*, 58 FAM. CT. REV. 157.

D. NON-MORMON POLYGAMISTS

Despite being popularly associated with Mormonism, polygamy can be found within many different religions, and even nonreligious families.⁷⁸ There are approximately 60,000 Americans who practice polygamy including “Hmong Americans, Muslims of various ethnicities, and members of the Pan-African Ausar Auset Society.”⁷⁹ These non-Mormon polygamists face legal challenges regarding “inheritance, hospital visits, and parentage rights.”⁸⁰

E. MAINSTREAM MORMONS

The Mainstream Mormon church vehemently opposes polygamy in an effort to sever its former ties to the practice.⁸¹ The church will excommunicate individuals found to be practicing polygamy, which is the harshest possible penalty available.⁸² Citing the Manifesto written by former President Woodruff and the Book of Mormon, the church emphasizes that strict monogamy is the standard doctrine to be followed by all its members.⁸³ The church also notes confusion among the general public and news media as polygamists are frequently, but falsely, associated with the mainstream Mormon church.⁸⁴

For the Mainstream church and fundamentalist groups, each faction’s respective “truth” regarding marriage drives their belief systems about right and wrong.⁸⁵ The disagreement of right versus wrong is a common issue in the mediation of religious conflicts.⁸⁶ Thus, “a successful mediation involving religious principles . . . requires a dramatic shift in people’s version of truth.”⁸⁷ To make headway in this century-old conflict, the religious-based parties must be willing to remain open to different perspectives.⁸⁸ Of course, this is easier said than done.

⁷⁸ Solomon, *supra* note 1.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Polygamy: Latter-day Saints and the Practice of Plural Marriage*, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://newsroom.churchofjesuschrist.org/article/polygamy-latter-day-saints-and-the-practice-of-plural-marriage> (last visited Apr. 12, 2024).

⁸² Solomon, *supra* note 1.

⁸³ *Id.*; *Doctrines and Covenants*, *supra* note 20.

⁸⁴ *Id.*

⁸⁵ *See id.*; Sukhsimranjit Singh, *Best Practices for Mediating Religious Conflicts*, DISP. RESOL. MAG. 12, 12–13 (2018).

⁸⁶ Singh, *supra* note 85, at 12–13.

⁸⁷ *Id.* at 14.

⁸⁸ *Id.*

However, there are two advantages to mediating religious, rather than secular, disputes.⁸⁹ First is the proven success of faith-based mediation.⁹⁰ Faith-based mediation involves “third party intervention efforts where religious creed, objects, and institutions play an important role.”⁹¹ Using a faith-based mediator offers numerous benefits, including increased leverage and enduring agreements.⁹² An example of increased leverage is found in countries like Pakistan and Afghanistan where religious leaders garner respect and trust from their communities, giving them more power to influence the acceptance of a proposed settlement.⁹³ The fact that more than “one third of all internal conflicts will recur at least once within a two year period” demonstrates the importance of lasting agreements.⁹⁴ This is because traditional mediators tend to view mediations as an isolated, short-term event, whereas faith-based mediators connect to parties in ways beyond the conflict.⁹⁵

Second, the ubiquitous principle of compassion present in all faiths provides an optimistic foundation for mediation.⁹⁶ Every faith promotes its own version of the Golden Rule and this is a strong place to start agreement amongst the parties.⁹⁷ By starting with a shared interest, the mediator is able to build momentum and empower the parties to find at least some agreement in the face of seemingly incompatible positions.⁹⁸

Norms surrounding polygamy are deeply based in religious convictions, making it well suited to this approach and a great contender for faith-based mediation.⁹⁹ In addition to general compassion present in all religions, the Mainstream and Fundamentalist branches are both products of Mormonism, and thus

⁸⁹ *Id.* at 15.

⁹⁰ See Jacob Bercovitch & S. Ayse Kadayifci-Orellana, *Religion and Mediation: The Role of Faith-Based Actors in International Conflict Resolution*, 14 INT’L NEGOT. 175, 183–85 (2009).

⁹¹ *Id.* at 183.

⁹² *Id.* at 187–89.

⁹³ *Id.* at 187.

