Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals

Jane W. Ellis
University of Washington School of Law

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PLANS, PROTECTIONS, AND PROFESSIONAL INTERVENTION: INNOVATIONS IN DIVORCE CUSTODY REFORM AND THE ROLE OF LEGAL PROFESSIONALS

Jane W. Ellis*

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* Assistant Professor of Law, University of Washington School of Law. B.A., University of California at Los Angeles, 1968; J.D., Yale Law School, 1983. I wish to thank my valued colleagues James Hardisty, Wallace Loh, and Mary Whisner for their comments and suggestions. For assistance on the empirical portion of this Article, I want to thank especially certain of my students, who are named in Part III. Funding for this research was generously provided by the Nona Furmerton Cox-Kenneth A. Cox Student Assistantship Fund and by the Washington Law School Foundation.
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I. INTRODUCTION

For the past two decades, state governments throughout this country have engaged in a massive movement to reform the laws of divorce custody.¹ Most of these states have adopted various forms of so-called "joint custody."² At the

¹. The literature on divorce custody laws and the reform of those laws requires a full-scale bibliography and not a mere footnote. The best recent overview of these reforms is Bruch, And How Are the Children? The Effects of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States, 2 INT'L J. L. & FAM. 106 (1988). Numerous other articles are cited throughout this Article.

². A summary in Family Law Quarterly (accurate as of August, 1988) reported that 34 states had adopted some form of joint-custody legislation, and that two more had approved of joint custody in their case law. See Freed & Walker, Family Law in the Fifty States: An Overview, 22 FAM. L.Q. 367, 467 (1989). This survey does not count Washington State among the joint-custody jurisdictions, although the state's new Parenting Act is arguably a joint-custody-type statute. See, e.g., infra notes 30-32 and accompanying text.

Joint custody means many things to many people and comes in many legislative guises. The clearest categorization of the different legal options appears in Schulman & Pitt, Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children, 12 GOLDEN GATE U.L. REV. 539 (1982). Schulman and
same time, numerous advocates and scholars (theorists and empiricists alike) have pointed to the dangers, especially for women and children, of some or all legislative varieties of joint custody.\(^3\) During this period, reform of the “process” of divorce has also received much attention.\(^4\) Skepticism about the role of the adversarial system and its primary representative—the divorce lawyer—preceded “no fault” reforms and continues unabated.\(^5\) More and more jurisdictions now permit Pitt break joint custody into its two standard components, “joint legal” and “joint physical” custody, and state that the former “connotes parents’ equal legal rights, or authority, to make the vital decisions affecting the child’s life”; the latter refers to “parents’ alternating ‘physical care and living time with the child.’” Id. at 542 (quoting Levy & Chambers, The Folly of Joint Custody, FAM. ADVOC., Spring 1981, at 6, 9). They then categorize joint-custody legislation as belonging to one of four types: (1) joint custody as an option; (2) joint custody as an option only when parties are in agreement; (3) joint custody upon the request of one party; (4) joint custody ‘preference’ and ‘presumption.’” Id. at 546.


4. For a useful summary, see Bruch, supra note 1.


The literature on post-no-fault “process” reform is also too voluminous for convenient citation in a note. Much of the literature advocating alternative dispute resolution in divorce is implicitly, even when it is not explicitly, a critique of the traditional adversarial system. A seminal work on mediation is O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978). An excellent selection of readings on various process reforms is found in Carbonneau, A Consideration of Alternatives to Divorce Litigation, 1986 U. ILL. L. REV. 1119, 1120 n.2. Fineman, supra note 3, has numerous citations to this literature. A useful recent collection of essays, both theoretical and empirical, on divorce mediation is J. FOLBERG & A.
a court to require parents to go through mediation before proceeding to trial. Recently, however, some scholars have criticized these alternative dispute resolution procedures, especially mandatory mediation. Other scholars have examined the actual practices of divorce attorneys in an effort to provide better information on the reality of the law's informal processes, processes that govern the great majority of divorce cases.

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For estimates of the percentages of divorce cases that are resolved by informal
Of late, two trends have emerged. First, a number of jurisdictions, as well as the American Bar Association's (ABA) new Model Joint Custody Statute, have encouraged or required the use of a device called a "parenting plan," where parents elect some form of "joint custody" or "shared parenting." Second, in response to growing public awareness of the prevalence of child abuse and domestic processes rather than formal litigation, see infra note 22.

9. The Model Joint Custody Statute is reprinted in 15 Fam. L. Rep. (BNA) 1494 (Aug. 22, 1989). It was approved by the American Bar Association House of Delegates at the ABA's 1989 Annual Meeting, but "at the urging of Peter Langrock of Vermont, the house stopped short of urging state legislatures to adopt the model statute." Id.

