

Washington Law Review

Volume 69
Number 3 *Symposium on the 21st Century
Lawyer*

7-1-1994

The Washington State Parenting Act in the Courts: Reconciling Discretion and Justice in Parenting Plan Disputes

Jane W. Ellis
University of Washington School of Law

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THE WASHINGTON STATE PARENTING ACT IN THE COURTS: RECONCILING DISCRETION AND JUSTICE IN PARENTING PLAN DISPUTES

Jane W. Ellis*

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*Professor of Law, University of Washington School of Law. I would like to thank Professors Robert Aronson, James Hardisty, Leslie Harris, Deborah Maranville, Katherine O'Neill, and Marjorie Rombauer; Attorneys Michael Keyes, Kim Prochnau, and Amy Stephson; and, as always, Jeri Miles and Jack Litewka, for their time and assistance. Any errors are mine alone.

I. INTRODUCTION

On July 8, 1993, the Washington Supreme Court handed down a decision construing the residential provision section of the Washington State Parenting Act. The case is significant for the children of divorcing parents in the State of Washington, and its importance extends beyond Washington because the supreme court's opinion is the first to interpret a key section of a law that has attracted national and international attention.¹ The case, *In re Marriage of Kovacs*,² is an example of the sort of egregious injustice that can occur when a trial court fails to exercise its discretion in an appropriate manner and an appellate court fails to demand that the trial court conscientiously follow the law.

The Washington state child custody statute that preceded the Parenting Act was governed solely by "best interests" and a non-exclusive list of equally-weighted factors for the court's consideration.³ The new Act, passed in 1987, does not give unfettered discretion to a trial court. Instead, it sets out a policy that articulates the meaning of "best interests of the child."⁴ Additionally, its section on so-called residential provisions⁵ mandates that a trial court consider seven factors and that one of those factors, factor (i)—"the relative strength, nature and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child"⁶—be "given the greatest weight."⁷ It thus structures the trial court's discretion by assigning a preference to one factor.

The supreme court did not discuss the meaning or application of factor (i) in *Kovacs*.⁸ Instead, it chose to focus on whether the statute requires a

1. Junda Woo, *Divorce Lawyers Study Parenting Plans*. Wall St. J., Nov. 15, 1993, at B5. Telephone Conversation with Jim Sturrock, Research Section, Federal Department of Justice, Canada (May 7, 1994).

2. 121 Wash. 2d 795, 854 P.2d 629 (1993) (hereinafter *Kovacs II*).

3. Wash. Rev. Code § 26.09.190 (repealed 1987), see *infra* note 82.

4. Wash. Rev. Code § 26.09.002 (1992), reprinted *infra* at note 55.

5. Wash. Rev. Code § 26.09.187(3) (1992), reprinted *infra* at note 48 and accompanying text. The term "residential provisions" refers to what most jurisdictions call physical custody and visitation.

6. Wash. Rev. Code § 26.09.187(3)(a)(i) (1992).

7. Wash. Rev. Code § 26.09.187(3)(a) (1992).

8. Its sole reference to the statutory preference for factor (i) was the summary statement that "the Act requires consideration of seven factors and provides that the child's relationship with each parent be the factor given the greatest weight in determining the permanent residential placement." *Kovacs II*, 121 Wash. 2d at 800, 854 P.2d at 632.

court always to award primary residential care to the parent who has been the primary caregiver absent evidence that the primary caregiver has harmed the child.⁹ The court held, correctly,¹⁰ that the statute did not contain such a legal presumption. Then, in two short paragraphs, the supreme court dismissed all objections to the trial court's decision. It held that the trial court had considered the statutory factors and that there was "ample evidence" to support its findings of fact.¹¹ Hence, there was no abuse of discretion.¹²

The trial court's exercise of its discretion in the *Kovacs* case should not have been so summarily considered and upheld. Most of the court's findings of fact are vague and conclusory. Their relation to the statutory factors and the express statutory preference is ambiguous at best, and the record indicates that the court rested in whole or part on legally irrelevant and arguably biased considerations. If the supreme court intended to give such unlimited discretion to the trial court, then it is, with all due respect, wrong on the law and wrong as a matter of policy. If it did not so intend, then it should return at the next opportunity to the important question of what guidance the Parenting Act provides to the exercise of that discretion. To do any less is to treat a question that has lifelong ramifications for children as a matter that isn't worth the time and consideration it deserves.

Part II begins by describing the facts and relating a history of the case from trial through the court of appeals and the supreme court. Part III examines the Parenting Act's statutory language, including the emphasis on factor (i) with its reference to patterns of parental caregiving. It describes why honoring the statutory preference for factor (i) is in the best interests of the child. It then argues that to ensure proper implementation of the residential provision section of the Parenting Act, trial courts must be required to make concrete factual findings in explicit relation to the statutory criteria and appellate courts must be willing to enforce that requirement. Greater accountability by and of trial courts will ensure, first, that the statutory preference is followed and, second, that improper considerations by courts and expert witnesses, including conscious or unconscious gender biases, are more likely to be ferreted

9. The precise language used by the court in framing this issue is set out *infra* at note 41 and accompanying text.

10. I agree with the court's resolution of the issue as stated. See Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. Mich. J.L. Reform 65, 78 n. 36 (1990).

11. *Kovacs II*, 121 Wash. 2d at 810, 854 P.2d at 637.

12. *Id.*

out and eliminated at trial and on appeal. Without these procedural safeguards, children and their primary caregiving parents will suffer unnecessarily and unjustly. Part IV uses the findings and record in *Kovacs* to illustrate the miscarriage of justice that can occur when a trial court does not properly exercise its discretion. Finally, Part IV demonstrates the difference that more demanding standards for trial court decisions could, and should, make.

II. HISTORY OF *KOVACS*

The *Kovacs* case is, in simplest terms, a dispute between a primary caregiving mother and a father over who should have primary residential care of their three young children following their divorce. It has the human drama and inevitable sorrow of all such cases. The supreme court's opinion now stands, however, as the first definitive statement on the meaning of the residential provision section of the Washington State Parenting Act. I begin with the facts and then examine the legal issues.

A. *The Facts*

As every lawyer and judge knows, the facts of a case can be characterized and summarized in a myriad of ways. Because the treatment of facts in the *Kovacs* case is a central theme in this article, and because the trial court's findings of fact are brief and largely conclusory,¹³ the "facts" described here are taken verbatim from the opinions of the court of appeals and the supreme court. Variations in information or emphasis between the factual accounts in the two appellate opinions are briefly described. Next, the trial court's minimal findings are set out. Finally, additional facts from the Record of Proceedings are mentioned.

In January, 1991, a judge sitting pro tem in the Superior Court of the County of Spokane awarded primary residential custody of three young children to their father following a two-day trial. The mother appealed. Judge Thompson, writing for a majority of the court of appeals,¹⁴ in an opinion that reversed and remanded, described the evidence as follows:

Mr. and Mrs. Kovacs met in Alaska and married in 1982. For the most part, theirs was a traditional marriage: he worked full time and she cared for the home and the children. In September 1984, Mr.

13. See *infra* note 21 and accompanying text.

14. A dissent was filed by Chief Judge Shields.

Kovacs sold the maintenance company he owned to a major company in the same field, then worked for it until he was fired in the spring of 1988. In 1989, Mr. and Mrs. Kovacs decided to relocate in Southern California where the economy was stronger. Rather than move the whole family at once, they agreed Mrs. Kovacs and the children would stay with her parents in Spokane while Mr. Kovacs located a house for them and found a job.

Mrs. Kovacs and the children moved to Spokane at the end of April 1989. They lived with Mrs. Kovacs' parents until their furniture arrived, then moved into a duplex owned by the parents. Mr. Kovacs joined them May 22, remained about 2 weeks, then went on to California. In August, he was hired as Director of Environmental Services at Anaheim Memorial Hospital. He found a 3-bedroom townhouse in a planned, self-contained community in Irvine.

While Mr. Kovacs was in California, Mrs. Kovacs became romantically involved with a man who lived in Olympia. She also received two traffic citations, including a charge of driving while under the influence (DWI). Her children, who were in the car, were removed to a foster home for 2 days. When Mr. Kovacs drove to Spokane in November 1989 to pack and move the family, he learned the marriage was over. Mrs. Kovacs filed a petition for dissolution. The children remained with her, but spent scheduled visitation periods with Mr. Kovacs.

Trial was held January 2 and 3, 1991. Johnny Kovacs was then almost 8, Courtney was 6, and Billy was 3.

The parents and their various friends and relatives who testified all stated that Mrs. Kovacs was the children's primary caretaker. She prepared the family's meals, and was at home most of the day. Ruth and David Gray socialized with the family while they lived in Alaska. They described Mrs. Kovacs as a "good mother" and as an "excellent mother" who "[did] things with her children". Mr. Kovacs played and roughoused with his children, but worked long hours and frequently was gone until late at night. For the year and a half prior to trial, Mr. Kovacs lived in California and saw the children only during holidays and for 6 weeks during the summer.

Donna Gort, a mental health practitioner, testified in Mrs. Kovacs' behalf; E. Clay Jorgensen, a clinical psychologist, testified in Mr.

Kovacs' case. Both professionals observed the children. Ms. Gort found them "well-behaved" and "well-mannered". Dr. Jorgensen described them as "doing fine". Ms. Gort affirmatively stated the children "are very clearly attached and bonded to their mother". When she mentioned to the children that she thought it would be hard to choose between a mother and a father, the two oldest looked at her and said, "We want to live with our mom." Dr. Jorgensen recommended the court place the children with their father because, in his opinion, Mr. Kovacs had a more stable personality and would provide more structure for the children than Mrs. Kovacs, whom he characterized as dependent.¹⁵ Nevertheless, he admitted that a person with a personality disorder can be an adequate parent, that the best predictor of future behavior is past behavior, and that the children presently were "adequately adjusted".¹⁶

Chief Justice Anderson, writing for a unanimous supreme court that reversed the court of appeals and reinstated the trial court's award to the father, adopted most of the facts reported by the court of appeals. The emphasis, however, is slightly different, and some additional details were added.

First, the supreme court implicitly adopted the trial court's concern that the mother was not "adher[ing] to the agreement"¹⁷ to join her then-husband in Southern California and not telling him immediately that she was contemplating divorce. Thus, the court reports:

Marcia traveled to Irvine in October 1989 to see the new home but did not tell John at that time that she intended to file for dissolution of their marriage. It was *not until* John arrived in Spokane in November 1989 to move his family to California that Marcia told him the marriage was over.¹⁸

Second, the supreme court paints a harsher picture of the mother's behavior during the period she and her husband were first separated. The opinion states:

15. "Dr. Jorgensen testified: '[Mr. Kovacs] errs in the direction of being overcontrolling of the kids. [Mrs. Kovacs] . . . errs in the direction of not imposing enough controls with the kids.'" *In re Marriage of Kovacs*, 67 Wash. App. 727, 729 n.1, 840 P.2d 214, 215 n.1 (1992) (hereinafter *Kovacs I*).

16. *Kovacs I*, 67 Wash. App. at 728-29, 840 P.2d at 214-15.

17. Finding of Fact XII, *infra* note 21 and accompanying text.

18. *Kovacs II*, 121 Wash. 2d at 798, 854 P.2d at 630 (emphasis added).

Marcia became romantically involved with another man, she left the children with various relatives during times when she was traveling to and from the man's home in Olympia, and was cited for two alcohol-related driving offenses. She was arrested for driving while under the influence of alcohol in October 1989 after she was involved in an automobile accident. The children, who were in the automobile at the time, were temporarily removed from Marcia's care and placed in a foster home for 2 days.¹⁹

Finally, the supreme court puts a very different gloss on the testimony of the two expert witnesses with its selection of facts. The opinion reports:

Both parents had apparently agreed to be evaluated by the father's expert witness, a clinical psychologist. The psychologist interviewed each parent alone, administered personality tests to each parent, observed the children alone and observed each parent with the children. With the information gained through the testing, the interviews and observation the psychologist concluded that Marcia has a personality disorder. The psychologist testified that although an individual with a personality disorder could "get by as a parent", the personality disorder would inevitably affect parenting.

The psychologist testified that although the children were "adequately adjusted", they appeared to respond better to the father's directions than the mother's. He stated that the oldest child was the most difficult of the three to manage and that child needed the firm limit setting that the father was able to provide. While stating the question was "relatively close", the psychologist recommended that the father be awarded primary residential placement of the children because the father "is a more stable individual who will provide a more structured stable environment for the children."

19. *Id.*, 854 P.2d at 631. I use the phrase "harsher picture" because of, inter alia, the court's use of the phrase "left the children with various relatives" with its connotations of abandonment. These connotations are not supported by the record. See *infra* note 119. Similarly the court's references to the "times when she was traveling to and from the man's home in Olympia" make it sound as if her leaving the children for the sake of romance was a frequent occurrence. The mother's uncontradicted testimony is that she visited him "maybe once a month," Verbatim Record of Proceedings at 23, *In re* Marriage of Kovacs (Spokane County Super. Ct., Jan. 17, 1991) (No. 89-3-02873-3) (hereinafter VRP). The evidence on the mother's affair and on her drinking is discussed in Part IV.

The mother's expert was a counselor who met the mother for the first time just a few days before trial. She observed the mother and children together the day before trial began. The counselor did not administer any tests and did not meet the father. The counselor recommended the children be placed with the mother. The counselor said she found the children to be "in pretty good shape, so whatever either parent has done, they must have done a pretty good job." She also said the children told her that they wanted to live with their mother. The counselor, noting that the mother was the primary caregiver of the children, stated, "Children can get along without a lot of things, but they don't get along well without nurturing from a mother."²⁰

In contrast to the factual accounts of the court of appeals and the supreme court, the trial court's findings of fact are cryptic and conclusory. They read, in pertinent part, as follows:

V

Three children have been born of this marriage: John Steven Kovacs, born February 16, 1983; Courtney Elizabeth Kovacs, born April 20, 1984; and William Richard Kovacs, born April 27, 1987. Petitioner is not now pregnant.

VI

Both Petitioner and Respondent were interviewed, tested and observed with the children by Dr. E. Clay Jorgensen, who testified that although the Petitioner can offer the children continuity, having lived with her and having attended Spokane schools, that is out-weighed by the Respondent's ability to offer a more structured stable environment for the children.

VII

Petitioner's instability was shown by conclusions made by Dr. Jorgensen, her reluctance to reach a decision regarding the move with her children to the California home secured for the family, and her dependency on other people.

20. *Kovacs II*, 121 Wash. 2d at 799, 854 P.2d at 631.

VIII

The Petitioner's family members, with whom the children have had frequent contacts and who were alleged to be significant adults to the children, are unstable.

IX

The Respondent's sister, Maryann Dodd, and niece, Lisa Dodd, who testified, were credible and stable.

X

The Respondent has a more stable life than the Petitioner and has demonstrated a more successful ability to see to his responsibilities than the Petitioner.