⁹⁴ *Id.* at 189.

⁹⁵ *Id.* Faith-based mediators often have connections to parties in ways unrelated to the conflict, like community affairs. *Id.* Furthermore, faith-based mediators are more suited for long-term commitments to the disputing parties’ resolution because of their access to financial resources and “motivation derived from their religious or spiritual belief systems.” *Id.*

⁹⁶ Singh, *supra* note 85, at 15.

⁹⁷ *Id.* The Golden Rule states, “always treat others as you would wish to be treated.” *Id.*

⁹⁸ *Id.*

⁹⁹ See generally Embry, *supra* note 3.

already have significant common ground between them.¹⁰⁰ The teachings from the Book of Mormon guide both Mainstream and Fundamentalist Mormonism, offering hundreds of pages of common ground to build upon and bridge divides.¹⁰¹ A faith-based mediator has the potential to understand interests of these two parties and structure a value-creating agreement.¹⁰²

F. PEOPLE WHO HAVE LEFT POLYGAMY

Those who left polygamous families where abuse occurred are often opponents of polygamy, in stark contrast to those who share positive experiences like the Browns and the Dargers. Sound Choices Coalition, though no longer active, served as a voice for these individuals and highlighted negative outcomes of the practice, including the subjugation of women, frequent and forced pregnancies, child marriage, child rape, and poverty.¹⁰³ The FLDS community and the Kingston clan—two of the most horrific examples of using polygamy as a tool to achieve power and control—confirm many of these concerns.¹⁰⁴

ADR allows former polygamists to separate their position from their interests.¹⁰⁵ Their position appears to be much more rigid as they advocate to ban polygamy entirely.¹⁰⁶ However, polygamist opponents' interest in preventing the oppression of women and children suggests flexibility and the potential to create value in an

¹⁰⁰ *Id.*

¹⁰¹ See generally THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://www.churchofjesuschrist.org/?lang=eng> (last visited Apr. 30, 2024).

¹⁰² See generally Singh, *supra* note 85.

¹⁰³ SOUND CHOICES COALITION, <https://www.facebook.com/SoundChoicesCoalition/> (last visited Apr. 13, 2024); see also Jennifer Dobner, *Utah Senate votes to decriminalize polygamy among consenting adults*, REUTERS (Feb. 18, 2020), <https://www.reuters.com/article/idUSKBN20D05Z/>.

¹⁰⁴ Stephen Lemons, *Blood Cult*, S. POVERTY L. CTR.: INTELLIGENCE REPORT (Aug. 8, 2017), <https://www.splcenter.org/fighting-hate/intelligence-report/2017/blood-cult> (the Kingston clan seeks to maintain a “pure” bloodline and keep men in power through incestual practices, child abuse, and oppression of women); *Fundamentalist Church of Jesus Christ of Latter-Day Saints*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/fundamentalist-church-jesus-christ-latter-day-saints> (last visited Apr. 13, 2024) (the leader of the FLDS, Warren Jeffs, maintained his power through oppression of women and sexual abuse of children).

¹⁰⁵ See MALHOTRA & BRAZEMAN, *supra* note 7, at 66.

¹⁰⁶ See generally SOUND CHOICES COALITION, *supra* note 103.

agreement because polygamists can likely sympathize with this interest.

ADR is also useful in reducing tension and preventing conflict within a community.¹⁰⁷ As history demonstrates, there are deep and enduring tensions within the state of Utah between the opponents and proponents of polygamy.¹⁰⁸ Of particular relevance are the survivors and witnesses of abuse within polygamous communities.¹⁰⁹ With the presence of such deep-rooted convictions amongst these social groups, public dispute resolution is likely the most attractive option.¹¹⁰ In fact, “conflict prevention efforts generally focus more on public conflicts . . . rather than private disputes.”¹¹¹

G. THE GOVERNMENT

The final interested party is the government.¹¹² Aside from protecting the well-being of its citizens, the government must also consider the procedural implications of legalizing polygamy. The legalization of polygamy “would require revising the tax code and entitlement programs to accommodate multi-partner families.”¹¹³ Additionally, the United States offers more federal benefits for civil marriage than any other Western nation, all of which are currently unattainable for polygamists.¹¹⁴ It is likely that if the government legalized polygamy, these benefits would need to be reevaluated and adjusted accordingly.