10. See, e.g., COLO. REV. STAT. § 14-10-123.5(3) (1987) ("In order to implement joint custody, both parties may submit a plan or plans for the court's approval. If no plan is submitted or if the court does not approve a submitted plan, the court, on its own motion, shall formulate a plan which shall address and resolve, where applicable, the parties' arrangements for . . . (a) The location of both parties, the periods of time during which each party will have physical custody of the child, and the legal residence of the child; (b) The child's education; (c) The child's religious training, if any; (d) The child's health care; (e) Finances to provide for the child's needs; (f) Holidays and vacations; and (g) Any other factors affecting the physical or emotional health and well-being of the child."); ILL. REV. STAT. ch. 40, para. 602.1 (1989) ("In such [joint-custody] cases, the court shall initially request the parents to produce a Joint Parenting Agreement. Such Agreement shall specify each parent's powers, rights and responsibilities for the personal care of the child and for major decisions such as education, health care, and religious training. The Agreement shall further specify a procedure by which proposed changes, disputes, and alleged breaches may be mediated or otherwise resolved and shall provide for a periodic review of its terms by the parents."); MASS. GEN. L. ch. 208, § 31 (1988) ("The court shall require the parents to submit a plan in writing to the court within thirty days of the entry of the temporary custody order setting forth the details of shared legal custody including but not limited to procedures for resolving disputes . . . with respect to child raising decisions and duties."); see also LA. CIV. CODE ANN. art. 146A(I) (West 1982); MO. REV. STAT. § 452.375(4) (1986); MONT. CODE ANN. § 40-4-223(2) (1989); N.M. STAT. ANN. § 40-4-9.1(F) (1989); OHIO REV. CODE ANN. § 3109.04(D) (Baldwin 1989); TEX. FAM. CODE ANN. § 14.021 (Vernon Supp. 1990); VT. STAT. ANN. tit. 15, § 666 (1989).

The California Chapter of the Association of Family and Conciliation Courts also proposed the idea of a "plan" to the California State Legislature in AB 1612. See ASSOCIATION OF FAMILY & CONCILIATION COURTS, NEWSL., Fall 1989, at 4.

The idea of a plan appears to have originated with mental health and family law professionals affiliated with the Association of Family and Conciliation Courts, who were concerned with encouraging better cooperation between parents following divorce. See, e.g., Shear, Developing Written Agreements And Working Effectively with Attorneys, in CALIFORNIA CHAPTER, ASS'N OF FAMILY & CONCILIATION COURTS, MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES: TRANSCRIPTS FROM THE VALLAMBROSA RETREAT 58 (Sept. 1981) [hereinafter VALLAMBROSA RETREAT TRANSCRIPTS]; Ricci, The Divorce Process: Response and Reasons for Disputes, in VALLAMBROSA RETREAT TRANSCRIPTS, supra, at 7; see also Steinman, supra note 3, at 759 ("We have found that a very specific joint custody plan is useful psychologically as well as legally.").
violence, a number of jurisdictions around the country have not been content to leave child protection to the traditional *parens patriae* power of the courts. They have therefore amended their statutes to include express references to specific harmful behaviors that courts should heed in making custody orders.

Although the virtues and faults of all these reforms can be debated in the abstract *ad infinitum* and although empirical studies are susceptible to methodological bias or interpretive distortion, the insights provided by a combination of debate and empiricism still give us the best material we have to work with as our society continues to experiment with laws governing—and touching—the lives of divorcing parents and

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12. Professor Bruch writes:

> Although such concerns [spousal or child abuse] were traditionally an accepted reason for denying custody or visitation rights, the recent emphasis on parental access (sometimes expressed in joint custody or friendly parent provisions) prompted many courts to turn a deaf ear to one parent's plea that spousal or child abuse by the other parent required a traditional sole custody order, perhaps even one with restricted visitation. Such arguments were often viewed as mere efforts to avoid joint custody rather than as good faith assertions of conditions justifying limited access by one parent. As a result, some state legislatures have now enacted statutes reminding judges that a legislative directive to encourage continued parental contact after divorce is not a licence [sic] to ignore the court's responsibility to enter orders protecting children and custodial parents from abuse . . . .

Bruch, *supra* note 1, at 113.


The ABA Model Joint Custody Statute, 15 Fam. L. Rep. (BNA) 1494, 1494 (Aug. 22, 1989), incorporates this trend in its Policy Section: “Joint custody is inappropriate in cases in which spouse abuse, child abuse, or parental kidnapping is likely to occur.”
their children. This Article refines some old questions and raises some new ones about divorce custody reform and about the role of legal professionals in relation to that reform. To put some flesh on the bones of theory, it uses as an illustration an important recent statute, the Washington State Parenting Act ("the Parenting Act" or "the Act"). Legislation in other states may embody implicit compromises between pro-joint-custody and anti-joint-custody advocates, but this innovative statute self-consciously and explicitly incorporates both "shared parenting" provisions and express limitations on those provisions.