XI

The strength, nature and stability of the children's relationship with the Respondent is healthier and more evident than with the Petitioner.

XII

The Petitioner and Respondent had agreed in 1989 that the Petitioner and the children would join the Respondent in Southern California, but the Petitioner did not adhere to the agreement.

XIII

During the first five years, this marriage was traditional in that the Petitioner performed more of the domestic parenting functions and the Respondent was the wage earner, however, the roles were reversed at times and the Respondent did participate in parenting functions and the Petitioner did generate income for the family.

XIV

The children of the parties are emotionally and physically healthy.

XV

A change of the children's surroundings, school and playmates will not be psychologically detrimental to the children.

XVI

It is in the best interests of the children that they be placed with their father, the Respondent.

XVII

A permanent Parenting Plan is attached.²¹

The trial court's permanent parenting plan assigned primary residential care to the father with liberal visiting time for the mother. The court, which had the power to restrict the mother from driving the children if it believed she posed a danger to them, set no such limitation.²² Rather, the plan states "None" on the line that asks whether there is a need for any restrictions on parent-child contact, a fact that strongly suggests neither the father nor the trial court were concerned about the children's future safety in the car with their mother.

Certain facts found in the record, but not mentioned by any of the deciding courts, are important in relation to points that will be made later in Part IV. They include evidence of the father's history of drinking, the father's minimal performance of parenting functions, and the fact that the trial court's references to the mother's "instability" appear to be based in large part, if not entirely, on that court's reaction to her marital misconduct.

B. The Legal Issues

Kovacs is the first case in which the Washington Supreme Court has considered the meaning and application of the residential provisions in the 1987 Washington State Parenting Act. The difficulty of deciding this case is evidenced by the contrasting approaches to the legal issues, as the case progressed through the courts.

The trial court's reference to the governing law for its residential provision decision states only that:

[a]ccording to the evidence as applied to the factors enunciated in R.C.W. 26.09.187(3), the Respondent (father) shall be designated

21. Findings of Fact and Conclusions of Law at 2-4, *In re Marriage of Kovacs* (Spokane County Super. Ct., Jan. 17, 1991) (No. 89-3-02873-3) (hereinafter "Findings").

22. Wash. Rev. Code § 26.09.191(3) (1992).

as the primary residential parent and the minor children of the marriage shall be placed with him.²³

The court does not indicate how its minimal and conclusory findings of fact relate to the statute or to the requirement that factor (i) be given the “greatest weight.”

The mother’s brief in the court of appeals argued, *inter alia*, that the trial court had abused its discretion by grounding its decision on the mother’s “infidelity”, instead of relying on the factors set out in Wash. Rev. Code Sec. 26.09.187(3) or on the policy section of the Parenting Act, Wash. Rev. Code Sec. 26.09.002, that states: the “best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.”²⁴ The Brief included, among the listed issues, the question whether the trial court should have been required to “articulate on the record and in its findings of fact how it has viewed the evidence vis-a-vis the criteria set forth in RCW 26.09.187(3).”²⁵ The Brief described the statutory policy, but only in passing, as “a presumption in favor of continuing the relationship between the children and their primary care giver and nurturer.”²⁶

The father argued in response that, *inter alia*, the trial court “correctly adhered to the statutory mandates of R.C.W. 26.09.187”²⁷ and thus followed the law; the court had “strong evidentiary support” for its findings of fact²⁸; it was “not bound by pre-dissolution custodial arrangements;”²⁹ and that the “record contains no evidence that the court was prejudiced against the mother or her witnesses.”³⁰

The majority opinion of the court of appeals viewed the legal question as “whether evidence of Mrs. Kovacs’ personality and parenting style, without evidence showing effect upon the children, is sufficient to

23. Findings, *supra* note 21, at 6.

24. Brief for Appellant at 14–17, *Kovacs I*, 67 Wash. App. 727, 840 P.2d 214 (1992) (No. 11319-1-III). Both statutory sections are set out *infra* at, respectively, note 48 and accompanying text and note 55.

25. *Id.* at 3.

26. *Id.* at 17.

27. Brief for Respondent at 7, *Kovacs I*, 67 Wash. App. 727, 840 P.2d 214 (1992) (No. 11319-1-III).

28. *Id.* at 10.

29. *Id.* at 14.

30. *Id.* at 17.

support the court's findings."³¹ Citing both the residential provision section³² and the policy section³³ of the Parenting Act, the court of appeals held that "the evidence [concerning the mother's 'personality and parenting style'] relied upon by the superior court was insufficient to support a change in the children's primary residence."³⁴ It analogized the policy section's language to "the language of the former modification statute," that provided for no modification "unless, inter alia, '[t]he child's present environment is detrimental to [the child's] physical, mental, or emotional health."³⁵ Elaborating later in the opinion, the majority stated:

We hold the record must reflect actual circumstances supporting a change, not just an expert's prediction of benefit. Otherwise, placement decisions are based on speculation, not evidence. The evidence relied on by the trial court here is insufficient to support the court's findings. Since the findings relate to the factor which is to be given the "greatest weight" in determining residence, see RCW 26.09.187(3)(a), the matter is reversed and remanded for trial.³⁶

One judge on the court of appeals dissented. The central legal issue as he saw it concerned the need for deference to the trial court's broad discretion. In his words,

The court here relied primarily on the testimony of [the father's expert witness] and followed his recommendation. Dr. Jorgensen acknowledged it was a close call. I believe it is the trial court's function to make that call, not this court's; therefore, I dissent.³⁷

The father immediately appealed to the supreme court. The issue articulated in his Petition for Review was:

31. *Kovacs I*, 67 Wash. App. at 730-31, 840 P.2d at 216.

32. Wash. Rev. Code § 26.09.187(3) (1992).

33. Wash. Rev. Code § 26.09.002 (1992).

34. *Kovacs I*, 67 Wash. App. at 728, 840 P.2d at 214.

35. *Id.* at 731, 840 P.2d at 216 (citing former Wash. Rev. Code § 26.09.260(1)(c) (1974) (currently codified at Wash. Rev. Code § 26.09.260(2)(c) (1992)).

36. *Id.* at 731-32, 840 P.2d at 216.

37. *Id.* at 732-33, 840 P.2d at 217 (Shields, C.J. dissenting). Interestingly, the dissenting judge explicitly mentions factor (iii) of the statute, the factor concerned with *future* performance of parenting functions, as authority for the trial court's reliance on the expert's recommendation and its consequent conclusion that the father should be awarded primary residential care because he "could offer a more stable and structured environment for the children than could Mrs. Kovacs." *Id.* at 735, 840 P.2d at 218. As I discuss in Part IV, I agree that the expert's evidence is relevant to factor (iii).

By refusing to uphold a Trial Court’s permanent placement of children to the Father based on a lack of harm to the children while placed temporarily with the Mother, did the Court of Appeals err by failing to apply specific legislative directives affecting residential placement of children?³⁸

The mother filed a Supplemental Brief in which she argued that the court of appeals “simply applied the applicable legislative policy.”³⁹ The mother’s brief set out all arguably relevant sections of the Parenting Act, reiterated the insufficient evidence argument, and emphasized the statutory language requiring that factor (i) be given the greatest weight. It asserted the court of appeals was correct in requiring evidence of “actual circumstances supporting a change, not just an expert’s prediction of benefit.”⁴⁰

Faced with the issues and arguments set out in the briefs, along with holdings by the court of appeals, the Washington Supreme Court articulated the legal issue in *Kovacs* as follows:

Does the Parenting Act of 1987 create a presumption that placement of a child with the parent who has been the primary caregiver is always in the child’s best interests absent proof that the primary caregiver’s personality, conduct or parenting style has harmed the child’s physical, mental or emotional well being?⁴¹

The Court held that there was no such presumption.⁴² It then concluded in two short paragraphs—with no reference to the statute’s “greatest weight” requirement and with no discussion of the evidence—that there was “ample evidence”⁴³ to support the trial court’s

38. Petition for Review at 1, *Kovacs II*, 121 Wash.2d 795, 854 P.2d 629 (1993) (No. 60035-0).

The use of the phrase “placed temporarily” with the mother is factually inaccurate since the children had always lived with the mother. The attorney for the father may have used this language to deflect the court from the central question about the meaning and application of the statute governing residential provisions in the permanent parenting plan to a tangential technical issue concerning the relation of the terms of temporary orders to permanent orders. The supreme court did briefly discuss the import of temporary orders (even while conceding they were unable to locate any such temporary order in the record on appeal). See *Kovacs II*, 121 Wash. 2d at 798 n. 2, 808–09, 854 P.2d at 630 n.2, 636.

39. Supplemental Brief for Respondent at 4, *Kovacs II*, 121 Wash. 2d 795, 854 P.2d 629 (1993) (No. 60035-0). The briefs filed in the court of appeals were part of the record on appeal before the supreme court. The only additional briefing was the father’s Petition for Review and the mother’s Supplemental Brief.

40. *Id.* at 14.

41. *Kovacs II*, 121 Wash. 2d at 800, 854 P.2d at 631–32.

42. *Id.*, 854 P.2d at 632.

43. *Id.* at 810, 854 P.2d at 637.

findings of fact, including the findings, challenged by the mother, concerning "the stability of each parent."⁴⁴ It accepted the trial court's bald assertion that it had followed the law, stating:

The record reflects that the decision of the trial court in this case was based on a consideration of the statutory factors set forth in RCW 26.09.187(3)(a), and on the evidence presented, including testimony of expert witnesses. On the record presented, we cannot conclude that the trial court's decision was based on untenable grounds or that it was manifestly unreasonable. We hold therefore that the trial court did not abuse its discretion⁴⁵

Whether or not the trial court's findings are supported with substantial evidence—and I disagree with the supreme court that they are—those findings arguably bear little or no relation to the statute governing residential provisions. At worst, there are strong indications that the decision turned not on the children's best interests, as required by the Parenting Act,⁴⁶ but on a desire to punish the children's mother. At best, we simply cannot tell whether the judge followed the governing law. This case, therefore, makes apparent the importance of examining what the law governing residential provisions says, what it means, and how it can be responsibly applied to legally relevant evidence by trial courts in future residential provision disputes.

III. RESIDENTIAL PROVISION DECISIONS UNDER THE PARENTING ACT

No one in the Kovacs case disputed that Section 26.09.187(3)(a), on residential provisions in permanent parenting plans, read in conjunction with Section 26.09.002, the Parenting Act's "policy" section,⁴⁷ governs residential provisions disputes. That residential provision section reads:

The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with RCW 26.09.191. Where the limitations of RCW 26.09.191

44. *Id.*

45. *Id.*

46. Wash. Rev. Code § 26.09.002 (1992), *infra* note 55.

47. *Id.*

are not dispositive of the child's residential schedule, the court shall consider the following factors:

- (i) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.

Factor (i) shall be given the greatest weight.⁴⁸

The meaning and application of this statute, and, in particular, of factor (i), lie at the heart of this case. That is the subject matter that I next examine.

A. The Statutory "Preference" for Factor (i)

Factor (i) focuses on the relationship between each parent and the child. In so doing it expresses the Parenting Act's recognition of the importance for the child of a strong and stable bond between child and parent. In addition, it asks the court, in evaluating the relationship of each parent to the child, to consider "whether a parent has taken greater responsibility for performing parenting functions relating to the daily

48. Wash. Rev. Code § 26.09.187(3)(a) (1992). The section refers to Wash. Rev. Code § 26.09.191 which sets out a series of parental behaviors that require or may justify restrictions on that parent's time with a child. See *infra* note 94.

needs of the children.” Examples of daily needs are set out in the definition of parenting functions.⁴⁹

There is no committee or legislative report regarding the meaning or application of this factor.⁵⁰ The use of the word “including” in factor

49. “Parenting functions,” referred to in factor (i), are set out in the definitions section of the Parenting Act at Wash. Rev. Code § 26.09.004(3). Daily needs are illustrated in subsection (b). The definition reads in its entirety as follows:

“Parenting functions” means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:

- (a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;
- (b) *Attending to the daily needs of the child, such as feeding, clothing, physical care and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;*
- (c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;
- (d) Assisting the child in developing and maintaining appropriate interpersonal relationships;
- (e) Exercising appropriate judgment regarding the child’s welfare, consistent with the child’s developmental level and the family’s social and economic circumstances; and
- (f) Providing for the financial support of the child. (emphasis added).

50. A statement made by one legislator, Representative Appelwick, and quoted by the supreme court in *Kovacs*, tells us only that this individual lawmaker considered factor (i) “tremendously complex,” that he did not believe that the language concerning “whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child” created a “tie-breaker” for determining primary residential care, but that he believed the court ought “not overlook it.” Letter from Representative Marlin Appelwick to Senator Phil Talmadge, Chairman, and Members of the Senate Judiciary Committee (part) (Mar. 25, 1987), *quoted in Kovacs II*, 121 Wash. 2d at 807, 854 P.2d at 635–36.

As the supreme court notes in its opinion, “While the statements of individual lawmakers . . . cannot be used to conclusively establish the intent of the Legislature as a whole, they can be instructive in showing the reasons for the *changes* in the legislation.” *Id.*, 854 P.2d at 636 (emphasis added). The court uses this letter, not to explain the meaning or application of factor (i), but as support for its contention that the legislature was rejecting a legal presumption for the primary caregiver absent evidence that that parent had harmed the children. *Id.* at 807–08, 854 P.2d at 636. I agree with that conclusion. *See supra* note 11 and accompanying text. I also agree with Representative Appelwick, though his statement establishes no official legislative intent, that a trial court ought “not overlook” “whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child.” *Kovacs II*, 121 Wash. 2d at 807, 854 P.2d at 635.

There is a colloquy between Representative Appelwick and Representative Heavey in the Journal of the House of Representatives that arguably has indirect bearing on the residential provision section, but says nothing about factor (i) or any of the other language in the residential provision section. Representative Heavey inquired of Representative Appelwick whether the Parenting Act would “change the standard for the determination of custody in a dissolution action, that being what is in the best interests of the child.” Representative Appelwick answered that it would not, that “the best interest standard is, in no way, affected.” Washington State House of Representatives Journal

(i),⁵¹ however, tells us that courts should consider “greater responsibility for performing parenting functions relating to the daily needs of the child” an important indicator of “the strength, nature, and stability” of a parent’s relationship with a child. We know, moreover, that the drafters of the Parenting Act, a group of legal and child development professionals, stated that one of the most serious failings of the child custody statute immediately preceding their new legislation was that “*insufficient weight is given to demonstrated patterns of parental care and existing emotional attachments between parent and child.*”⁵²

Factor (i) is preferred over all the other statutory factors in the residential provision section by the express requirement that it be accorded the “greatest weight.”⁵³ This preference is grounded on a policy favoring continuity of care, both physical and psychological, for children of divorcing parents. That policy is not only described in the advisory Commentary to the Parenting Act;⁵⁴ it is also stated explicitly in the policy section of the Parenting Act itself. This policy section reads in pertinent part:

[T]he best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.⁵⁵

(April 17, 1987). It is true, as stated in the policy section to the Act, that the Act’s paramount concern, and its over-arching legal standard, is the best interest of the child. Wash. Rev. Code § 26.09.002 (1992), *infra* note 55. Representative Appelwick could not have meant, however, that the Parenting Act’s statutory sections concerning “custody” disputes were identical to the custody statute that the Act replaced. That meaning would render the detailed language of the Parenting Act’s policy, residential provision, and decision-making sections a nullity.