Programs designed to train government leaders in providing dispute resolution help to “create public processes to facilitate economic restructuring and other social change.”¹¹⁵ A strong example in this area is South Africa’s negotiations between black labor unions and the white mining company management, which demonstrate how people of different racial backgrounds can work through differences using effective mediation when the country is

¹⁰⁷ Brown et al., *supra* note 47, at 9.

¹⁰⁸ Embry, *supra* note 3.

¹⁰⁹ See generally SOUND CHOICES COALITION, *supra* note 103 (this abuse includes subjugation of women, frequent and forced pregnancies, child marriage, child rape, and poverty).

¹¹⁰ See John B. Stephens, *Public Management Bulletin: Using a Mediator in Public Disputes*, 2 UNC SCH. OF GOV’T 1, 2 (Nov. 2, 1998), <https://www.sog.unc.edu/sites/default/files/reports/pmb02.pdf>.

¹¹¹ Brown et al., *supra* note 47, at 20.

¹¹² See Solomon, *supra* note 1. This includes both state and federal actors.

¹¹³ See *id.*

¹¹⁴ *Id.*

¹¹⁵ Brown et al., *supra* note 47, at 9.

transitioning its governmental structure.¹¹⁶ Several transitioning countries like Angola, Rwanda, and Russia also demonstrate similar successful records.¹¹⁷ ADR is a viable solution that brings together interests of all parties, including the government, to form a value-creating outcome.¹¹⁸ Applying this model to the polygamy issue within Utah, and throughout the United States at large, may help bridge gaps between these starkly different positions while also providing procedural protections where there are extreme power imbalances between the parties.

V. DISPUTE RESOLUTION IN THE LEGISLATIVE PROCESS

Passing a decriminalization bill for polygamy only addresses fears of being prosecuted, while completely ignoring all other interests that contribute to the debate.¹¹⁹ Applying dispute resolution techniques within the legislature may be a better approach. Dispute resolution is not limited to private parties and can take place on a local, state-wide, or national level.¹²⁰ In fact, dispute resolution has been successfully utilized in the legislative process,¹²¹ and can be a potential tool in the polygamy dispute. Scholars define dispute resolution as the “process by which two or more conflicting parties improve their situations by cooperative action.”¹²² What is the backbone of the legislature if not cooperative action to improve the situation of the constituents? Because dispute resolution techniques find a natural fit in the legislative process, they should be considered in the polygamy context to help overcome barriers specific to this process.

There are three important barriers to consider: (1) strategic voting, (2) bargaining through mass media, and (3) the principal-agent problem.¹²³ The strategic voting barrier occurs when legislators vote in ways that do not align with their true preferences as part of a larger scheme to predict outcomes and achieve their

¹¹⁶ *Id.* at 19.

¹¹⁷ *Id.* at 20 (these countries implemented dispute resolution programs such as “Search for Common Ground,” and “International Alert”); *see also* SEARCH FOR COMMON GROUND, <https://www.sfcg.org> (last visited Apr. 30, 2024); INTERNATIONAL ALERT, <https://www.international-alert.org/> (last visited Apr. 30, 2024).

¹¹⁸ *See* Brown et al., *supra* note 47, at 9.

¹¹⁹ *See* Solomon, *supra* note 1.

¹²⁰ *See generally* Tom Melling, *Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 1677, 1677–715 (1994).

¹²¹ *Id.*

¹²² *Id.* at 1680.