Although the Act requires

14. Robert Emery of the University of Virginia, a leading researcher on the effects of divorce on children, has written:

Science is not always as objective as we idealize it to be . . . . My concern is not with deliberate distortion. Rather, I am concerned that we pay too much attention to what we expect to find and too little attention to the unexpected. I am equally concerned that we recognize that the methodology employed in any given study can strongly influence its findings. . . . The more general lesson is that we cannot simply accept the conclusions of empirical studies. We must carefully evaluate them. Emery, supra note 3, at 141. He then adds that "[e]mpirical research on children and divorce has grown considerably in terms of both quantity and sophistication, however." Id.; see also Fineman & Opie, The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce, 1987 WIS. L. REV. 107; Chambers, The Abuses of Social Science: A Response to Fineman and Opie, 1987 WIS. L. REV. 159.

The debate about empirical work in the area of family law is only one piece of a larger debate about the validity and utility of all so-called sociolegal studies. See generally Review Symposium: Critical Empiricism and Sociolegal Studies, 14 LAW & SOC. INQUIRY (1989). It is true that empirical studies, indeed any fact, can be misused by advocates of one or another political stance. Information has been subject to abuse throughout human history, and some people are more prone than others to hide their beliefs behind claims of "objectivity" and "evidence." I therefore share, and advocate, a healthy skepticism about the use of empirical studies as the basis for legal reform. I do not believe, however, that we should reject all searches for better understanding through observation, particularly in an area like divorce law reform where states continue to rewrite legislation with little or no knowledge of how those laws operate in practice.


16. See, e.g., WASH REV. CODE §§ 26.09.181-.191. The drafters of the Act do not denominate or characterize their legislation as "joint custody" legislation. In place of the term "joint custody," the drafters use the expression "shared parenting."

The absence of "joint custody" terminology does not change the fact that some aspects of the law share some characteristics of certain types of joint-custody statutes. See infra notes 166-67, 176-77, and accompanying text (discussing this point). For a discussion of the way in which mental health professionals' language (e.g. "shared parenting") has entered the realm of (and now arguably dominates) custody reform debates, see Fineman, supra note 3, at 746-53.
parents to file a "plan" concerning their postdivorce parental arrangements, its use of the plan is unusual and important in two respects. First, the Act requires all parents—not only those electing one or more aspects of shared parenting—to complete a parenting plan at divorce. Second, the Act specifies the components that must be included in a parenting plan.

The Act reflects another trend as well. It lists a series of parental behaviors that the court must heed to protect children and abused spouses from harm. This aspect of the new law is significant not only because of the range of behaviors it specifies as giving rise to limits on shared parenting, but also because it requires limitations on each plan component where certain behaviors are found. As a result, the Act is arguably the nation's most extensive regulation to date of the "private ordering" process.


19. Id. § 26.09.184; see infra notes 146-51 and accompanying text.
21. See infra notes 153-55 and accompanying text.
22. I take the phrase "private ordering" from the influential work of Mnookin & Kornhauser, supra note 5, who, in turn, refer to a definition of "private ordering," attributed to Professor Lon Fuller, as "law that parties bring into existence by agreement." Id. at 950 n.1; see also infra note 48. Since Mnookin & Kornhauser first used this expression, another group of scholars has called into question any connotation of autonomy conveyed by the phrase "private ordering." Their empirically based work depicts a world in which private parties in an emotionally vulnerable state are influenced strongly by attorneys' interpretations of vague or indeterminate laws, the threat of costly litigation, or their own impatience, and arrive at necessary and necessarily imperfect solutions to disputes. Erlanger, Chambliss & Meli, supra note 8. They conclude their paper with the observation that the prevailing image of settlement as the negotiation of an agreement is inaccurate. Id. at 602. Their findings are not dissimilar to the work of other noted empiricists who have examined and criticized the lawyer-client interaction. See Sarat & Felstiner, Law and Strategy, supra note 8; Sarat & Felstiner, Legal Consciousness, supra note 8.

Because over 90% of divorce cases end in settlement rather than trial, this innovative attempt to control the agreements or settlements of parents is of particular significance. The standard figure given for the number of contested custody cases is approximately 10% of cases. See, e.g., Levy, Comment on the Pearson-Thoennes Study and on Mediation, 17 FAM. L.Q. 525, 530 (1984) ("[S]omething like 85 to 90 percent of divorce cases are settled by the spouses and
The Parenting Act therefore provides an opportunity to study important recent trends in custody reform as applied to actual human lives by actual parties and professionals. An examination of a law in practice as opposed to that same law in theory provides, in turn, an occasion to reevaluate the state's role in regulating the arrangements of family members during and following divorce.