51. See *supra* note 48 and accompanying text.

52. Commentary to 1987 Parenting Act, Chapter 460, 1987 Wash. Laws, at D-3 (hereinafter “Commentary”) (emphasis added). The Commentary is not official legislative history and is intended, in its own words, “only to be advisory.” *Id.* at D-iii. It refers the reader to its “purpose” section, codified as the “policy” section, Wash. Rev. Code § 26.09.002 (1992), *infra* note 55, for “legislative intent.” *Id.*

53. Wash. Rev. Code § 26.09.187(3) (1992), *supra* note 48 and accompanying text.

54. See Commentary, *supra* note 52, at D-22:

[The parenting function concerned with] objectively observable day-to-day care-giving . . . recognizes the significant role played by the parent who has performed these day-to-day caregiving functions for the child. The mental health professionals on the drafting committee found that where such a pattern of care exists, maintaining it is beneficial to the child’s post-decree best interests.

55. Wash. Rev. Code § 26.09.002 (1992). The whole section states:

Factor (v) of the statute, emphasizing other significant relationships in the child's environment, also reflects the policy of continuity. Other statutory factors point to the future rather than to continuity of past patterns.⁵⁶ Factor (i), however, focusing on the relationship between each parent and child, including the history of daily caregiving by each parent, is assigned the "greatest weight."

The Washington legislature is not alone in emphasizing the importance of continuity of care. Many leading child development experts, jurists, and scholars have also recognized its importance. Goldstein, Freud, and Solnit's ground-breaking and influential work on the implications of knowledge about child development to placement decisions, *Beyond the Best Interests of the Child*,⁵⁷ states:

Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. Since they do not play the same role in later life, their importance is often underrated by the adult world.

....

Thus, continuity is a guideline because emotional attachments are tenuous and vulnerable in early life and need stability of external arrangements for their development.⁵⁸

Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

56. For example, factor (iii) refers expressly to "future performance of parenting functions."

57. (1973). Joseph Goldstein is a world-famous legal scholar and psychoanalyst. He is now Professor of Law Emeritus at the Yale Law School and the Yale Child Study Center. Anna Freud, who died in 1982, is known world-wide for her expertise in child development and her work at the Hampstead Child-Therapy Clinic in London. Albert J. Solnit, Professor Emeritus of Pediatrics and Psychiatry at Yale University School of Medicine, is another internationally-known child development expert and psychoanalyst who, for many years, headed the Child Study Center at Yale University.

58. *Id.* at 31-32, 34. The authors also describe how disruptions of continuity affect children of different ages from infancy through adolescence.

Furthermore, many legal and psychological experts agree that past performance of daily parental care is the single best objective indicator of which parent has the stronger and more stable *relationship* with the child.⁵⁹ Factor (i) recognizes that important correlation.

Leading courts around the country, including the supreme courts of California, Oregon (in accord with legislative direction), and Minnesota, have all recognized the importance of continuity of care by a primary caregiver.⁶⁰ The principle has long been accepted in England.⁶¹ In Washington state, the norm is well-established among legal professionals,⁶² and was incorporated in child-placement decisions of all sorts even before passage of the Parenting Act.⁶³

59. In the words of Justice Wahl of the Minnesota Supreme Court:

The importance of emotional and psychological stability to the child's sense of security, happiness, and adaptation . . . is a postulate . . . about which there is little disagreement within the profession of child psychology. . . . For younger children in particular, that stability is most often provided by and through the child's relationship to his or her primary caretaker—the person who provides the child with daily nurturance, care and support.

Pikula v. Pikula, 374 N.W.2d 705, 711 (Minn. 1985).

Goldstein, Freud, and Solnit, in a later book written along with attorney Sonja Goldstein, have recommended consideration of primary caregiving as an accurate and efficient means of determining the strongest and most important parent-child relationship. Joseph Goldstein et al., *In the Best Interests of the Child* 66–67 (1986). Other well-known scholars and jurists include Eleanor E. Maccoby and Robert H. Mnookin, *Dividing the Child—Social and Legal Dilemmas of Custody* (1992) (professor of law at Harvard and professor of psychology at Stanford); Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. Rev. 481 (1990), (professor of law at University of North Dakota); Martha Albertson Fineman, *The Illusion of Equality* 182 (1990) (professor of law at Columbia University). The list could go on and on.

Even a well-known legal scholar who has questioned the importance of continuity of care by a primary caregiver as opposed to a secondary caregiver has conceded that nearly all of many mental health professionals with whom he discussed the matter “believe that there is something special in that relationship [with the primary caregiver] worthy of weight in making decisions about placement.” David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 537 (1984) (professor of law at University of Michigan). Professor Chambers has advocated a primary caregiver rule for decisions involving younger children. *Id.* at 478–79.

60. See, e.g., *Burchard v. Garay*, 724 P.2d 486, 491 n.6 (Cal. 1986) (“The child’s need for and right to stability and continuity have been widely recognized.”); *In re Marriage of Derby*, 571 P.2d 562, 564, modified on other grounds and reh’g denied, 572 P.2d 1080 (Or. 1977) (“the close and successful emotional relationship between the primary parent and the children coupled with the age of the children dictate the continuance of that relationship”); *Pikula*, 374 N.W.2d at 711. Many other state courts have acknowledged the importance to children of continuity of care, including Pennsylvania, New York and New Jersey. See cases cited in Goldstein et al., *supra* note 59, and in O’Kelly, *supra* note 60.

61. See *D. v. M.*, 3 All E.R. 897, 902–03 (1982), quoted in Goldstein et al., *supra* note 59, at 180 (quoting Lord Justice Ormrod).

62. A 1988 survey to which 288 Washington state judicial officers, including 119 Superior Court Judges, and 1509 Washington state attorneys responded found that a “majority of lawyers (69%) and

Whether or not one agrees with all those child development experts, prominent jurists, legal scholars, and empiricists who have advocated the importance of continuity of care by a primary caregiver, it is impossible to ignore that it is a piece of common wisdom in our culture that continuity—with its reassuring familiarity—matters. Two scholars who have completed an impressive study of divorce patterns—probably the single most important empirical study of divorce agreements and divorced families to date in the United States⁶⁴—found that in California, a state with no statutory primary caretaker presumption or preference, divorcing parents were themselves deeply influenced by this criterion. It was reflected in their custody settlements, and a number of parents

an overwhelming percentage of judges (95%) responded that past child-rearing responsibility when the marriage was intact is the most persuasive factor in determining which parent should get custody.” Final Report of the Washington State Task Force on Gender and Justice in the Courts, *Gender & Justice in the Courts* 64, Appendices A & B (1989).

63. See, e.g., *McDaniels v. Carlson*, 108 Wash. 2d 299, 310, 738 P.2d 254, 261 (1987) (paternity action):

Child development experts widely stress the importance of stability and predictability in parent/child relationships, even where the parent figure is not the natural parent. See, e.g., J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (1979); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *Syracuse L. Rev.* 5 (1969–1970); *Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties*, 73 *Yale L.J.* 151 (1963); see generally E. Erickson, *Childhood and Society* (1963). Our courts and Legislature have echoed these concerns.

The principle has also been affirmed in the context of dependency actions, see, e.g., *In re Aschauer*, 93 Wash. 2d 689, 695, 611 P.2d 1245, 1249 (1980) and divorce custody, see, e.g., *In re Marriage of Allen*, 28 Wash. App. 637, 644, 626 P.2d 16, 20–21 (1981). Finally, the principle is repeatedly emphasized in actions for modification of custody (or residential placement), see e.g., *In re Marriage of Stern*, 57 Wash. App. 707, 712, 789 P.2d 807, 810, rev. denied, 797 P.2d 513 (1990). The relationship of the legal criteria and underlying policies governing modification actions, as opposed to initial permanent parenting plan determinations, is not a simple one, however, and to do it justice a separate discussion, not essential to this article, is required.

64. The study is described in Maccoby and Mnookin, *supra* note 59. I recommend this book highly to any legal professional involved in divorce custody (or residential provision) disputes. It should be noted that these scholars came to their work without a strong bias or agenda. After studying hundreds of divorce cases in California, however, they decided to advocate recognition of the practical importance of maintaining the child’s continuity of care by the primary caregiver. They write:

A woman who has served as the primary parent, after all, has already largely developed and demonstrated the skills to care for the child on an everyday basis. While her post-divorce role as custodial parent would require change, she has much less to learn in most cases than the father. Her experience as well as his inexperience strike us as relevant to the custodial decision.

Id. at 283–284.

who were interviewed in the study voluntarily “underscored the importance of continuity.”⁶⁵

Finally, the statute’s recognition of the importance of a history of primary caregiving is not gender-biased. A father who performs most of the daily care for his child is likely to have a closer and more important relationship with that child than the mother who did not so act, even assuming that she, too, loves and is loved by the child. The frequent references to “mothers” in case law and scholarship, therefore, do not represent a gender-based preference. Rather, they reflect the fact that mothers are still the primary caregivers in the great majority of homes.⁶⁶ The fear, expressed by the dissenting judge in the court of appeals in *Kovacs*, that “[t]he result of the majority’s emphasis [on the historical responsibility for performing parenting functions in RCW 26.09.187(3)(a)(i)] would most often be automatic residential placement with the mother”⁶⁷ ignores an essential fact: the paramount purpose of the Parenting Act is not to do justice between male and female parents. The paramount purpose is to promote the best interests of the child, and the legislature has decreed that past patterns of parental caregiving is an essential aspect of that determination.⁶⁸

Thus, the language of factor (i) as well as the policy of the Parenting Act point to the importance of continuity of care and highlight the connection between daily caregiving and the important bonds that exist between a primary caregiver and his or her child.

65. *Id.* at 83. As noted, the norm is also prominent in Washington state among legal professionals. See *supra* note 62 and accompanying text.

66. Maccoby and Mnookin, *supra* note 59, at 282–83. See also John P. Robinson, *Caring for Kids*, *Am. Demographics* 52 (July 1989) (For children under age five, mothers spend an average of 17 hours a week in “primary activities” alone—where the main activity is tending the child and not the other tasks that are nevertheless essential to the child’s well-being like cooking and cleaning, tasks traditionally done by women in the home. Fathers averaged 5 hours a week in “primary activities”).

67. *Kovacs I*, 67 Wash. App. at 734, 840 P.2d at 218 (Shields, C.J., dissenting). The dissenting judge may have been reacting to a statement by the mother’s psychological expert, quoted by him in a note, that “I’ve seen children taken away from mothers before, but I’ve never seen it done successfully.” *Id.* at 734 n.2, 840 P.2d at 218, n.3. If the expert was referring to all mothers, whether or not they had been primary caregivers, then the expert is expressing what the dissenter delicately calls “a preconceived notion,” *id.*, and what I would call, less delicately, gender bias. See discussion on gender bias in custody disputes, *infra* note 90 and accompanying text.

68. Wash. Rev. Code §§ 26.09.002 and 26.09.187(3)(a)(i) (1992).

*B. Proper Implementation of the Statutory Preference:
Responsibilities of Trial and Appellate Courts*

The supreme court's holding in *Kovacs* that there is no legal presumption favoring a primary caregiver absent proof that primary caregiver has harmed the child⁶⁹ only raises the next, and most essential, inquiries. First, what is the practical effect of the preference assigned to factor (i) in the decision making process? Second, what are the responsibilities of trial and appellate courts in ensuring that the statutory preference, with its important policy implications, is properly implemented?

1. Applying the Statutory Preference in the Decision Making Process

Two steps are necessary if the language of the residential provision statute and the Parenting Act's express policy emphasizing continuity of care⁷⁰ are to be honored. First, the trial court should consider the evidence to determine which parent, if any, should receive the benefit of factor (i)'s "greatest weight." Second, the court should consider the evidence going to the other statutory factors and decide whether that evidence should "override the special weight assigned" to factor (i).⁷¹ Let me illustrate how a court might proceed.

a. Step One

The trial court should begin by considering the "strength, nature and stability of the child's relationship with each parent." That determination will likely be based on testimony of the parents, of lay witnesses who know the family (e.g., teachers, family friends), and, where the parties

69. *Kovacs II*, 121 Wash. 2d at 800, 854 P.2d at 632.

70. See *supra* note 55 and accompanying text.

71. According to one legal scholar, a preference means that:

[B]oth parents are evaluated and compared but the nonpreferred parent has the burden of showing what qualities or circumstances *override the special weight assigned* to the consideration that favors [its] beneficiary.

O'Kelly, *supra* note 59, at 508 (emphasis added). The author adds that the "substantive content therefore gives more guidance to initial decisionmakers and facilitates more effective review by appellate courts than is permitted by an unweighted standard." *Id.* at 508-09.

O'Kelly refers, on occasion, to this preference as a "weak presumption" as opposed to a "strong presumption." *Id.* at 508. To avoid confusion with the supreme court's use of the term "presumption" in *Kovacs*, a term that accords with what O'Kelly would call a "strong presumption," I use her term "preference."

can afford it, of one or more qualified expert witnesses. The court must listen with care and decide whether the testimony goes to factor (i), the factor most concerned with continuity of care, or whether it goes to another factor.

No matter what the nature of the evidence going to the parent-child relationship, the court must consider which parent, if any, “has taken greater responsibility for performing parenting functions related to the daily care of the child.”⁷² This evidence is essential not only because the statutory language requires it, but also because the history of parental caregiving is the single best objective indicator of which parent likely has the stronger and more stable relationship with the child.⁷³ That history is not subject to the possible biases of lay and expert witnesses. Nor is it subject to the parties’ frequently unequal abilities to pay for the services of an expert. Nor is it limited, as is some expert testimony, to short periods of observation under the strains of litigation.⁷⁴ As a result, identification of the parent who has taken greater responsibility for performing daily caregiving is the surest means for determining the parent who should be favored under factor (i).