¹²³ *Id.* at 1683–84, 1686, 1691.

next–best alternative.¹²⁴ The bargaining through mass media barrier occurs when disputing parties face the dilemma of whether to pursue appeals to the press or to keep details private.¹²⁵ Here, the media’s presence has been heavily involved in the conflict, particularly through the decade long reality television series *Sister Wives* (pro–polygamy)¹²⁶ and *Escaping Polygamy* (anti–polygamy).¹²⁷ The principal–agent problem occurs when not all of the interested parties participate in the legislative debate.¹²⁸ As previously noted, there are a multitude of interested parties to the polygamy dispute who are not fairly represented in the current legislative process.¹²⁹

Three proven dispute resolution strategies can overcome these barriers.¹³⁰ First is the unanimous decision rule which “eliminates the instability and chaos of cyclical voting by compelling the parties to develop a mutually beneficial solution through cooperative bargaining.”¹³¹ This strategy requires a consensus in the final resolution, rather than a determination by a majority.¹³² In order for this strategy to be practical, the possibility of no agreement “must be worse for all parties than a negotiated settlement.”¹³³ The benefits are plentiful. First, “consensus . . . is more likely to resolve a dispute . . . because it is likely to meet more . . . interests.”¹³⁴ Second, when someone forces parties to come to a consensus, they are able to discover “subtle alternatives that ‘enlarge the pie.’”¹³⁵ Third, it encourages reluctant parties to participate in the resolution process.¹³⁶ Fourth, it eliminates “instability associated with shifting coalitions and strategic voting.”¹³⁷ The disadvantage of this strategy is that each party possesses veto power.¹³⁸ This strategy may be a practical solution to the polygamy dispute. The potential for no agreement leaves all parties in a worse

¹²⁴ *Id.* at 1684.

¹²⁵ *Id.* at 1687.

¹²⁶ *Sister Wives*, TLC, <https://go.tlc.com/show/sister-wives-tlc> (last visited Apr. 13, 2024).

¹²⁷ *Escaping Polygamy*, LIFETIME, <https://www.mylifetime.com/shows/escaping-polygamy> (last visited Apr. 13, 2024).

¹²⁸ Melling, *supra* note 120, at 1691.

¹²⁹ *See infra* Part IV on relevant parties & interests involved in the polygamy dispute.

¹³⁰ Melling, *supra* note 120, at 1692.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 1697.

¹³⁴ *Id.* at 1696.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 1698.

position than if a negotiated settlement was reached.¹³⁹ Without an agreement, polygamous families are left without protection and opposers to polygamy are left without their concerns addressed.

The second strategy is negotiation in private.¹⁴⁰ This eliminates the media as a bargaining weapon,¹⁴¹ something quite powerful in the polygamy debate. Removal of the media “smooth[es] out the playing field,” and allows value to be created more easily.¹⁴² This may be a viable option in the polygamy debate. Because news outlets favor straightforward issues, the message may become distorted, gloss over complications, or narrow the number of possible options.¹⁴³ Additionally, the media has different motivations for discussing issues surrounding polygamy, which can hinder the ability to come to a successful resolution that addresses the needs of each party.¹⁴⁴ Private negotiations on the macro and micro level have potential to bring real solutions to these complicated and deep-rooted disputes.

The third strategy is mediation by a politician, which “encourages interested groups to come to the bargaining table.”¹⁴⁵ A notable example of a successful politician-mediated dispute is the Central Utah Project Completion Act (CUP dispute) where several groups worked to resolve water management issues.¹⁴⁶ A politician trusted by both sides, despite not being neutral on the topic, successfully mediated the CUP dispute.¹⁴⁷ Credibility is the strongest barrier to implementing this strategy and the chosen politician must garner trust from all sides.¹⁴⁸ In context of the polygamy dispute, the Utah Senator who worked to pass the recent decriminalization bill, Deidre M. Henderson, would be a great option for the role of mediator.¹⁴⁹ Despite a lack of neutrality on the subject, Senator Henderson supports concerns of opposing sides and would likely be open to cooperative bargaining given her prior comments on the issue.¹⁵⁰ In fact, a member of Senator Henderson’s team noted that before this decriminalization bill, anti-polygamy laws pushed abusers “into the shadows of society,” allowing them “to get away with harming people too scared to report such abuse to

¹³⁹ *Id.* at 1696.

¹⁴⁰ *Id.* at 1686.

¹⁴¹ *Id.* at 1692.

¹⁴² *Id.* at 1700.

¹⁴³ *Id.* at 1689–90.

¹⁴⁴ *Id.* at 1689.