Beginning with an overview of the "law in theory" in Part II, this Article describes the Parenting Act's political origins and the aspirations on which the Act was based. These aspirations reflect common contemporary national themes and are based on common (and often unexamined) assumptions about the purposes of custody law and, indeed, the nature and capacity of law itself. They are described in conjunction with major theoretical arguments about custody reform. Part II then sets out the specific regulations embodying the drafters' goals. The Article next looks at this ambitious new "law in practice" in Part III. It describes the ways in which the law was communicated to and received by family law professionals and the practical, ethical, and attitudinal barriers these regulations encountered—especially from counsel and courts—in the new law's first year of implementation. This Part describes the significant role legal professionals play in shaping or resisting this implementation process. It also examines the written arrangements made by parents in a sample of approximately three hundred cases. In addition, this section compares this information, whenever possible, to empirical findings from other jurisdictions. Finally, Part IV of this Article discusses the implications of the insights gleaned from this study.

The results of this examination provide important insights into the behavior of parties, courts, and counsel during a new law's initial emergence. And these observations, in turn, highlight issues important to any jurisdiction that has or is considering similar regulations and that is concerned, as all jurisdictions should be, with both the actual operation of statutes and the influence of legal professionals on the arrangements made by divorcing parents and their children.

See infra note 144.
FALL 1990

Divorce Custody Reform

II. THE LAW IN THEORY

A. A Brief History

In 1987, the Washington State Legislature passed a controversial new statute, the Washington State Parenting Act. An odd amalgam of current cultural themes in family law, the Act reflects the political concerns of its time and contains the inevitable compromises struck by drafters and legislators. In the early 1980s, Washington, like many other states around the country, was considering a number of different joint-custody bills. Following the defeat of the most recent of a number of such statutes, a multidisciplinary committee got together to try its hand at drafting an innovative law that would be acceptable to a larger constituency. Although the original members of this Ad Hoc Drafting Committee had different interests and perspectives—they were family law or mental health professionals—they all advocated a “shared

23. See supra note 15.
26. COMMENTARY TO 1987 PARENTING ACT, CHAPTER 460 LAWS OF WASHINGTON 1987, at 9-10 (1987) [hereinafter COMMENTARY]. The final version of the commentary does not have official pagination. I have called the “preface” page ii, and have begun consecutive numbering at page 1 on the page captioned “Be it enacted . . .”. The commentary was authored by the nine-member Ad Hoc Drafting Committee along with three additional experienced family law attorneys. The preface to the commentary states:

This commentary to the 1987 Parenting Act has been prepared to serve the same function as the Official Comments that were drafted to such uniform laws as the Uniform Parentage Act or the Uniform Commercial Code or to the Federal Court Rules. . . .

The commentary is intended to assist attorneys, judges, court workers, litigants, scholars and others in understanding the substance, origins and intentions behind the 1987 Parenting Act. This commentary should not be cited as authoritative legislative intent . . . .

COMMENTARY, supra, at ii. In spite of the disclaimer at the end, with respect to authoritative legislative intent, the commentary has been described in training sessions to numerous state judges, commissioners and attorneys as the definitive statement of the Act’s meaning and purpose. Address by Representative Marlin Appelwick at a Continuing Legal Education Seminar sponsored by the Seattle-King County Bar Association (Apr. 22, 1988).
parenting” model. They hoped this model would facilitate less-contentious divorces and encourage shared parental responsibilities after divorce. Later on, the committee brought in as co-drafters several other family law experts who worked in the public sector. These new committee members, who were highly experienced with a client base that included many low-income women and their children, brought a separate set of concerns. They wished to ensure both that a “shared parenting” bill would not further harm the already weak financial position of women in divorce and that vulnerable parties—women and children who had been victims of abuse or violence—would be protected against further harms.

27. See COMMENTARY, supra note 26, at 10.
28. See id. at 11-13.
29. The origins and precise make-up of this group of self-appointed experts is a story unto itself to be told at greater length elsewhere. One of the founders of the original (“shared parenting”) group described the invitation to the additional committee members as an inevitable and necessary reaction to the political power wielded by “women’s groups” in the State of Washington. Interview with Drafter D (Sept. 13, 1988). (Several drafters requested anonymity in these interviews; to conceal their identities, I have concealed the identities of all of the drafters with whom I spoke, not merely of those who so requested.) Similarly, the newer members of the committee felt it was important to join the group and thus have a role in drafting the new Act. They were particularly concerned with establishing a primary caretaker rule, and with statutory protections in cases involving domestic violence. Interview with Drafter A (Sept. 20, 1988).