There may, however, be cases where the evidence indicates a primary caregiver parent does not have the more important relationship with a child. For example, the primary caregiver may suffer from some serious disability that interferes significantly with the normal bond between caregiver and child.⁷⁵ In that instance primary caregiving per se would not answer the question of which parent, if any, should receive the benefit of factor (i)’s “greatest weight.” There may also be cases in which the parents participated in substantially equal ways in parental

72. Wash. Rev. Code § 26.09.187(3) (1992).

73. See *supra* note 59 and accompanying text.

74. The evaluation of expert evidence in primary residential care disputes requires and deserves a separate article. At a minimum, the court should consider not only the expert’s credentials and experience, but any indications of possible bias (e.g., Who is paying each expert? Is there any evidence that the expert’s personal values or religious beliefs may be clouding his or her professional judgement?). The court should also consider bases of the testimony including, for example, the circumstances of the expert’s observations of parties and children. See, e.g., Douglas Knowlton, *Psychology Evaluations of Children: Their Place in the Courtroom*, 66 N.D. L. Rev. 673 (1990); David N. Bolocofsky, *Use and Abuse of Mental Health Experts in Child Custody Determinations*, 7 Behav. Sci. and the Law 197 (1989); Jay Ziskin & David Faust, *Psychiatric and Psychological Evidence in Child Custody Cases*, 25 Trial 44 (August 1989); Christopher Allan Jeffreys, *The Role of Mental Health Professionals in Child Custody Resolution*, 15 Hofstra L. Rev. 115 (1986). The expert evidence in the Kovacs case is discussed in Part IV.

75. For example, there might be a case in which a primary caregiver parent is a serious substance abuser, who is capable of and does perform parenting functions in a perfunctory way, but who has little or no emotional relationship with the child.

caregiving. In those cases, too, primary caregiving will not resolve the question which parent, if any, has the better relationship with the child.

b. Step Two

Once the court has identified the parent, if any, who will receive the benefit of the preference for factor (i), it necessarily will look to the other factors listed in the statute. It is unlikely, but not inconceivable, that evidence going to one of the other factors might have such striking significance that it would legitimately override factor (i)'s "greatest weight." For example, there might be evidence that a child's special developmental needs could, for some reason,⁷⁶ be met only by the parent who was not preferred under factor (i) and that the child would be developmentally impaired absent primary residence with the nonpreferred parent. It is also possible that evidence going to two or more of the other factors might combine to weigh in favor of a placement with the nonpreferred parent. For example, if a child, who is sufficiently mature to express a reasoned choice, strongly favors the non-factor-(i) parent and, additionally, the child's relationships with other significant adults would be adversely affected by placement with the factor-(i) parent, the combined "weight" of those considerations might tip the scales away from the otherwise preferred factor-(i) parent. Other examples could be given, and cases will turn, of necessity, on their individual facts.

In sum, the essential task of the trial court is an exercise in statutorily guided discretion.⁷⁷ It must apply the evidence with care to the statutory factors, considering the preferred factor (i) as well as the evidence going to the other six factors. Ordinarily, the greater weight assigned to factor (i) will mean that the parent preferred under that factor will be awarded primary residential care. There will be cases, however, in which the court is convinced that evidence going to the other factors must override the preference for the factor (i) parent. To ensure the court has conscientiously exercised its discretion, the court's findings of fact must in some meaningful way reflect the relationship between those facts and the statutory criteria. It is to that subject that I turn next.

76. For example, the nonpreferred parent might expect to live in an area that has essential medical or special educational facilities not available in the area where the preferred parent expects to live. I suspect such cases would be rare since it seems highly likely that a parent who has been primary caregiver for the child would bend over backwards to continue to accommodate the essential needs of that child.

77. The role of appellate courts is discussed in the next section of this article.

2. *Ensuring Proper Implementation and Excluding Biased and Inappropriate Considerations: The Need for Concrete Findings of Fact Explicitly Related to the Statutory Factors*

We must assume that the “greatest weight” language in the new statute is meant to be heeded.⁷⁸ Washington’s current rules concerning findings of fact and appellate review provide insufficient guarantee that the language will be given effect. The existing rules also provide insufficient safeguards against judicial bias and emotionalism. To ensure proper implementation of the section governing residential provisions, including the preference for factor (i), and to preclude reliance on inappropriate considerations in these decisions, trial courts should be required to set out concrete findings of fact for each statutory factor.

a. *Honoring the Statutory Language*

The traditional standard of review for child custody cases in Washington and elsewhere has always been “abuse of discretion.” Under Washington’s formulation of that standard, an appellate court will not reverse unless the trial court’s decision is “based on untenable grounds” or is “manifestly unreasonable.”⁷⁹ Abuse of discretion also occurs when the court “makes findings which are not supported by the record.”⁸⁰ There is no requirement under this standard that a trial court’s findings of fact be explicitly related to the governing statute. In fact, in Washington, case law expressly states, with respect to the child custody law that preceded the Parenting Act, that where “the record indicates substantial evidence was presented on the statutory factors . . . specific findings are not required on each factor.”⁸¹

This rule was not unreasonable under the former statute, since its factors were expressly non-exclusive and it assigned no more or less weight to any of them.⁸² The same approach is no longer appropriate, however, under the residential provision section of the Parenting Act, a

78. *Sutherland Stat. Const.* § 46.06 (Norman J. Singer ed., 5th ed. 1992) (Elementary rule that effect must be given, if possible, to every word, clause and sentence of a statute); *Cox v. Helenius*, 103 Wash. 2d 383, 387–88, 693 P.2d 683, 686 (1985).

79. *Kovacs II*, 121 Wash. 2d at 801, 854 P.2d at 632.

80. *Kovacs I*, 67 Wash. App. at 730, 840 P.2d at 216.

81. *In re Marriage of Croley*, 91 Wash. 2d 288, 292, 588 P.2d 738, 741 (1978).

82. Former Wash. Rev. Code § 26.09.190 read in pertinent part, “The court shall determine custody in accordance with the best interests of the child. The court shall consider *all relevant factors including . . .*” (emphasis added). It then set out five factors.

statutory section that structures the discretion of the trial court by requiring it to assign "greatest weight" to one of the statutory factors. A review that asks only whether the trial court's decision is manifestly unreasonable, even assuming the findings of fact are supported by the evidence, does not provide sufficient scrutiny. If the trial court is not required to set out the facts on which it relied, the statutory factor to which that evidence applies, and the weight assigned to each factor and its evidence, we have no rational evidentiary basis for deciding whether that court followed the statute and heeded its express preference. In sum, the practical effect of reviewing a trial court's residential placement decision under the traditional "abuse of discretion" standard, without more, is to render the "greatest weight" language superfluous.

It is therefore essential to implementation of this section of the Parenting Act, with its statutorily structured discretion, that more be demanded of trial courts. Requiring explicit links between findings of fact and specific statutory factors would go a long way toward ensuring due consideration is paid the requirement that greatest weight be assigned to factor (i). If a trial court decides not to award primary residential care to the parent preferred under factor (i), then its findings in relation to the other factors will likely make the basis of that decision clear. If not, the trial court should briefly explain the evidence and the factors that were determinative.⁸³

Appellate courts have an essential role to play in demanding such accountability. As Professor Mary Ann Glendon of Harvard Law School has written:

As case law begins to develop under a grant of discretion, appellate courts also have an important role to play. Rather than automatically deferring to the "sound discretion" of the trial judge, they should, especially in the early application of a new statutory grant of discretion, carefully examine lower court decisions to promote coherence, continuity and predictability in the case law.⁸⁴

I therefore urge appellate courts to clarify that trial courts abuse their discretion when they fail to set out factual findings for each of the statutory factors along with a brief explanation, if necessary, of what

83. See discussion of "step two," *infra* Part III(B)(1)(b). I am aware that writing this explanation will likely take the court longer than reading and signing findings drafted by counsel for the prevailing party. Those few hours of work will be well spent. These decisions affect adult parties and their children on the deepest levels for the rest of their lives.

84. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 Tul. L. Rev. 1165, 1196 (1986).

evidence caused the court to award primary residential care to the parent not preferred under factor (i).⁸⁵ If a decision is appealed, the appellate court will then be able to decide fairly and efficiently whether, as a matter of law, the trial court exercised its discretion in accord with the statutory language and policy.⁸⁶

In addition, I urge that findings of “fact” that are conclusory or merely restate words or phrases in the statute without reference to the evidence, not be accepted. Appellate courts do not have time for guessing-games, and litigants deserve to know the facts that determined the result. Furthermore, a requirement that findings be concrete will help combat another serious problem: the problem of judicial bias or emotionalism.

b. Excluding Biased and Inappropriate Considerations

Where courts have broad discretion, there is always a danger that personal values and biases, and not governing statutes and precedent, will determine the outcome. Moreover, child custody proceedings strain the equanimity of even the calmest of persons, be they professional or not. These cases implicate some of the deepest values that human beings have: values about how one should or should not raise children. They may very well trigger emotional responses that implicate the personal histories, hopes, and fears, of the professional and lay participants.⁸⁷ Judges must do everything in their power to recognize and not be unduly influenced by these common responses. But sometimes judges do not accept responsibility for this important act of recognition. A requirement that courts specify the relevance of certain facts may assist or force a court to examine the legal appropriateness of personal responses to the

85. One scholar would even go further. The suggestion by Professor Carl Schneider of Michigan Law School that trial courts in custody disputes be required to write full opinions is worthy of serious consideration. The Parenting Act, while not granting unfettered discretion, does still leave much room for judgment “according to authority” by the trial court. Ronald Dworkin, *Taking Rights Seriously* 32 (1977). As Schneider notes, there are a number of advantages to a requirement of opinion writing, including the fact that trial court will need “to think more clearly” and that appellate courts will be better able to use trial court experience to develop rules. Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard*, 89 Mich. L. Rev. 2215, 2294–95 (1991).

86. The question of finality is discussed *infra* note 175 and accompanying text.

87. Stephen A. Newman, *A Tale of Two Cases: Reflections on Psychological and Institutional Influences on Child Custody Decisions*, 34 N.Y.L. Sch. L. Rev. 661, 667–68 (1989); Jane W. Ellis, *Evaluating the Expert: Judicial Expectations of Expert Opinion Evidence in Child Placement Adjudications*, 5 Cardozo L. Rev. 587, note 69 and accompanying text (1984). For a general discussion of the psychological experience of judging, see Andrew S. Watson, *Some Psychological Aspects of the Trial Judge’s Decision-Making*, 39 Mercer L. Rev. 937 (1988).

evidence. Similarly, if judges were required in their findings to refer to concrete facts and not mere conclusions like “stable” or “unstable” or “healthier”⁸⁸ it would not be as easy to conceal and rest on emotion or bias.⁸⁹

The specter of bias based on gender stereotypes or archaic sexist attitudes looms large in custody cases. We know, for example, that many Washington state attorneys report they have discouraged fathers from even attempting to obtain the status of primary residential parent on the theory (scientifically untested) that a father cannot win.⁹⁰ In every case where a father has been a primary caregiver parent and fails to seek primary residential care for fear of gender bias, the Act’s deference to and support of continuity of care for children is undermined. As a result, children whose fathers have performed the bulk of their daily care and who have established a close emotional bond with them, may lose that primary caregiver parent after divorce solely because of that parent’s gender.

The problem of gender bias, however, arises more frequently for mothers than for fathers in our society because women—whether or not they work outside the home—still perform the great majority of parenting functions in the family.⁹¹ Mothers are therefore much more likely to have been the primary caregiver. Unfortunately, women in our culture continue to be treated, consciously and unconsciously, according to a double standard in a variety of ways, two of which are especially relevant in the divorce custody context. First, women are still judged especially harshly with respect to sexual conduct, even when that conduct has not affected the well-being of their children. Second, mothers are often judged by a higher standard than are fathers when it comes to parental caregiving. As I discuss in Part IV of this article, both of these biases may have played a role in the Kovacs case.

In Washington state it is improper to decide a residential provision case on the basis of one parent’s sexual conduct, absent evidence of harm

88. See Findings, *supra* note 21 and accompanying text.

89. Cf. Schneider, *supra* note 85, at 2294 (recommending full opinions to prevent trial court reliance on improper justifications).

90. Sixty-five percent (65%) of attorneys who responded to a 1988 survey of Washington State attorneys by the Washington State Task Force on Gender and Justice said that they have always (8%), usually (21%) or occasionally (36%) dissuaded fathers from seeking custody because their experience suggests that when all other factors are equal, judges will not give fathers’ petitions fair consideration. Final Report of the Washington State Task Force on Gender and Justice in the Courts, *supra* note 62, at 65–66 Fig. 21.

91. See *supra* note 66 and accompanying text.

to the child from that conduct. Even before the state's no fault legislation in 1973, when marital misconduct was not infrequently considered in divorce custody cases, the Washington Supreme Court held that "adultery" does not necessitate a finding that a parent is unfit.⁹² The Dissolution Act of 1973 moved even further in the direction of separating moral fault per se from custody decisions. Thus, the statute immediately preceding the Parenting Act included the statement that the "court shall not consider conduct of a proposed guardian that does not affect the welfare of the child."⁹³ The Parenting Act does not refer to marital misconduct on its face, but there is no reason to believe that it was re-injecting older notions of fault back into custody determinations. To the contrary. The Act has a lengthy section that describes the parental conduct that requires or may require a court to restrict a parent from living with or spending time alone with his or her child. That section is concerned exclusively with conduct that has had or might have an adverse effect on the child.⁹⁴ There is nothing in the language or legislative history of the Parenting Act that supports any other result. Thus, the law in Washington is in accord with the national trend, considering proof of extramarital sexual conduct "insufficient reason to impose conditions on custody or visitation . . . as long as the parent's [sexual] conduct is not directly detrimental to the well-being of the child."⁹⁵

92. *Westlake v. Westlake*, 52 Wash. 2d 77, 78, 323 P.2d 8, 8 (1958).

93. Wash. Rev. Code § 26.09.190 (repealed 1987), *supra* note 82. In the words of Luvern V. Rieke, Professor Emeritus of the University of Washington School of Law: "The intent of [the quoted language] is that custody should not be denied simply to punish a parent for conduct which, while perhaps immoral, will in no tangible way harm the child." Luvern V. Rieke, *The Dissolution Act of 1973: From Status to Contract?*, 49 Wash. L. Rev. 375, 409 (1974).

94. Wash. Rev. Code § 26.09.191(3) states explicitly with respect to a list of harmful parental behaviors that may require restrictions on the parent-child relationship:

(3) *A parent's involvement or conduct may have an adverse effect on the child's best interests, and the court may preclude or limit any of the provisions of the parenting plan, if any of the following factors exist:*

[The listed behaviors all concern the parent-child relationship - e.g., "neglect or substantial nonperformance of parenting functions"]

or,

(g) *such other factors or conduct as the court expressly finds adverse to the best interests of the child*

(emphasis added).

Wash. Rev. Code § 26.09.191(2)(c) contains a similar requirement that the court find a nexus between parental conduct and harm to the child.

95. Diane M. Allen, Annotation, *Propriety of Provision of Custody or Visitation Order Designed to Insulate Child from Parent's Extramarital Sexual Relationships*, 40 A.L.R. 4th 812, 816 (1985).