¹⁴⁵ *Id.* at 1692.

¹⁴⁶ *Id.* at 1679.

¹⁴⁷ *Id.* at 1702.

¹⁴⁸ *Id.*

¹⁴⁹ *See* Hauser, *supra* note 2.

¹⁵⁰ *Id.*

the public.”¹⁵¹ This demonstrates Senator Henderson’s sympathies regarding anti-polygamists concerns as well as the need to take action to prevent abuse.¹⁵² With interests of both supporters and opposers in mind, Senator Henderson has a strong foundation of trust to build upon for a successful mediation.¹⁵³

It is also essential all parties engage in cooperative resolution of conflict.¹⁵⁴ This may seem obvious, but it is easier said than done. Generally, there are two types of barriers to cooperative resolution of conflict: strategic and institutional.¹⁵⁵ Strategic barriers occur when a “rational actor, behaving in his best interest, [chooses] alternatives that do not achieve his best outcome.”¹⁵⁶ This is sometimes referred to as “individually rational and collectively deficient.”¹⁵⁷ In this context of the polygamy dispute, the Brown family’s move to Nevada is a perfect demonstration of such barriers.¹⁵⁸ Although individually rational (to escape prosecution) and in the family’s best interest (self-preservation), it was a collectively deficient decision because their case became moot as a result of their move.¹⁵⁹

Institutional barriers occur when bureaucracy causes the original goal to regress or become obsolete.¹⁶⁰ The Federal Bureau of Reclamation, historically tasked with developing water resources in the West, is an example of this type of barrier.¹⁶¹ Now with a developed West, there is need for efficiency.¹⁶² However, the Bureau’s goal is still development while the region remains inefficient in its water management.¹⁶³ In the context of the polygamy debate, the barrier is apparent in the Poland Act’s restriction of the Utah’s probate courts’ jurisdiction.¹⁶⁴ Originally, Utah restricted jurisdiction to discourage polygamy.¹⁶⁵ However, Utah has since decriminalized polygamy, and polygamous families

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ Please note that consideration should be given to the fact that Senator Henderson may not be formally trained as a mediator.

¹⁵⁴ *See* Melling, *supra* note 120, at 1680.

¹⁵⁵ *Id.* at 1681.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See supra* Part IV(B).

¹⁵⁹ *Brown v. Buhman*, 822 F.3d 1151, 1156 (10th Cir. 2016); *see* Melling, *supra* note 120, at 1681.

¹⁶⁰ Melling, *supra* note 120, at 1682.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See supra* Part II; Madsen, *supra* note 10, at 426.

¹⁶⁵ Madsen, *supra* note 10, at 426.

still lack competent dispute resolution options that were previously available through the probate courts.¹⁶⁶ To address this issue, legislators must be willing to act cooperatively in a dispute resolution process.¹⁶⁷

VI. PUBLIC DISPUTE RESOLUTION

Although there are individualized, polygamy-related disputes on the local, micro level that require a nuanced approach, public dispute resolution may successfully tackle the issue of polygamy on the larger, macro level.¹⁶⁸ It is best to use a mediator for public issues when any of the following are present: (1) “the disputants are interdependent,” (2) “there is a history of opposition or animosity,” (3) elected officials or agency administrators are perceived to be biased,” or (4) the disputants have uncertain or unattractive alternatives to a negotiated solution.”¹⁶⁹ In the context of the polygamy dispute, all of these factors are present. First, the disputants are interdependent because their interests and demands revolve around how law and society treat polygamy.¹⁷⁰ Second, there is certainly a history of opposition and animosity surrounding polygamy, as demonstrated in its historical background.¹⁷¹ Third, parties may perceive government officials to be biased based on their religious affiliation.¹⁷² Finally, disputants would be better off participating in a dispute resolution process because without one, their interests will not be met.¹⁷³

A successful example of public dispute resolution occurred in 1993 in Orange County, California.¹⁷⁴ The Orange County commissioners re-zoned land, including a dairy farm that the Hogan family owned, to allow for residential development.¹⁷⁵ Many groups opposed the issuance of a conditional use permit.¹⁷⁶ Several groups were parties to the public mediation and the mediator identified “thirty distinct interests,” including traffic concerns,

¹⁶⁶ See *supra* Part II & III; Hauser, *supra* note 2.