The “shared parenting” advocates were not unsympathetic to the concerns about women and children and were willing to accommodate those concerns. “But,” as one of the original drafters stated, “we considered men’s issues equally valid, especially [fathers’] feelings of disenfranchisement [following divorce].” Telephone interview with Drafter C (Aug. 25, 1988). Whether this working alliance of very different interest groups is perceived as mutual cooperation or a politically necessary mutual co-optation, it is an historically significant event, standing in contrast to the passage of joint-custody legislation around the country. See H. JACOB, SILENT REVOLUTION 138 (1988). Jacob observes that “feminist organizations were relatively quiescent” with respect to the initial passage of joint-custody statutes in many states around the country. Id. He attributes the lack of political involvement to feminist “inability to monitor continuously the activities of state legislatures” and to “the ambivalence many feminists felt toward joint custody.” Id; cf. Kay, An Appraisal of California’s No-Fault Divorce Law, 75 CALIF. L. REV. 291, 300 (1987) (describing the role of the California Commission on the Status of Women in California’s no-fault divorce reform and noting that the Commission supported removal of fault as a desirable elimination of hypocrisy, not as a reform promising gender equality at divorce.)

At the same time, it was not an alliance without tension. Many, if not all, of the ambiguities in and possible conflicts between different sections of the Parenting Act can be traced to the tensions and compromises between the interests of “shared parenting” advocates and feminists. Interviews with Drafter A (Sept. 20, 1988), Drafter B (Aug. 10, 1988), and Drafter D (Sept. 13, 1988).

Some of the original group also attempted to keep in contact with fathers’ rights
The different constituencies represented by members of the Ad Hoc Drafting Committee each got something of what they desired. Those concerned with "shared parenting" concepts got a statutory statement of policy that "the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests." They also obtained substantive rules that allow the court to order "mutual decision-making," alternative dispute resolution methods and sharing of "residential care" in cases where the parents did not agree to such sharing. Furthermore, the Act requires all parents to agree to or settle on many details of postdivorce child rearing in a mandatory "parenting plan," the structure of which bears a strong resemblance to the sorts of plans sometimes required in jurisdictions with joint-custody legislation.

Those members concerned with the needs of women and children won safeguards against some of the perceived dangers of joint-custody legislation with passage of sections listing express limitations on each aspect of shared parenting and sanctions for bad faith negotiation. As the drafters' commentary to the Act states:

The [former law] fails to protect persons who are vulnerable. There is often a substantial power imbalance between the parties because of physical, emotional, or economic differences, or where certain types of conduct, particularly spousal abuse and child abuse, have occurred. In such situations, the current system...
fails to properly:

a. limit or prohibit joint custody or other provisions which require forced and inappropriate continuing contact between the parties

b. sanction [sic] or prohibit the abusive use of a custody challenge as a bargaining weapon to gain reduced or "apportioned" support awards or other concessions;

c. identify and protect unrepresented vulnerable parties.\textsuperscript{35}

They also obtained language that arguably creates a statutory "preference," though not a "presumption," for the primary caretaker in the event of disputes over a child's "residential schedule."\textsuperscript{36}

\textsuperscript{35} COMMENTARY, supra note 26, at 5.

\textsuperscript{36} I borrow the word "preference" from O'Kelly, Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian, 63 N.D.L. REV. 481 (1987) and from J. Goldstein, A. Freud, A. Solnit & S. Goldstein, IN THE BEST INTERESTS OF THE CHILD 66-67 (1986) [hereinafter IN THE BEST INTERESTS] (advocating "primary caregiver preference"). Under O'Kelly's recommended scheme, primary caretaking is "weighted more heavily than other considerations." O'Kelly, supra, at 483. A "preference" approach stands in contrast to a "presumption" favoring a primary caretaker such as that adopted by Justice Neely in Garska v. McCoy, 278 S.E.2d 357, 364 (W. Va. 1981), where once a parent is identified according to explicit caretaking criteria as primary caretaker, "the sole remaining question is whether that parent is fit." O'Kelly, supra, at 534.

The pertinent section of the statute, reprinted in the Appendix to this Article, directs the court to consider for purposes of determining a residential schedule, inter alia, "(i) [t]he 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." WASH. REV. CODE § 26.09.187(3)(a)(i) (1989) ("factor (i)"). Parenting functions are explicit tasks and responsibilities defined in another section of the statute, WASH. REV. CODE § 26.09.004(3), reprinted in Appendix. In all, there are seven statutory factors for residential provisions, but the court is instructed that "[f]actor (i) shall be given the greatest weight." Id. § 26.09.187(3).