Yet, even in light of precedents and policies in Washington state and across the country that oppose consideration of extramarital affairs absent evidence of direct harm to the children, women who have affairs are often made to pay a price in terms of their relationships with children at divorce. A recent study in *Stanford Law Review* confirmed, again, that consistent with several authors' claims, "courts are more intolerant of women's sexuality than of men's and are particularly intolerant of mothers' extramarital relationships . . ."⁹⁶

This study concentrated on decisions in modification actions where one parent had remarried or begun to cohabit. There is, unfortunately, no reason to believe such bias is less prevalent in initial custody determinations. In another study, for example, consisting of interviews with sixty divorced mothers and fifty-five divorced fathers, the author discovered that:

Most fathers believed that wifely disobedience was a form of maternal unfitness, and that "uppity" wives deserved to be custodially punished. . . . "Uppity" behavior included non-marital sexual activity during marriage or after divorce . . . or initiating a divorce against a husband's wishes.⁹⁷

Thus, the "bad wife" is instantly transformed by her sexual misconduct into a "bad mother." This irrational perception is not only unjust to the adult woman, assuming she has been the primary caregiver and assuming no other facts weigh against her being granted primary residential care after divorce. It also works a grave injustice, as it did in the *Kovacs* case, to the children who will lose important and reassuring continuity of care by that otherwise good enough mother.

A second common type of gender bias that influences custody decisions, and that may well have played a role in *Kovacs*, is the higher expectation of parenting that is placed on mothers as compared to fathers. This double standard for judging parenting has been recognized by courts. For example, in a well-known California Supreme Court case concerned with the injustice, to mother and child alike, of depriving a primary caregiver mother of custody because she, *like the father*, had to work outside the home to earn a living, former Chief Justice Bird noted the double standard applied in numerous cases:

96. Jennifer E. Home, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 *Stan. L. Rev.* 2073, 2137-38 (1993).

97. Phyllis Chesler, *Mothers on Trial* 78 (1991) (emphasis in original; underscore added). Phyllis Chesler, Ph.D., is Professor of Psychology, City University of New York.

See . . . *In re Marriage of Estelle* (Mo.App. 1979) . . . in which the court affirmed a custody award to a working father, not remarried, as against an equally fit working mother. The reviewing court . . . emphasized that the father often prepared the child's breakfast and dinner and picked her up from the day care center himself. . . . It is difficult to imagine a mother's performance of these chores even attracting notice, much less commendable comment.

Other examples of the double standard include *Gulyas v. Gulyas*, [Mich. 1977] . . . which affirmed a trial court's award to a father who worked a standard 40-hour week. The mother . . . worked 40 to 50 hours during tax season, but only 10 to 30 hours the rest of the year. She had greater flexibility in her work hours, she was at home when the child left for school and she picked the child up at a neighbor's home one or two hours after school. . . .

In its award to the father, the trial court "repeatedly emphasized [the mother's] employment" . . . and "noted that [the mother's] 'career and need for obtaining a better livelihood has diminished her manifested ability to care for the child other than in Day Care homes.'" . . . The trial court "did *not* remark upon [the father's] inability personally to care for the child during his working hours." . . . The court concluded that "the husband [was] more inclined to the old fashioned virtues," that "the mother of the child is an energetic and ambitious career woman . . . and that the father of the child is perhaps less ambitious than the mother, but is more of a homebody." . . . These moralizing conclusions, *supported only by the facts recited above*, were sufficient to support an award of custody to the father.⁹⁸

As Dr. Chesler notes in her study of contested custody cases, mothers are expected to perform an endless series of caregiving tasks and are never allowed to fail in any of their responsibilities. Fathers are expected to do much less and are allowed to fail even those limited expectations.⁹⁹

98. *Burchard v. Garay*, 724 P.2d 486, 495-96 n.6 (Cal. 1986) (Bird, C.J., concurring) (emphasis added and citations omitted).

99. Chesler, *supra* note 97, at 49. See also Nancy D. Polikoff, *Gender and Child Custody Determinations: Exploding the Myths*, in *Families, Politics and Public Policies: A Feminist Dialogue on Women and the State* 183, 191 (I. Diamond ed., 1983): "Case analysis shows a tendency to overrate small paternal contributions to parenting because they are still so noticeable, and to concomitantly over-emphasize lack of total maternal parenting."

Nowhere is this double standard more apparent than when a mother has “failed”—when she has done something that has allegedly harmed a child. Indeed a mother’s “bad act,” even a single one, may trigger gender-biased reactions that preclude a rational evaluation of the act’s effect on the child. One scholar attributes this reaction to “anxiety and ambivalence concerning the mother-child relationship” and adds that:

[T]he “bad mother” image may have immediate impact on the legal practitioner . . . First, the image can lead the lawyer [or judge] to exaggerate the harmfulness of a [mother’s] alleged behavior. . . . It will discourage the lawyer’s critical inquiry into whether in fact a child is being harmed at all¹⁰⁰

As I demonstrate in the next section, exactly such an exaggeration and such a lack of critical inquiry may have occurred in the *Kovacs* case.

Finally, courts must make every attempt to be aware of the way in which gender-linked empathies, conscious and unconscious, may inappropriately influence their perceptions of the evidence. I don’t believe it is necessary to cite any authority for the assertion that people often find it easier to identify with a person of the same, and not the other, gender. Similarly, when a person has been divorced, another person’s divorce may trigger old emotions that increase the possibility of identification with the divorcing person of the same gender. This is ordinary human nature. But in a judge, that ordinariness may preclude his or her taking in and fairly evaluating each divorcing parent’s separate version of reality.

The ability to retain one’s critical sense and to recognize and separate one’s personal values, including gender biases and gender-linked emotional identifications, from the evidence about parenting is an essential skill for the lawyer, judge, and psychological expert involved in custody decisions. Lawmakers and all those judges who apply the facts to the law must make every effort to be aware of those biases and not let them weigh in the scales of justice.

There is, of course, no way to exclude all personal biases, sexist or not, on the part of a trial judge. In the end, we must rely on the best possible training for judges concerning the governing law—a law that is concerned with children and not with the punishment of parents—and the policies that underlie that law, including the importance of continuity of care. We hope that every judge is conscientious in trying to sort out

100. Marie Ashe, *The “Bad Mother” in Law and Literature: A Problem of Representation*, 43 *Hastings L.J.* 1017, 1020–21 (1992).

which reactions to evidence are rational and relevant and which reactions are not. We wish for a judge who combines Solomon's wisdom and the self-knowledge of a Socrates. We also recognize, however, that judges, like the rest of us, are human. So we make and must follow technical legal rules, like the "greatest weight" requirement in the statute and the requirement recommended here of explicit, concrete findings of fact in relation to each statutory factor, along with a brief explanation whenever a parent preferred under factor (i) is not awarded primary residential care.

IV. *KOVACS* REVISITED—THE NEED FOR GREATER ACCOUNTABILITY

To demonstrate the need for greater accountability by trial courts as well as the way in which a court can responsibly exercise its discretion in deciding a residential provision dispute, it is necessary to complete two exercises. First, I return to the findings of fact by the trial court in *Kovacs*. I hope to show that that court's decision should have been reversed and remanded. Second, I return to the statute to demonstrate, using the record in the *Kovacs* case, how a court might have decided that case in a way that honored the letter and spirit of the law. This latter task is necessarily hypothetical since I did not observe the witnesses and so did not have the opportunity to evaluate their respective credibility. It should serve, however, as a model of the type of decision making that I am advocating for future decisions.

A. *Inadequacy of the Trial Court's Findings of Fact and Conclusions of Law*

Findings I through V by the trial court are recitations of concrete facts, none of which were disputed by either party. I therefore begin my examination of the trial court's findings with Finding VI.

VI

Both Petitioner and Respondent were interviewed, tested and observed with the children by Dr. E. Clay Jorgensen, who testified that although the Petitioner can offer the children continuity, having lived with her and having attended Spokane

schools, that is out-weighed by the Respondent's ability to offer a more structured stable environment for the children.¹⁰¹

Finding VI describes the conclusions of the father's expert witness and the bases of his testimony, testimony on which the court, by its own admission, relied heavily.¹⁰² We cannot determine the legal relevance of this evidence from the finding alone. Furthermore, the wording suggests confusion concerning the judge's, as opposed to the expert's, role in applying the facts to the law.

The relevance of the finding to the statutory factors is ambiguous. The reference to "continuity" suggests the judge may believe the expert's evidence goes to factor (i). The reference to "ability to offer a more structured stable environment," with its forward-looking perspective suggests the judge is describing expert evidence that would properly go to factor (iii), the factor concerned with future performance of parenting functions. Resolution of this ambiguity is crucial; it will determine which parent receives the benefit of the preferred factor (i). As I discuss below, I believe the record demonstrates clearly that the expert's reasons for recommending the father as primary residential parent go to factor (iii). The essential point for future cases, however, is that the legal relevance of this finding about the expert and his bases is ambiguous, and this ambiguity must be resolved to honor the statutory preference for factor (i).

Additionally, the wording of this finding suggests that the trial court may have confused its role as decision maker with the expert's role as provider of an advisory recommendation. Even if it is factually correct that the expert thinks "continuity" is *outweighed* by "ability to offer a more structured stable environment," that weighing is not and should not be legally determinative. The statute assigns "greatest weight" to the factor that is concerned with "continuity" and not to the factor concerned with future parenting. Furthermore, it is the judge, not the expert, whose weighing of the evidence, in relation to the language of the statute, must decide the case. The use of the word "outweighed" in the finding may, of course, be nothing other than an attempt by the father's counsel to

101. Findings, *supra* note 21.

102. Dr. Jorgensen, I feel that he did an outstanding job. In fact, if this had been a shorter case, you could almost say, *should the court take his opinion*, that you could call Dr. Jorgensen a seeing eye dog, that he interviewed the parties, the children and made his recommendation, and the court is following it. However, not only did Dr. Jorgensen testify, but I observed both parents in court for two days

VRP, *supra* note 19, at 332 (emphasis added).

create the appearance that the evidence was indeed “weighed” as required by the statute.¹⁰³ The court’s acceptance of this wording, however, may indicate, additionally, that the court willingly delegated to the expert its authority to weigh the evidence and apply it to the law. If so, that delegation was improper.¹⁰⁴

VII

Petitioner’s instability was shown by conclusions made by Dr. Jorgensen, her reluctance to reach a decision regarding the move with her children to the California home secured for the family, and her dependency on other people.¹⁰⁵

The findings and the record in this case are permeated with references by the court, the father’s expert, and the father himself to the mother’s alleged “instability.” It is impossible not to infer that this “instability” played a key role in the court’s decision. The term is both vague and condemnatory. It is also emotionally evocative. Who, after all, wants an unstable mother? It is therefore essential to step back and dispassionately ascertain the finding’s legal relevance and to verify that it has legitimate evidentiary support in the record.

Once again, we are left to guess whether this finding goes to factor (i) or to some other factor. Factor (i) does refer to the “relative strength, nature and *stability* of the child’s relationship with each parent.”¹⁰⁶ There is no indication on the face of Finding VII, however, that it is concerned with the mother-child *relationship*, and it would be a mistake to assume that the stability of a parent-child *relationship* is the same thing as one parent’s “stability” or “instability” in some other context. Two examples from this case demonstrate this distinction. First, there was testimony by the father’s former supervisor at work that the father was not a dependable employee and had been fired for illegal conduct.¹⁰⁷ A rational person would not assume, based on this evidence, that the father was therefore a “bad father” or that his relationship with his children was unstable, although one might reasonably question his role as employee.

103. These findings were, as is customary, “presented by” counsel for the prevailing party. Findings, *supra* note 21, at 8.

104. Jeffreys, *supra* note 74, at 126–27. See also Robert H. Aronson, *Law of Evidence in Washington* 704–4 (2d ed. 1993): “[A] witness (particularly an expert witness) may testify on an ultimate *factual* issue that constitutes an element of the charge or claim, as long as the opinion does not encompass application of a legal standard outside of the witness’ competence.”

105. Findings, *supra* note 21.

106. Wash. Rev. Code § 26.09.187(3)(a)(i) (1992) (emphasis added).

107. VRP, *supra* note 19, at 120, 122–25.

Second, Finding XIV states the children are “emotionally and physically healthy.”¹⁰⁸ One can reasonably infer from Finding XIV that the “instability” of the mother, who has been the primary caregiver throughout the lives of these healthy children, and who cared for them alone for all but ten of the seventy-eight weeks preceding trial, has not negatively affected the children or her relationship with them. Thus, the relevance of the “instability” conclusion remains ambiguous, although it appears on its face not to concern the mother-child relationship and so not to go to factor (i).

Let us set aside the crucial question of relevance, however, and examine the evidentiary basis for this finding. This exercise is particularly important because “instability” is precisely the sort of vague, pejorative, and evocative term that may mask an emotional or biased judgment, especially when the finding gives no clue as to how the “instability” relates to the children’s well-being. The finding states that the mother’s “instability” is shown, first, by Dr. Jorgensen’s “conclusions.” (I will return to this evidence in a moment.) It also refers to the mother’s “reluctance to reach a decision” about moving to California and the mother’s “dependency on other people.” The finding does not explicitly mention her drinking and driving, but because of the appellate courts’ references to that evidence, and because of its inherent seriousness, I will discuss it as another possible basis for the trial court’s “instability” conclusion, and I will explain why I believe that, on the record in this case, reliance on that evidence would have been improper. I begin with the court’s references to the mother’s “reluctance to reach a decision” and her “dependency.”

Indecisiveness and dependency. There is no explanation why the court has equated the mother’s indecision about moving to California with instability. (The equation seems peculiarly psychologically naive since the indecision concerned the momentous question whether or not to continue a marriage. Indeed, one might consider “indecision” about such an important question, an indication of stability, not instability.) Nor is there any way of knowing with certainty what the court is referring to when it mentions the mother’s “dependency,” another example of the court’s use of a mere conclusion about her character rather than a “fact.” The expert also uses the term “dependent” in the record,¹⁰⁹ but the phrasing of this finding suggests the court is relying on facts or interpretations of facts in addition to the separately described “expert’s

108. Finding XIV, *infra* note 168 and accompanying text.

109. VRP, *supra* note 19, at 250.

conclusions.” The finding fails to tell us, however, what those facts might be.