¹⁶⁷ See Melling, *supra* note 120, 1680.

¹⁶⁸ Here, macro-level polygamy disputes refer to legal recognition of the practice of polygamy.

¹⁶⁹ Stephens, *supra* note 110, at 2–3.

¹⁷⁰ See generally Embry, *supra* note 3; Madsen, *supra* note 10.

¹⁷¹ See *supra* Part II & III; see generally Embry, *supra* note 3; Madsen, *supra* note 10.

¹⁷² See Embry, *supra* note 3.

¹⁷³ Stephens, *supra* note 110, at 2–3.

¹⁷⁴ *Id.* at 4.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

impact on schools, and flood plain and wildlife protection.¹⁷⁷ The mediator was eventually able to help the group find ways to meet their interests by redesigning the site plan.¹⁷⁸ This example has strong parallels to the polygamy dispute.¹⁷⁹ Similar to how the rezoning plan in Orange County addressed only one specific interest (desire for development) while ignoring all other interests, the decriminalization bill addresses only one specific concern (fear of prosecution) but ignores all other interests and parties.¹⁸⁰ Just as there were thirty distinct interests in the Orange County example, there are also numerous interests in the polygamy dispute that some form of public dispute resolution would better address.¹⁸¹

The traditional approach for addressing public disputes is through the legislative process.¹⁸² Although this approach supplies a measure of partial accountability, there may be a better way through a consensus-oriented model.¹⁸³ Public dispute resolution requires first determining who should be at the table and then subsequent completion of a conflict assessment, also referred to as a “map of the conflict.”¹⁸⁴ The conflict assessment is completed using a matrix organized by categories of groups along the side, and issues along the top.¹⁸⁵ In the corresponding cells, the mediator indicates how each group feels about each issue.¹⁸⁶ It is also not necessary to name anyone in the matrix.¹⁸⁷ An example of a conflict assessment matrix tailored to the polygamy debate is displayed below.¹⁸⁸

¹⁷⁷ *Id.* at 5.

¹⁷⁸ *Id.*

¹⁷⁹ *See generally* Madsen, *supra* note 10.

¹⁸⁰ *See* Stephens, *supra* note 110, at 2–5; Hauser, *supra* note 2.

¹⁸¹ *See supra* Part IV.

¹⁸² Lawrence E. Susskind, *Keynote Address: Consensus Building, Public Dispute Resolution, and Social Justice*, 35 *FORDHAM URB L.J.* 185, 186 (2008).

¹⁸³ *Id.* at 186, 190 (a consensus-oriented model emphasizes collaboration, equality of ideas, and recognizing all interests).

¹⁸⁴ *Id.* at 187.

¹⁸⁵ *Id.* at 187–88.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; *see also* Stuart Pearson et al., *Conflicts in Some of the World Harbours: What Needs to Happen Next?*, 15 *MAR. STUD.* 1, 4 (2016) (providing an example of a conflict assessment matrix).

¹⁸⁸ For a discussion on the parties and interests listed in the chart, *see infra* Part IV.

**TABLE 1: CONFLICT ASSESSMENT MATRIX FOR THE
 POLYGAMY DEBATE**

	Plural Wives			Plural Families			Children in Plural Families			Secular Polygamists			Polygamists of other religions			Left Polygamy			Mainstream Mormons			Federal			State			Local		
	Fundamentalist Mormons						Non-Mormons						Opposers						The Government											
Personal																														
Religious convictions	x	x	x								x						x													
Domestic violence	x																x													
Need for community	x	x	x				x	x																						
Freedom to make personal decisions	x	x	x				x	x					x																	
Reside in state of choice	x	x	x				x	x					x	x																
General Abuse	x	x	x				x	x					x	x																
Risk of prosecution	x	x	x				x	x											x	x					x	x				
Social																														
Lack of education						x											x		x	x					x	x				x
Poverty						x					x	x					x		x	x					x	x				x
Child abuse						x											x		x	x					x	x				x
Oppression of Women	x	x															x													
Child marriage						x											x		x	x					x	x				x
Assigned marriage						x											x													
Procedural																														
Rights in intestacy	x	x	x				x	x											x	x					x	x				
Parenting Rights	x	x	x				x	x											x	x					x	x				
Divorce	x	x					x	x											x	x					x	x				
Health Insurance	x	x	x				x	x											x						x					
Federal Marriage Benefits	x	x					x	x											x						x					
Testifying immunity	x						x	x											x	x					x	x				