A Garska-type presumption was included in a draft presented to the 1986 Legislature. See S.H.B. 1618, 48th Leg. (1986). This draft was strongly opposed by, among others, the Washington State Family Law Bar. 5 WASH. FAM. L. REP., No. 5, 1986, at 1. The legislature subsequently rejected it. Weber, Parenting Plans, Where Are We?, FAM. L. NEWSL., July 1986, at 7. The draft act was then revised to eliminate the presumption. See COMMENTARY, supra note 26, at 15. Under the final version the court is to give greatest weight to the child's relationship with each parent, including whether one parent has been a primary caretaker. See WASH. REV. CODE § 26.09.187(3)(a) (1989), reprinted in Appendix. This version accords with the "preference" recommended by O'Kelly. A "preference" loses in determinacy what it gains in political viability and interpretive flexibility. The political delicacy of the section is demonstrated by an explication offered by drafter and legislator Marlin Appelwick:

Of the factors considered, the most important factor is "the relative strength
The "parenting plan" and the express restrictions on the terms of the plan thus represent the two major ideological strands in the Act: (1) shared parenting, and (2) limitations on shared parenting—mandatory protections for vulnerable spouses or children and, arguably, a primary caretaker preference where parents bring a residential care dispute to the court. They also represent the major conceptual bases for the Act's extensive statutory regulation of private parental ordering upon divorce.

Before looking more closely at the drafters' concerns with these two predominant themes, it is important to clarify who represented the interests of children in the drafting process. The answer is everyone, in his or her fashion, and no one at all. There were genuine expressions of concern for children, and the drafters relied both on the expertise of their own mental health professional members and on work done on "parenting functions" by an ad hoc committee of child psychiatrists of the Washington Psychiatric Association. The statute reiterates the ubiquitous (and indeterminate) "best interests of the child" as its basic governing principle.

Everyone on the drafting committee seems to have agreed that parents should be encouraged to cooperate so that, absent...
other harms, children can continue to have ongoing relationships with both parents following divorce. Everyone seems to have agreed that children should be protected from harms inflicted by abusive or violent parents. Everyone was concerned about the considerable evidence that ongoing parental conflict following divorce is bad for children. Everyone thought children have a right to reliable support. No individual drafter, however, appears to have spoken solely from the child's point of view. Whether any of these expressions of concern should be discounted because those concerns coincided in many cases with the interests of adult constituencies remains to be seen.

B. Aspirations

The goals of the Parenting Act include many of the basic concerns and assumptions on which much recent custody law reform has been based. Drafters envisioned their custody

39. COMMENTARY, supra note 26, at 10.
40. Id. at 10, 12, 25-27, 36-41.
41. Id. at 13.
42. Id. at 12, 13; see also New State Parenting Act is Emeritus Law Prof's 'Baby,' U. WEEK, Jan. 7, 1988, at 1, 8 (quoting Professor Emeritus Vern Rieke) [hereinafter New State Parenting Act].
43. See, e.g., supra note 29 (statement of Drafter C); see also COMMENTARY, supra note 26, at 10:

The drafting committee was intentionally constituted to represent a variety of concerns, such as the need for protection of vulnerable populations, including low-income parents, abused spouses and children, the need to recognize the interests of fathers in continuing to be involved with their children, and the overriding concern that wherever possible and appropriate, children would be permitted to have positive relationships with both parents.

The importance of evaluating policy concerning children from the point of view of the child is one of the basic tenets of J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter BEYOND THE BEST INTERESTS]. Not all scholars agree that the child's perspective should be paramount. See, e.g., Elster, supra note 38, at 11 (arguing that making the needs of the child paramount "is liable to yield unjust decisions by neglecting the rights and needs of the parents").

It is extremely difficult, if not impossible, to untangle the web of selfish and unselfish adult motives for a given legislative policy ostensibly benefiting children. The history of the Parenting Act reveals much candor on the part of many of the concerned adults about the potential benefits accruing to adult interests from the proposed legal changes. See, e.g., supra note 29.
regime as one that would encompass many functions in addition to the traditional “private dispute resolution” or the discretionary common-law “child protection” function, where the state is basically passive unless and until an irresolvable conflict arises between parents. These aspirations were articulated in expansive rhetorical terms by the Ad Hoc Drafting Committee in its commentary to the Act. Interviews with some of the drafters as well as contemporaneous newspaper and magazine accounts of the drafters’ intentions provide further information on the reasons and assumptions on which the changes were based. This Article next examines the underlying aspirations in relation to the Act’s two predominant aspects, the plan and limits on the plan.