The finding does contain some verbal clues, however, about the court’s concerns. We know from the record that the mother’s “reluctance to reach a decision” occurred at the same time her husband was in California and she was involved with another man. We also have the vague reference in the finding to “dependency on other people.” Both these clues support the inference that the court’s concern with the mother’s indecision and dependency is a veiled reference to her marital misconduct during the time immediately preceding her decision to divorce instead of joining her husband in California. The record strongly suggests, in fact, that the words “instability” and “unstable”—words that appear to be used as a means of impugning her parenting abilities—are really proxies for judgments that the mother in this case was a “bad wife” who did not deserve custody of her three children. For example, the father testified that he should be awarded primary residential care of all three children because:

Marcia is *not stable enough* to stay there and handle those limits. *That’s a product of even after I left she went out and had an affair.*”¹¹⁰

The judge appears to have agreed with the father’s evaluation, an evaluation that is nothing other than a moral (and probably very emotional) judgment dressed up in the garb of psychological assessment. Almost the entire focus of the court’s oral decision is on the mother’s “instability,” an instability that he attributes chiefly to her indecision regarding a divorce and to her affair and *not at all* to her relationship with the children she has raised. Thus, the court states:

The court is going to find that certainly the petitioner is *unstable*. I can’t understand—she did testify that, when she left Alaska, that she was on the verge of separating, but she didn’t do that. She didn’t come back to Spokane and file for dissolution. It was agreed that the father would go to California, obtain employment, find a suitable home and pick up the family and return to California as a unit. Certainly, one thing shows that the natural mother is *an unstable person*, and there’s no contradiction to the testimony that the personal belongings were half packed up ready to go. All he had to do was pack the other half, and they’d be on their way south, but at that time was when she informed the respondent that it was

110. VRP, *supra* note 19, at 307 (emphasis added).

all over, and she certainly should have been able to make up her mind or have her mind made up before all that transpired. If she had intentions when she left Alaska to return to Spokane and wait for her husband to come down and then find a job and resume a family residence, *she certainly wouldn't have been out associating with another man, carrying on a romance* if she was planning on going to California with her husband. It seems that whichever way the wind blows is the way that she goes¹¹¹

There is nothing in the Parenting Act's provisions on residential placement or restrictions on parenting plans, nor is there anything in Washington case law, that indicates the judge was correct in relying at all, let alone so heavily, on the mother's romance or her "indecision" regarding her relationship with her husband as a basis for the decision absent evidence of harm to the children. To the contrary.¹¹² Furthermore, here we very likely have an example of judicial intolerance of a mother's extramarital affair improperly coloring the court's decision.¹¹³ An appellate court should reject the finding to the extent it is based on these facts. What, though, of the court's reliance in the same finding on the expert's conclusions? Should that evidence redeem an otherwise unacceptable finding?

The expert's conclusions. Trial courts are allowed, of course, to hear and evaluate the worth of expert testimony. Here, however, the court uses that testimony to bolster a conclusion that should not otherwise stand. Furthermore, the record in this case indicates that the expert has himself relied in significant part¹¹⁴ on the fact of the mother's affair in forming his conclusions. It contains the following testimony by the expert during cross-examination by the mother's attorney:

Q. What were the *factors of instability* that you felt were present in Marcia's life?

A. Well, the factors primarily described from the test. When after the couple separated—in fact, actually it was before separation—I think there was a plan for Marcia and the children to come and stay with her parents while John went to California, got a job and got set up, and then reunite. There were two drinking-related traffic offenses during that period of time. *She became involved*

111. VRP, *supra* note 19, at 333 (emphasis added).

112. *See supra* note 94 and accompanying text.

113. *See supra* note 96 and accompanying text.

114. *See infra* notes 115 and 123.

romantically with another person, all of which fits the personality profile described in the test, that she's dependent on other people for her support and for feelings of well-being.

....

Q. But other than that drinking *and that episode* that happened in October of '89, those were the only factors of *instability* that you really noticed with her?

A. Those are the only historical events, yes.¹¹⁵

A trial court that was not itself reacting emotionally and inappropriately to the mother's "indecision" about her marriage and her infidelity would carefully evaluate this aspect of the expert's testimony. As Goldstein, Freud, Solnit, and Goldstein have noted, trial court dependence on an expert witness may be an evil where "experts compensated by only one side have uncurbed leave to express opinions which may be subjective or not narrowly controlled by the underlying facts."¹¹⁶ A rational court would consider, therefore, whether the testimony might reflect the personal moral values of the expert witness rather than the expert's professional assessment.¹¹⁷ It would also consider, in accord with legal precedent, whether there was evidence from the expert or other witnesses that the children have been harmed or might be harmed by the mother's having had an affair. (Her drinking and driving, another behavior to which the expert refers, is discussed separately below.) Where there was little or no evidence of harm to the children from a mother's marital and extramarital behavior, an unbiased court would consider either discounting the weight to be given to, or disregarding altogether, the expert's testimony about the mother's "instability."

It is conceivable, in theory, that the trial judge in *Kovacs* brought his personal reactions to the case, but rested ultimately on a reasoned

115. VRP, *supra* note 19, at 262–64 (emphasis added). It should be noted that the expert later states that the mother's drinking did *not* play a role in his recommendation for the father. See *infra* note 123 and accompanying text. Thus, the expert's conclusion about the mother's "instability" appears to rest in significant part on his evaluation of her having had an affair.

The "test" referred to in the quote is a standardized test that he administered and interpreted. For a discussion of the use and abuse of such tests in custody disputes, see Bolocofsky, *supra* note 74, at 206–07 and Ziskin and Faust, *supra* note 74, at 48.

116. Goldstein *et al.*, *supra* note 59, at 50 (quoting *Bennett v. Jeffreys*, 387 N.Y.S.2d 821, 827 (1976)).

117. *Id.* at 10–17.

evaluation of expert testimony that he deemed legitimate and important. It is equally conceivable and much more likely, however—given the judge's oral decision and given his coupling of the expert's "conclusions" and what are probably veiled references to the mother's infidelity under the rubric of "instability"—that he simply seized on the expert's testimony as a rationalization for his personal biases. If so, then the judge in the *Kovacs* case was able to do with the expert what longstanding legislative policy would not allow him to do by himself.¹¹⁸ He was able to condemn and punish a mother for her sexual conduct in the absence of evidence that the conduct had harmed the three children for whom she had been primary caregiver throughout their lives.¹¹⁹

118. See *supra* notes 93–94 and accompanying text.

119. The supreme court appears to concede in *Kovacs* that the children have not been harmed by the mother's "personality, conduct, or parenting style." See *supra* note 41 and accompanying text. At the same time, that court's depiction in its statement of facts of the mother's having "left the children with various relatives during times when she was traveling to and from the man's home in Olympia," *supra* note 19 and accompanying text, implies it may have believed there was possible harm to the children (i.e., neglect) by the mother because of the affair. The record fails to support this implication. The father testified the mother left "the children in several places," but was unable to name a single specific instance and ended up relying, instead, on remarks allegedly made in one or more telephone calls by "Delores," the maternal grandmother. VRP, *supra* note 19, at 95–97. (The grandmother testified, however, that her daughter "had left the children in good care, and [the paternal grandmother] wanted to see the kids." VRP, *supra* note 15, at 11.) The father's niece testified that she received a phone call on one occasion from the maternal grandmother in which the grandmother stated that "she knew that Marcia was having an affair and that Marcia had dropped the kids off at her house and she couldn't take care of them, and she wanted John to come and get them." VRP, *supra* note 19, at 175. Even assuming this statement was admitted for the truth of the matter asserted (the father's attorneys referred to it as "rebuttal" evidence, VRP, *supra* note 19, at 174), and even assuming it is true, it provides no direct evidence that the children were being or had been neglected.

In sum, the only examples of the mother's leaving the children consist of stays with close relatives. VRP, *supra* note 19, at 95–96, 175. (Query whether a happily married couple's decision to leave their children for occasional short stays with relatives would be construed as neglectful.) There is no evidence that the children ever suffered any harm from their time with their relatives. Indeed, the father's expert testified that he didn't "perceive anything that would indicate maltreatment by either parent," VRP, *supra* note 19, at 249, and no evidence of "either abuse or neglect." VRP, *supra* note 19, at 268. Nor, as noted earlier, is there any evidence that the mother's leaving the children with relatives during the time of her affair was a frequent occurrence. See *supra* note 19. Finally, it should be noted the affair occurred during one isolated period of crisis and change in the mother's life, VRP, *supra* note 19, at 21–23, and there is no evidence that this behavior was part of a pattern on the mother's part.

Thus there is no evidence that the children were harmed by the mother's affair. Nor is there any evidence from which one can infer future harm from the mother's extramarital affair. At most, there is the father's expert's professional speculation that the mother's affair was indicative of "instability" that, in his opinion, would harm the children in the future. See *infra* note 147 and accompanying text. In the normal case—without the strong indications of an emotional and punitive reaction by a judge to the mother's affair—we would credit the judge's weighing of this speculation. If the judge decided the expert testimony was worthy of weight, the question of the speculation's

It is not the responsibility of an appellate court to re-weigh expert evidence, and I am not suggesting that the court of appeals or the supreme court should have taken on that task.¹²⁰ At the same time, an appellate court should be loath to accord evidentiary sufficiency to a finding based on expert testimony where the record indicates there is a strong possibility that the court used that expert testimony to justify punishing a parent for her behavior as a spouse instead of tending, as the law demands, to the question of the children's interests and the mother's and father's role as parents. One solution at the appellate level would be to set aside the suspect finding¹²¹ and only examine the remaining findings in deciding whether to affirm or reverse. If the court decides to affirm, then the arguably tainted finding will not have influenced the decision. If it decides to reverse, it can remand with instructions to the trial court to weigh any expert evidence with careful regard to the underlying facts and legislative policy.

legal relevance would then need to be faced. As I argue later in this paper, I believe the expert's opinion, if given any weight, would go properly to factor (iii), or factor (iv), but not to factor (i). See *infra* note 155 and accompanying text.

120. I note as an aside, however, that I would not have given much or any weight to this expert's conclusions even apart from any questions raised by his reliance on the mother's sexual conduct in the absence of harm to the children. The expert's conclusion that the mother had "personality problems" and was "dependent" appears peculiarly ignorant both of the difference between female and male social conditioning in our culture and of the effect of the mother's real life circumstances as opposed to any individual psychopathology. He testified, for example:

Well, [the mother] would not be described as being mentally ill or disturbed in any sense. There were some personality problems that were more troublesome. . . . She is a person who tends to find her identity with other people, primarily mates. She's a dependent individual.

VRP, *supra* note 19, at 250.

The expert seems blissfully unaware that the woman he is describing has not only sacrificed many years of her life to raising three young children, but is the product of a culture that rewards women for devoting themselves to, or finding their identity in, relationships with other people, whether children or adults. See generally Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (1982).

Additionally, the expert seems strangely oblivious to the well-known fact that marital breakup is a "psychosocial stressor." See Ziskin and Faust, *supra* note 74, at 45. The mother's affair (and drinking and driving) occurred during just such a period of crisis. The Kovacs were physically (though not legally) separated, and she had come to the upsetting realization that she no longer trusted or respected her husband. VRP, *supra* note 19, at 21-22. A person's behavior under such circumstances may not be representative of his or her behavior under less stressful circumstances. Ziskin and Faust, *supra* note 74, at 45.

121. The appellant's attorney, as occurred in the *Kovacs* case, can bring such an abuse to light for review. Brief of Appellant at 10-11, 15, *Kovacs I*, 67 Wash. App. 727, 840 P.2d 214 (1992) (No. 11319-1-III).

In sum, the record indicates that the court's finding on the mother's "instability" was very likely based on the court's personal reaction to the mother's relationship with her husband and her extramarital affair as well as on testimony, both lay and expert, that was itself based entirely or in significant part on the mother's sexual conduct without evidence of adverse effect on the children. What, though, of the mother's serious mistake of drinking and then driving while her children were in the car? Did that episode possibly figure in and arguably legitimize the trial court's finding on her "instability?" Should that evidence have figured in this case at all? If so, where would it fit in relation to the statute?

Drinking and Driving with Children in the Car. The mother's having been cited twice for alcohol-related driving offenses, including once when she had an accident with the children in the car, is distressing evidence. The trial court, however, made no reference to this behavior in its oral decision¹²² or in its findings of fact. Furthermore, as noted earlier, it placed no restrictions on the mother's time with the children in the permanent parenting plan, a fact that strongly implies (i) that the court did not consider the children to be in any danger in the future from the mother's drinking and driving, or (ii) that the court's real concerns lay not with protecting the children but with punishing their mother, or (iii) both. Furthermore, even the father's expert witness stated he was unwilling to base his recommendation on the fact of the mother's drinking:

Q. So from what I'm getting from you, you said that the drinking was a wash, that it didn't affect your decision at all

A. Yes.¹²³

What is going on? The most likely explanation is found in the fact that the record is full of uncontradicted evidence of the father's own history of substance abuse¹²⁴ as well as his receipt of numerous driving violations.¹²⁵ If he has no record of receiving a citation for DWI when his children were in the car—and we cannot be certain because the question was never put directly to him—it may be because he was able to leave the children at home alone with his wife on the numerous

122. See *supra* note 111 and accompanying text.

123. VRP, *supra* note 19, at 263. This testimony by the expert suggests it was really the mother's affair rather than her drinking that influenced the expert's interpretation of her personal "history." See *supra* note 115 and accompanying text.

124. VRP, *supra* note 19, at 19, 26, 102–05, 127, 263, 278.

125. VRP, *supra* note 19, at 129–30.

occasions when he went out drinking with friends.¹²⁶ In fact, the unedited version of the expert's testimony, quoted above, states:

Q. [T]he drinking . . . didn't affect your decision at all *because John also drank a lot?*

A. Yes.¹²⁷

A decision to award primary residential care to the father on grounds that the mother had two DWI's, including one with the children in the car, would have required a principled trial court to examine the substance-abuse record of the father as well as the mother in this case.¹²⁸ It would have required the court to admit, were drinking to be a basis for its decision, that it was very possibly taking the children from the frying pan and dropping them into the fire. Instead, the trial court in this case appears to have accepted the father's expert's perhaps disingenuous testimony that the mother's drinking did not play a role in his recommendation.¹²⁹ It is also possible that the trial court was influenced by the mother's drinking, but masked that judgment in its conclusory "instability" language. If so, then the mother was being held to a higher standard of behavior than the father.¹³⁰ And if that occurred, then the court's decision was not only based on an unacceptable double standard; it was also deeply unjust to the mother, and, more importantly, deeply unjust to the three young children.

In sum, Finding VII about the mother's "instability" is likely based on judicial bias rather than on any careful consideration of the mother's

126. VRP, *supra* note 19, at 19, 46–47, 83, 102–03, 127–28, 278.

127. VRP, *supra* note 19, at 263 (emphasis added).

128. It would also, of course, have required evidence about the effect of each parent's drinking, if any, on the children's welfare. The record in *Kovacs* is bereft of any evidence that the "strength, nature or stability" of the mother's relationship with her children has been impaired by the mother's drinking or her drinking and driving. There is no evidence that the children sustained any lasting emotional damage from the accident and the stay in a foster home. Nor is there evidence directly indicating that the mother's (or the father's) drinking is likely to interfere with care of the children in the future. It should be noted that the latter evidence would go either to factor (iii) on future performance of parenting functions or to the separate statutory section on parenting plan restrictions that refers to "[a] long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions." Wash. Rev. Code § 26.09.191(3)(c) (1992).

129. I say disingenuous because the expert denies the drinking by either parent was relevant, yet he also testified that the mother's history of drinking and driving played a role in his determination that she was unstable. *See supra* note 115 and accompanying text. It is worth noting that the father's expert considered the mother's drinking and driving an indication of a personality disorder and of her instability, but assigned no psychological significance whatsoever to the father's long history of substance abuse.