There are three reasons why a consensus-oriented model is better than the traditional model: the majority rule problem, the representation problem, and the adversarial format problem.¹⁸⁹ The majority rule problem arises from the fact that the traditional model seeks only 51% support, leaving the remaining 49% with nothing.¹⁹⁰ The consensus-oriented model assumes there are solutions and configurations that can meet almost all parties' interests, rather than the black-and-white approach of the traditional model.¹⁹¹ In the context of the polygamy dispute, the Utah legislature passed the decriminalization bill based on a majority voting system.¹⁹² As previously discussed, while this bill addresses one interest (the risk of prosecution), it fails to address all other relevant interests.¹⁹³

The representation problem arises when "general-purpose, longstanding elected representatives" represent interests of a group.¹⁹⁴ The consensus-oriented model demands each group to choose representatives for each specific policy discussion (i.e., ad hoc).¹⁹⁵ This allows the representative to reflect the "intensity of concerns" for each group, rather than a general voice sharing general concerns.¹⁹⁶ Here, while Senator Henderson serves as an advocate for the decriminalization of polygamy, she fits the description of a general-purpose, longstanding elected representative who does not embody the intensity of each of the relevant interests.¹⁹⁷

The adversarial format problem arises when groups view their position in the dispute resolution process as one where they can only achieve their goals at the expense of other groups.¹⁹⁸ When parties participate in a negotiation they bring both a cooperative interest (creating as much value as possible) and a competitive interest (desiring a bigger share for themselves).¹⁹⁹ The consensus-oriented model combats this adversarial mindset through a collaborative process where parties "commit to finding ways of creating value so that everybody can get more than they would from a traditional process."²⁰⁰ Here, without a proper dispute resolution process, opposers of polygamy are deeply committed to their

¹⁸⁹ Susskind, *supra* note 182, at 191–95.

¹⁹⁰ *Id.* at 191.

¹⁹¹ *See id.*

¹⁹² Hauser, *supra* note 3; *see supra* Part III.

¹⁹³ Hauser, *supra* note 3; *see supra* Part IV.

¹⁹⁴ Susskind, *supra* note 182, at 193.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See* Hauser, *supra* note 2; *see supra* Part V.

¹⁹⁸ Susskind, *supra* note 182, at 194.

¹⁹⁹ *Id.* at 195.

²⁰⁰ *Id.*

competitive interest and see the other side's loss as necessary to their gain.²⁰¹

Further, using consensus-building to achieve dispute resolution is an attractive option for aspiring elected officials.²⁰² These strategies ensure no interest is left ignored and each party feels they contributed meaningfully to the result.²⁰³ It will compel everyone to "applaud and say, 'My goodness, you're a smart elected official. My goodness, you have taken my interests to heart.'"²⁰⁴ This not only creates a better world for the affected parties, but also the entire community.

VII. CONCLUSION

Despite the strides Utah has made to foster a safer and more inclusive community, the decriminalization bill falls short in its addressal of various interests, including those of plural families, mainstream Mormons, people who have left polygamy, and the government itself. After examining the lengthy history of polygamy in the United States, it is clear these are deep-rooted issues requiring an outside-the-box solution. The potential power of dispute resolution in the legislative process as well as public dispute resolution offer compelling options for those seeking to resolve issues surrounding the polygamy debate. Ultimately, there are a myriad of factors to consider when constructing a solution, and dispute resolution just may be the answer.

²⁰¹ See Hauser, *supra* note 2.

²⁰² Susskind, *supra* note 182, at 197.

²⁰³ *Id.*

²⁰⁴ *Id.* at 197.