1. The parenting plan— a. The facilitative function: individualized private ordering—A major goal, prominent in divorce reform literature and grounded in notions of liberty, was to facilitate private ordering. Drafters hoped the plan

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45. See Mnookin, supra note 38, at 229. I have characterized the drafters’ goals here as “facilitative,” “normative,” “educative,” “preventive,” and “protective.” These labels indicate what I perceive to be the primary, though not the exclusive, function of a given goal.

46. I refer to the commentary as “rhetorical” because it is full of pleasing generalities and addresses none of the potential conflicts in or problems with the legislation. This is hardly surprising given that it was written by people who had conceived of, drafted, and presumably made politically necessary compromises throughout a four-year task. The tendency of such people would, understandably, be to present a cohesive piece of legislation and explain its workings, not to advertise results about which they might be less than thrilled, although they might have recognized privately the problems with those sections. In private conversations with drafters, I heard many expressions of concern that are nowhere to be seen in the commentary presented to the public.

47. See infra notes 57, 69, 85.

48. The most eloquent spokesperson for the virtues of and reasons for state facilitation of “private ordering” is Professor Robert Mnookin. See, e.g., Mnookin & Kornhauser, supra note 5, at 950; Mnookin, Divorce and the Law, in VALLAMBROSA RETREAT TRANSCRIPTS, supra note 10, at 1 [hereinafter Mnookin, Divorce and the Law] (“My thesis, in other words, is that the primary function of divorce law today is to give divorcing couples the power to create their own legally enforceable commitments. This is what I call private ordering.”). Mnookin has returned to the subject and examined whether any limitations ought to be placed on private ordering in divorce negotiations. In Mnookin, Divorce Bargaining: The Limits on Private Ordering, 18 U. Mich. J.L. Ref. 1015 (1985) [hereinafter Mnookin, Divorce Bargaining], he articulates and then examines three possible “justifications for limitations upon divorce settlements: (1) problems of capacity . . . (2) problems in bargaining . . . and (3) problems of externalities.” Id. at 1036. The effect of certain rules and procedures on children are included in the third category. Id. at 1032. Mnookin’s strong preference is for minimum regulation of private ordering. Id. at 1019. For a contrary view of the private ordering process, see supra note 22.
device would encourage and permit individualized parenting plans, reflective of different ways of raising children in this pluralistic society. Thus, the commentary states that “[t]he key advantage of the parenting plan concept over former custody concepts is its ability to accommodate widely differing factual patterns, and allocate parental responsibility accordingly.” This goal assumes the willingness—and ability—of all divorcing parents to participate in such individualized planning in place of the traditional broad-brush “custody to x, reasonable visitation to y” language in decrees. It also assumes that the Act’s plan device will, in fact, facilitate appropriately individualized arrangements between parents and their children.

b. The normative function: shared parenting—A primary goal of the drafters—like that of legislators in the many jurisdictions who have adopted one of a variety of joint-custody statutes in recent years—was to encourage the continued participation of both parents in the lives of their children following divorce. In short, although accommodation of “widely differing factual patterns” is possible, patterns involving shared parenting are preferred. The Act’s drafters thus characterize the parenting plan, an idea advocated by a number of family law and mental health professionals, as a “framework which allows for and encourages [parental] participation” and as a vehicle to “provide for appropriate continuing relationships.”

49. COMMENTARY, supra note 26, at 26-27.
50. Id. at 27. For a discussion of the extent to which the Act may pressure parents to make one choice over another by virtue of certain substantive rules and certain requirements for findings, see, e.g., infra note 58.
52. COMMENTARY, supra note 26, at 13 (referring to “increased emphasis on keeping both parents involved”).
53. See COMMENTARY, supra note 26, at 27.
54. See supra note 10.
55. COMMENTARY, supra note 26, at 11. The statutory statement of policy on which this comment is based states that “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.” WASH. REV. CODE § 26.09.002 (1989). The commentary explains that “an active and involved parent would remain involved if limitations do not exist; a long-absent or abusive parent, having forfeited his or her rights under the Act by failing to perform his or her duties, would not gain any new rights under this Act.” COMMENTARY, supra note 26, at 11. The precise nature of these limitations, as well as the requirement of
At a minimum, the plan requirement means that parents must consider the possibility of some parental sharing. For example, findings concerning a party's "reasonable" opposition to mutual decision making must be included in an order for sole decision making. This requirement may create what one commentator described as a "weak pre-disposition" for joint legal custody. Legislative history indicates that the drafters intended this result.

Parents are also required to work out a detailed schedule of the time each child will spend with each parent, an activity that arguably "encourages" time sharing. At the same time, there is no statutory preference or presumption requiring any particular amount of shared residential time beyond the general "shared parenting" policy statement in the Act's opening section. In addition, there is arguably a "preference" for a primary caretaker in the event that parents go to court over residential time. Finally, where parents arrange for frequent, brief, and substantially equal intervals of residence in each parent's home, a finding that the

findings, is discussed at notes 153-64 and accompanying text, infra.