130. *See supra* note 99 and accompanying text.

past, present, or future parenting abilities. And even without that inherently disturbing fact, this condemnatory finding remains ambiguous as to its legal significance.

VIII

The Petitioner's family members, with whom the children have had frequent contacts and who were alleged to be significant adults to the children, are unstable.¹³¹

Finding VIII has the virtue of referring to facts that appear to go to one and only one factor in the statute: factor (v). This factor asks the court to consider:

[t]he child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities.¹³²

On its face this factor appears to be addressed to the importance of continuity with significant people (other than parents) and with significant surroundings and activities. The trial court in *Kovacs*, however, uses conclusions about the parents' respective extended families to justify a decision that will have the practical effect of removing the children from their "allegedly significant" relationships with other adults and from familiar daytime environments. This application of the facts seems to misconstrue the import of factor (v). Setting that question aside, however, is there evidence to support the finding that the mother's family members are "unstable," and, if so, is this conclusion a legitimate basis for not awarding primary residential care to the mother?

The court's finding that the mother's family is "unstable" is another conclusion without specific reference to the evidence. There was no expert evaluation of any member of the mother's family. Thus, the court's use of the word "unstable," a word that implies a psychological judgment based on psychological expertise, is suspect. I will assume, however, that the finding is based on the testimony of three lay witnesses—the mother, the mother's mother, and the father—that the mother's father has a history of drinking and (not clearly defined) abusive behavior, and I will not discuss the question of the judge's qualifications to conclude, based on that evidence, that the mother's

131. Findings, *supra* note 21.

132. Wash. Rev. Code § 26.09.187(3)(a)(v) (1992).

family members are “unstable.”¹³³ If I am correct about the basis for this conclusory finding, then it raises the legal question whether reports of a grandparent’s behavior—where the children spend time but are not living with that grandparent—are properly considered under factor (v) of the statute.

The party who is attempting to use evidence of a significant adult’s problems to his or her benefit in a residential provision case should be required to show, at a minimum, that (i) the relationship *is* a “significant” one, i.e., the child has been and will be spending significant amounts of time with that adult, and (ii) that “significant” relationship is sufficiently detrimental to the child that it is necessary to select a residential placement decision that will guarantee little or no contact with that “significant adult.” To demand any less is to punish a parent for behavior by another adult that he or she is incapable of controlling. It also punishes the children by depriving them of important continuity of care without any evidence that the parent preferred under factor (i) wouldn’t act to protect the children, if ever necessary, from the troublesome “significant” adult.

The court concedes in the finding itself that the children’s relationship with the mother’s parents is only “allegedly significant.” Furthermore, the record reveals that the children were not living with the grandfather at the time of trial and that there were no plans that the children would do so if they lived with their mother.¹³⁴ Additionally, with the exception of testimony that the youngest child once was in the room when the grandfather was shouting at his wife¹³⁵ and that the parents once had to leave the grandfather’s home with the children in hand because the grandfather was acting up¹³⁶—evidence that indicates both parents are willing and able to act to protect the children if need be from any bad behavior by the grandfather¹³⁷—the record contains no evidence that the children ever have been exposed to, let alone harmed by, their grandfather’s allegedly troublesome behavior. Furthermore, the father knowingly allowed his children to spend considerable amounts of time with the maternal grandparents prior to the divorce action.¹³⁸

133. See *infra* note 141.

134. VRP, *supra* note 19, at 21, 33.

135. VRP, *supra* note 19, at 173.

136. VRP, *supra* note 19, at 48, 55–56.

137. VRP, *supra* note 19, at 48–49.

138. VRP, *supra* note 19, at 29, 93.

Thus, in the absence of evidence that the children's relationship with the grandparents was or is "significant" and that the children have been or will be harmed by that relationship, an appellate court should rule that this finding is groundless and irrelevant.

IX

The Respondent's sister, Maryann Dodd, and niece, Lisa Dodd, who testified, were credible and stable.¹³⁹

The court may, of course, determine the credibility of witnesses. The relevance of this credibility finding is unclear, but probably concerns testimony by these witnesses concerning Marcia and John Kovacs, evidence that goes to other findings.¹⁴⁰

The court's conclusion that these witnesses are themselves "stable," however, is of questionable relevance, at best, and is without support in the record. There is nothing in the finding itself or on the record to indicate these relatives are "significant adults" in the children's lives or that they are expected to become significant adults in the children's lives. Furthermore, there is no expert evidence and not even any lay evidence from which the court might have reasonably inferred that these relatives are or are not "stable" people.¹⁴¹

X

The Respondent has a more stable life than the Petitioner and has demonstrated a more successful ability to see to his responsibilities than the Petitioner.¹⁴²

Finding X, like other findings, is both conclusory and ambiguous regarding its legal relevance. There is evidence, however, that arguably

139. Findings, *supra* note 21.

140. See, e.g., discussion of Finding X, *infra* note 147 and accompanying text.

141. As Goldstein et al., *supra* note 59, at 23, 26 (citations omitted), have written in connection with a similar conclusion in another child custody case:

The judge assumed a professional role for which he was not qualified. He acted as a psychologist by using his own courtroom observations to determine the emotional makeup of [the parties]. As a judge he was authorized to take into account his personal observations of the witnesses' behavior on the stand for purposes of evaluating the veracity of their testimony. Here, however, he used these observations not for such an authorized purpose but to assess the emotional and social maturity of two adults. . . .

. . . .

Even if the judge had been trained to make psychological assessments, he had no authority to become a witness, particularly one who did not take the stand.

142. Findings, *supra* note 21.

supports the finding's first clause, that the father has a "more stable life." If the judge is referring to psychological stability, he may be relying on the father's expert's conclusions. That merely raises the question, of course, how this finding differs from Findings VI and VII.¹⁴³ Alternatively, if the judge is referring to practical considerations which might be the basis for a common sense conclusion that the father has a more stable life, there is testimony by the father's sister and niece to that effect. I do not agree with the weight that the judge is willing to assign to the opinions of these lay witnesses,¹⁴⁴ but the judge is entitled to make that call. Even if one accepts, however, that there is a sufficient evidentiary basis for the part of the finding that refers to the father's "more stable life," its legal relevance remains unclear. The vague reference to the father's "life," particularly when he has not lived with his children for the year and a half before trial and was never their primary caregiver before that time, tells us nothing about his relationship with those children. Presumably, then, the finding addresses some factor other than factor (i).

The reference to the father's "more successful ability to see to his responsibilities than the [mother]" in the second part of the finding is so vague that it should be rejected by an appellate court. We have no idea, for example, what types of responsibilities the court has in mind. Are they the responsibilities of a husband or a wife? If so, what has the wife done to demonstrate less ability to be responsible compared to the husband?¹⁴⁵ Is this yet another veiled reference to the mother's marital misconduct? And, if these are spousal responsibilities, how exactly do they relate to the statutory factors and, overall, to the best interests of the

143. See *supra* note 21 and accompanying text.

144. I question whether the contact these non-neutral witnesses have had with the parties is sufficient for their sweeping conclusions. The 21-year-old niece is allowed to opine that the children should be with her uncle because since his separation from his wife, "I've seen a change in John and an improvement and . . . I haven't seen any marked improvement on the way Marcia lives." VRP, *supra* note 19, at 181–82. The niece's total contact with the parties and their children since 1984 was "a few days in the summer of '87, a few days the summer of 1989, a few days spring break of 1990 and a few days the summer of 1990." VRP, *supra* note 19, at 184–85. Similarly, the father's sister opines that her brother is "a stable man." VRP, *supra* note 19, at 194–95. Her view of her former sister-in-law is that she's "not particularly" stable. VRP, *supra* note 19, at 196. Again, however, the contact since 1985 has been minimal. VRP, *supra* note 19, at 196–197, 201–02, 205–09.

145. The court is characteristically silent about the husband's behavior and so fails to mention, *inter alia*, his not being a "dependable employee," VRP, *supra* note 19, at 120, and his having been fired for what his former boss called "illegal" behavior, VRP, *supra* note 19, at 122–25, or his staying out late nights drinking with friends when his three children were young. VRP, *supra* note 19, at 19, 46–47, 83, 102–03, 127–28, 278.

three children? Or is the finding a reference to parental responsibilities? If so, what facts led the court to conclude that a father who minimally performed parenting functions over the years,¹⁴⁶ and who, since the separation, has failed to pay child support on a consistent basis,¹⁴⁷ has demonstrated "more ability to see to his responsibilities"? If these are references to comparative ability concerning parental responsibility, do they go to factor (iii) or some other factor concerning the children? This vague and conclusory language provides no rational basis for evaluating either its evidentiary sufficiency or its legal relevance.

On remand, the trial court should be instructed to provide concrete facts for these vague and conclusory comparisons and to clarify which section of the statute is implicated by each aspect of this finding.

XI

The strength, nature and stability of the children's relationship with the Respondent is healthier and more evident than with the Petitioner.¹⁴⁸

Finding XI is crucial because it tracks the language of a key phrase in factor (i), and in so doing implies that the father should receive the benefit of the greater weight accorded to that factor. It demonstrates, like so many of the other findings in this case, why conclusory findings must not be allowed, and it provides an opportunity to consider the legal distinction between factor (i) with its emphasis on the parent-child relationship and factor (iii) that refers to the future performance of parenting functions.

Because the trial court did not interview the children in this case and because the court and the lay witnesses are not qualified, in any event, to conclude that one parent's relationship is "healthier" than the other's,¹⁴⁹ I assume for purposes of discussion that the court is relying here, again, on the father's expert's testimony. On that assumption, did this expert's testimony really go to factor (i)?

The expert was directly asked the basis of his recommendation that the father and not the mother be granted primary residential care of the three children, and he stated:

Primarily on my perception that John, who is the child that I think *is going to be* the most difficult child, is in need of the kind of style

146. See *infra* note 160.

147. VRP, *supra* note 19, at 32-33.

148. Findings, *supra* note 21.

149. See *supra* note 141.

that John [the father] has, that is, more firmness, more consistent limits than the more nurturing style that Marcia has, and that John's adjustment is better.¹⁵⁰

Thus, the court's finding about each parent's relationship with the children appears to be rooted in the father's expert's concerns about the future development of the oldest child. Similarly, the expert's preference for the father's "adjustment"—a preference that depends on the expert's view that the mother has a "personality disorder"¹⁵¹—is based on speculation about the children's future well-being:

Q. Okay. So, if Marcia—you said Marcia was not mentally ill, right?

A. She's not mentally ill, no. She has a personality disorder.

Q. Can a person with that personality disorder be a good parent?

A. Well, they can be—they can get by as a parent. . . . It's not automatic that they would be a poor parent, but it certainly puts them at risk in terms of their adjustment and how they handle their life, which will in turn affect the children. . . . *The personality disorder will affect the parenting. That's inevitable.*

Q. *In every case in every person?*

150. VRP, *supra* note 19, at 253 (emphasis added). This conclusion is based, presumably, on the expert's observation in his office of each parent with the three children. It was the expert's perception that during the two interview sessions the father was "somewhat overbearing" and that the children were "not particularly responsive to [the mother's] limit setting. At times, they bordered on being out of control." VRP, *supra* note 19, at Exhibit 1, at 3.

Once again, I must differ with the trial court's evaluation of this evidence, although I concede the court has the right and the responsibility to weigh the expert evidence. For the purposes of future cases, I have two reasons. First, on cross-examination, the expert was resistant to the possibility that the children's behavior with the mother might be attributable in whole or part to the fact that his session with the children and mother, unlike his session with the father and children, took place late in the afternoon. VRP, *supra* note 19, at 261–62. The expert therefore seems to have little or no awareness of the effect on young children of fatigue and pre-dinner hunger, a phenomenon well-known to most, if not all, primary (and many secondary) caregivers. Second, there is no indication that the expert's opinion of this behavior is leavened by the common sense observation that the children's behavior with their mother may have reflected their greater familiarity with, and therefore greater trust of, her compared to their father whom they had barely seen during most of the prior year-and-a-half and who had never been their primary caregiver.

151. For reasons described earlier, I question the expert's conclusions about the mother's "instability" or "personality problems" or "personality disorder," *see supra* note 120. However, to demonstrate the importance of requiring courts to tie their findings to the statutory factors, I will assume that those conclusions were well-founded and worthy of weight.

A. Yes. Whether it affects it in a destructive way or a very mild way is what's left to be seen. . . .

Q. So it's your conclusion . . . that the children were—the children were fine. They were okay. They were well-parented?

A. My conclusion was that they were adequately adjusted children.

Q. And did you know that for the previous two years prior to the time that you saw Marcia with the children Marcia had been almost the only parent that these children had had in terms of daily contact with the children?

A. I guess I assumed that John had daily contact, although certainly less in terms of how much time.¹⁵²

Thus, the expert's central concerns in making his recommendation go to the future. He testified that the children were "bright," developmentally normal, "doing fine," and "adequately adjusted."¹⁵³ Additionally, the expert's evidence concerning the emotional bonds between the children and each parent was that the children were "well bonded" with each parent.¹⁵⁴ Therefore, the evidence for this finding that is ostensibly concerned with the respective parent-child relationships is concerned not with the strength, nature, and stability of those relationships, including which parent was the primary caregiver, but with predictions about the effect of parental "style" or parental "adjustment" on the children in the future.

In sum, this finding, while borrowing the language of factor (i), appears to be based on evidence that goes, instead, to factor (iii)—"each parent's past and potential for future performance of parenting functions."¹⁵⁵ Its conclusory language, however, serves to mask its legal significance. If the law and policy of the Parenting Act are to be upheld, appellate courts should not accept conclusory findings that merely track the language of the statute without pointing to the concrete facts on which those conclusions are based.

152. VRP, *supra* note 19, at 264–65 (emphasis added).

153. VRP, *supra* note 19, at 247, 265. See also Finding XIV, note 22 and accompanying text, that the children "are emotionally and physically healthy."

154. VRP, *supra* note 19, at 270.

155. Judge Shields, dissenting from the majority of the court of appeals, appears to have concluded that the expert's evidence went to factor (iii). See *supra* note 37. I agree. It is also arguable that the evidence goes to factor (iv) concerned with the children's "emotional needs."

XII

The Petitioner and Respondent had agreed in 1989 that the Petitioner and the children would join the Respondent in Southern California, but the Petitioner did not adhere to the agreement.¹⁵⁶

This finding relates in no way on its face to the law governing residential provisions. Rather, it reveals the court's distress that the mother broke an agreement with the father. The articulation of this legally irrelevant fact suggests the possibility that the court may have been emotionally identifying with the father in this case.¹⁵⁷ Whether or not this conjecture is true, however, the finding appears to be completely irrelevant.

XIII

During the first five years, this marriage was traditional in that the Petitioner performed more of the domestic parenting functions and the Respondent was the wage earner, however, the roles were reversed at times and the Respondent did participate in parenting functions and the Petitioner did generate income for the family.¹⁵⁸

This finding's characterization of the parental role "reversal" suggests a gender-biased perception of the parents' respective caregiving activities. The fact that the mother was the primary caregiver throughout the children's lives is uncontradicted on this record.¹⁵⁹ The record indicates that the father performed some minimal parenting functions.¹⁶⁰ There is no evidence, however, that during the time the marriage was intact the parents' roles were ever "reversed." There was one period of approximately six months during which the father needed to use the parties' only car and, as a consequence, drove the children to school.¹⁶¹ In addition, there was a period when the mother worked full-time during

156. Findings, *supra* note 21.

157. The trial judge does refer to his own divorce at the end of the proceedings. VRP, *supra* note 19, at 345.

158. Findings, *supra* note 21.

159. VRP, *supra* note 19, at 25, 46, 79, 97, 126, 254, 256, 307.

160. His role with respect to the children seems to have been mostly "fun" (roughhousing, reading bedtime stories when he was home on time) with brief periods of transporting the children to school and occasional discipline. VRP, *supra* note 19, at 47-48, 67, 70-72, 110-12, 126-27, 169, 192, 279-81.

161. VRP, *supra* note 19, at 47-48.

the day caring for other people's children as well her own and, in addition, worked in the middle of the night as a janitor to make ends meet.¹⁶² The father's childcare during that period consisted of being at home at nighttime only, sleeping, while the mother who had cared for the children all day was out working for part of the night.¹⁶³ The court's elevation of either of these parenting functions by the father to a role "reversal" is a classic example of the way in which courts credit minimal parental responsibility by fathers and dismiss all caregiving by a mother who isn't there a full twenty-four hours a day.¹⁶⁴

It is theoretically possible that the court's reference to role "reversal" concerns the period of marital separation preceding the trial, although the plain language of the finding suggests otherwise. If so, the court is crediting the father with being a primary caregiver during the periods when the three children were visiting him in California. The only witness to the father's behavior during those visiting periods other than the father himself,¹⁶⁵ testified, however, that when she was there, she—and not the father—took care of cooking for the family.¹⁶⁶ Furthermore, even if the father did assume full parenting responsibilities during his time with the children in California (and he testified that a babysitter did most of the caregiving during the day¹⁶⁷), his role as primary caregiver consisted of a maximum of ten to twelve weeks over the previous eight years of caregiving for the Kovacs children. This is not a case, in short, where the caregiving was shared in anything even approaching an equal amount day-to-day or over time. Thus, again, this finding provides an example of the sort of gender-bias that leads a court to elevate a secondary caregiver father to primary caregiver status on the basis of minimal caregiving. This biased perception serves, in turn, to invalidate the realities of the children's lives and the significance of their relationship with the parent who has been their primary caregiver.

162. VRP, *supra* note 19, at 16–17.

163. VRP, *supra* note 19, at 46, 141. It is true, of course, that parents have to get up on occasion during the night with children. VRP, *supra* note 19, at 280.

164. See *supra* notes 98–99 and accompanying text.

165. The father never testified that he did, in fact, personally perform various parenting functions for the children when they were staying with him. VRP, *supra* note 19, at 320–322. Rather, he testified, ambiguously, in response to the *verbatim* wording in his own attorney's questions, that he was "able to take care" of various parenting functions. VRP, *supra* note 19, at 291.

166. VRP, *supra* note 19, at 204, 321.

167. VRP, *supra* note 19, at 321–22.

XIV

The children of the parties are emotionally and physically healthy.¹⁶⁸

This evidence is supported by, *inter alia*, the uncontradicted testimony of the father's and the mother's experts.¹⁶⁹

XV

A change of the children's surroundings, school and playmates will not be detrimental to the children.¹⁷⁰

This conclusory finding misstates the evidence on which it appears to rely. I will assume, since a judge and lay witnesses are unqualified for such a conclusion, that the finding is based on testimony by the father's expert.¹⁷¹ If my assumption is correct, however, the court has misstated what the father's expert said. That entire testimony consists of the following:

To go to California is, you know—they're in school here. That was the other point, and to go to California would be a move for them, although that was partially offset by the fact that the information I had from Marcia is that she's planning to move at some point anyway, and so that was kind of an issue.

....

Q. You had indicated that . . . because Marcia was going to be moving anyway, that that was also a wash: it didn't make a difference?

A. I would say that . . .

Q. Do you have any opinion as to what the effect of a move from Spokane to California would have on these children possibly?

A. I anticipate that it would be somewhat disruptive to the children.¹⁷²

168. Findings, *supra* note 21.

169. VRP, *supra* note 19, at 153, 247, 265.

170. Findings, *supra* note 21.

171. The mother's expert testified just the opposite, VRP, *supra* note 19, at 154–55, 159, but the court is entitled to weigh the testimony of each expert.

172. VRP, *supra* note 19, at 254, 257, 268–69.

Thus, the expert does not state that a move “will not be psychologically detrimental.” And, depending on one’s reading of the word “disruptive,” he may have said precisely the opposite. In any event, this finding is not supported by the evidence and is yet another example of an abuse of the trial court’s discretion.

The supreme court should have affirmed the court of appeals’ decision to reverse and remand even if it did not agree with every statement made in the majority’s opinion. The trial court decision in this case was based almost entirely on conclusory and arguably biased findings whose relevance to the governing statute was ambiguous at best. A reversal would have plunged the Kovacs children, once again, into a period of uncertainty, and the prolonging of litigation in custody cases is a real concern because family members need certain decisions so that they can get on with their lives. The important need to minimize the period of uncertainty must not be an excuse, however, for subjecting children to the vagaries of judges who fail to exercise their discretion in accord with the language and policy of the Parenting Act. Rather, the solution to the need for finality must be located elsewhere. Trial courts should issue stays where necessary to minimize disruption to the child during the appellate process,¹⁷³ and appellate courts must continue to do their best to expedite any decision involving a child’s residential placement. The requirement of concrete findings tied to the statutory factors should increase the ease and efficiency of appellate review, and the creation of precedents should work over time to decrease the number of cases that are appealed.

B. Kovacs—Hypothetical Findings of Fact and Conclusions of Law

To demonstrate that a requirement of concrete findings of fact in relation to the residential provision statute would not be prohibitively onerous (and would, in fact, facilitate appellate review), I set out findings of fact tied to the statute and based on the record in *Kovacs*:

The section of the Parenting Act that governs residential provisions, Wash. Rev. Code Sec. 26.09.187(3) and that Act’s statement of policy, Wash. Rev. Code Sec. 26.09.002, are the controlling law in this case.

173. I would recommend that a stay be issued whenever a child is living at the time of the trial court’s decision with the parent preferred under factor (i), and an appeal is taken following a decision in favor of primary residential care with the parent not preferred under factor (i). I assume, in making that recommendation, that there is no need to protect the child from harms connected with the factor (i) parent, pursuant to Wash. Rev. Code § 26.09.191. The trial court refused to issue a stay following the Kovacs trial. VRP, *supra* note 19, at 342–43.

The first question under Sec. 26.09.187(3)(a), the residential provision section, is whether the residential schedule is consistent with Wash. Rev. Code Sec. 26.09.191, the section placing restrictions on parent-child contact where that contact might be harmful to the child. Both parents have an unfortunate history of drinking. I therefore order that neither parent shall ever drink and then drive with the children in the car. I hope and expect that violation of this restriction will never become an issue.

I turn now to the statutory factors and the evidence that is relevant to them.

Step One. With respect to factor (i), I find the following:

The evidence indicates that each parent loves and is loved by the three children. Specifically, the father's expert testified the children were "well-bonded" with both parents.¹⁷⁴ The mother's expert, who did not interview the father or observe him with the children, testified to the mother's strong emotional bond with the children.¹⁷⁵ These experts did not know the family prior to the litigation, but nothing in the evidence by the lay witnesses who did know the family contradicts these conclusions.

I further find that the record contains uncontradicted evidence that the mother has consistently taken much greater responsibility for performing almost all parenting functions relating to the daily care of the three children from the time of the birth of each child to the present with the exception of the relatively brief periods the children have visited with their father in California during the past year and a half.¹⁷⁶ Thus, her relationship with the children has been more stable over time than the father's relationship. It is reasonable to infer from this history that the children's relationship with their primary caregiving mother is a closer one and is more important to them than their relationship with their father who loves them, but who has never assumed equal or greater responsibility for performing parenting functions related to their daily care. Finally, I note that even the father's expert witness, a witness who was quite critical of the mother's personality and parenting style (during an office observation), conceded that the children raised primarily by this very mother, were "adequately adjusted."¹⁷⁷

The father's expert opined that the father's parenting style and psychological adjustment would better serve the children in the future

174. VRP, *supra* note 19, at 270.

175. VRP, *supra* note 19, at 150–151.

176. VRP, *supra* note 19, at 25, 46, 79, 97, 126, 254, 256, 307.

177. VRP, *supra* note 19, at 265.

than would the mother's style and personality. That observation, however, goes properly to factor (iii).

Thus factor (i), concerning the "strength, nature and stability" of each parent's relationship with the children, including who has performed more of the parenting functions relating to daily care, favors the mother on this record. I turn now to the other factors.

Step Two. (ii) With respect to factor (ii), there was no agreement by the parties, so this factor has no bearing on this case.

(iii) With respect to factor (iii) there is evidence by the father's, though not by the mother's, expert that the father has better "past and potential for future performance of parenting functions." Specifically, the expert predicted that the father's parenting style (e.g., his methods of discipline) would be more effective with one of the three children, than the mother's parenting style.¹⁷⁸ The expert was also concerned about the mother's "adjustment" and "personality disorder" in terms of future care of the children.¹⁷⁹

I have many problems with this expert's testimony.¹⁸⁰ As a result, were I judging this case in the real world, I would give that evidence little or no weight. For purposes of this exercise and this article, however, I want to demonstrate what would happen if a judge, like the trial court in *Kovacs*, considered the testimony valid and important. I therefore conclude that the evidence relevant to factor (iii) favors the father. I note, additionally, that the father's expert himself did not consider these concerns a dire matter. Rather, he considered the choice between the mother and father "a fairly close call."¹⁸¹

(iv) With respect to factor (iv), there is very little evidence on this record concerning the children's needs and none of it goes, specifically, to their emotional needs or developmental level (normal for all three children).¹⁸² It is possible that the father's expert's concerns about the oldest child's need for more discipline should, properly, be considered under "emotional needs" rather than "future parenting functions." I have chosen to apply this evidence to factor (iii), however, rather than factor (iv).

178. VRP, *supra* note 19, at 253, 259.

179. VRP, *supra* note 19, at 253, 259, 264-65.

180. *See supra* notes 115, 120, 123, 129, 150 and accompanying text.

181. VRP, *supra* note 19, at 256.

182. VRP, *supra* note 19, at 247.

(v) With respect to factor (v)—the child’s relationship with siblings and with other significant adults, as well as the child’s involvement with his or her physical surroundings, school, or other significant activities—I find that the evidence is in conflict. On the one hand, there has been evidence concerning the mother’s father’s arguably destructive behavior.¹⁸³ On the other hand, the father’s expert has testified that a move to California will be “disruptive,”¹⁸⁴ and the mother’s expert testified it would be traumatic.¹⁸⁵ In the absence of any evidence that the maternal grandfather’s behavior has harmed or is likely to harm these children, and in light of the concern about certain disruption of their lives if they go to live with their father, I believe this factor weighs in favor of the mother.

(vi) With respect to factor (vi), the only evidence concerning the children’s wishes is the testimony of the mother’s expert that the two older children expressed a desire to stay with their mother.¹⁸⁶ Because there is no evidence establishing that the children are “sufficiently mature” to voice such opinions, however, I assign that evidence no weight. As a result, neither parent is favored under this factor.

(vii) With respect to factor (vii), the parents’ respective employment schedules, the father is now working full-time but assures this court that he can find responsible care for the children during his working hours.¹⁸⁷ The mother works part-time so that she can care for the children when they are not in school or daycare.¹⁸⁸ Thus, the mother’s present employment schedule is arguably better for the children than is the father’s. In the absence of evidence, however, that the mother will be able to continue to afford to work part time,¹⁸⁹ I assign this factor to the mother, but give it little weight.

In sum, factor (i) favors the mother. On the other factors, the case between the parents is a close one, with factor (iii) (or, alternatively, factor (iv), depending on one’s interpretation) favoring the father, although not by a great deal, and factors (v) and (vii) favoring the mother, but, again, not by a significant amount. Wash. Rev. Code Sec. 26.09.187(3)(a) requires me to assign greatest weight to factor (i), and

183. VRP, *supra* note 19, at 10, 44, 92–93, 161, 173, 257, 289.

184. VRP, *supra* note 19, at 269.

185. VRP, *supra* note 19, at 154.

186. VRP, *supra* note 19, at 152.

187. VRP, *supra* note 19, at 88–89.

188. VRP, *supra* note 19, at 34–35.

189. VRP, *supra* note 19, at 43–44.

nothing that I have heard with respect to the other factors is so striking or significant that it should override that most significant factor.

I therefore hold that the mother shall be awarded primary residential care subject to the warnings concerning driving and drinking as described above and that the father shall be awarded liberal residential time with the three children, subject to the same warnings and restrictions.

V. CONCLUSION

The question of a child's residence and care following divorce is too important to leave to completely unfettered discretion. The Parenting Act expressly recognizes that fact on its face. Furthermore, its language, requiring a court to give greatest weight to factor (i), reflects the wisdom of a host of child development experts, legal scholars, and jurists, as well as many American parents, who have recognized the importance of continuity of care. The court of appeals in *Kovacs* may have overstated the legal significance of factor (i) to the extent it read into the statute a legal presumption favoring a primary caregiver parent absent evidence that that parent had harmed the child or children. The supreme court correctly rejected that interpretation. That court should have ruled, however, that the findings of fact in *Kovacs* were conclusory, arguably biased, and ambiguous as to their legal significance, and so affirmed the court of appeals' decision to reverse and remand.

The supreme court has not yet acted to ensure that factor (i) is consistently granted the significance it merits by virtue of being assigned "greatest weight" and by virtue of reflecting the Parenting Act's policy supporting the importance for children of continuity of care. I hope that the court will not fail to address this question when the opportunity next presents itself. Until the supreme court returns to this question, attorneys and trial courts in Washington should use scrupulous care in applying the residential provisions of the Act. That care requires, at a minimum, concrete factual findings in relation to each of the statutory factors. If a trial court decides not to award primary residential care to the parent preferred under factor (i), it should specify its reasons and supporting evidence in those findings and conclusions. Appellate courts, in their turn, should demand concrete findings in relation to the law so they can better (and more quickly) assess whether all relevant statutory factors have been considered, whether any inappropriate evidence formed the basis of the decision, and whether there is substantial relevant evidence for the trial court's findings and conclusions. Then, and only then, can

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the law function in a responsible and respectable way. Our children and those who care for them deserve no less.