57. Hall, The Parenting Act—What to Watch for, TRIAL NEWS, Dec. 1988, at 6; see also Gaddis & Sooter, The New Era in Child Custody Resolution, 42 WASH. ST. BAR NEWS 13, 14 (1988) ("The act's bias toward dual parental involvement can be defeated only by showing, according to guidelines given within the act, that the other parent's involvement would be harmful to the child's development.").

58. If a parent objects to mutual decision-making but the objection is unreasonable, that parent is creating a conflict situation. Conflict is harmful to children and is not in the best interest of the child. Therefore, it would undercut that unreasonable parent's probability of being awarded the sole decision-making authority. This is intended to be a subtle way to prompt parents to raise only reasonable objections to the use of mutual decision-making or risk that the other parent would be given sole decision-making authority on an issue or all issues.

Letter, supra note 36.

Professor Martha Fineman has demonstrated the ways in which ostensibly neutral procedural devices—like mandatory mediation or, perhaps, like "plans"—often mask the implicit substantive agenda of "shared parenting." See Fineman, supra note 3, at 728. Here the substantive agenda was neither totally hidden nor totally overt. One needs to read the statute, the commentary, and the legislative history with care.


60. See WASH. REV. CODE § 26.09.002; supra note 30 and accompanying text.

61. WASH. REV. CODE § 26.09.187(3)(a), reprinted in Appendix; see also supra note 36 and accompanying text.
arrangement is "in the best interests of the child" must be included by the parties or the reviewing court. Legislative history indicates, however, that these provisions were not intended to interfere with the fact that "parents will have equal time with children in many cases." Nor do they preclude a court from ordering substantial shared time over the objection of one parent.

This normative preference for the continued involvement of both parents, absent certain express behaviors, assumes that the plan requirement, with its accompanying substantive rules, will result in more postdivorce parental sharing than parental arrangements made under the former custody regime. With the exception of this Article, no published studies to date explore the amount of shared parenting in a regime requiring a parenting plan.

This goal also assumes that such legally influenced sharing of parental decision making and of time with the child is in the best interests of the child. Common sense dictates that it is important, assuming no harmful behavior by a parent, for children to retain meaningful contact with both parents following divorce. The problem for policy makers, however, is whether, when, how, or how much the law should encourage

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62. WASH. REV. CODE § 26.09.187(3)(b) (1989), reprinted in Appendix; see also COMMENTARY, supra note 26, at 35. As one highly experienced commentator noted:

The act rejects the premise that equal responsibility in parenting means that all decisions must be made in concert, and that equal time must be slavishly allocated to each parent. The act emphasizes that equal responsibility in parenting means continued concurrent involvement of both parents in their individual parenting roles.

Gaddis & Sooter, supra note 57, at 14.

63. Statement by Senator Phil Talmadge to Senator Brad Owen, WASH. ST. SENATE J., Apr. 15, 1987, reprinted in COMMENTARY, supra note 26, app. II.

64. See infra notes 164, 176 and accompanying text (concerning the fact that in spite of the special attention allotted to frequent changes and substantially equal time intervals, a court can order that arrangement over the objection of a parent as long as it makes the appropriate findings); see also infra note 68 and accompanying text (concerning studies on the effect of frequent transitions between parental homes when parents are at war).

65. For data from the few studies done in jurisdictions where joint custody has been allowed (or encouraged) following divorce, see infra notes 213, 217, and accompanying text. Some authors have suggested that what occurs in practice is a fair amount of joint legal custody with considerably less joint physical custody. See e.g., R. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 130 (1988); Bruch, supra note 1, at 110.

66. Gaddis and Sooter write: "The act assumes a child's needs are best met by continuing a close relationship with each parent, unless compelling reasons to the contrary exist . . . ." Gaddis & Sooter, supra note 57, at 14.
or require such arrangements. To date, there is little empirical evidence on the effect of legally induced shared decision making, and the evidence on the effect of various amounts of shared residential time is, at best, inconclusive.\textsuperscript{67} A considerable—and growing—body of evidence, however, now documents the harm to children who are in frequent contact with two venomous and warring parents.\textsuperscript{68} Finally, in

\textsuperscript{67} Even one of the strongest (and most respected) proponents of shared residential time, researcher and clinician Joan Kelly, does not claim that empirical studies per se support her position: "I would agree with Emery that the research differences in favor of joint physical custody are still limited and that this body of research remains confounded by sampling, definitional, and methodological problems." Kelly, \textit{Further Thoughts, supra} note 3, at 160.

Leading experts on the effect of divorce on children are divided themselves about whether any type of state-coerced "physical joint custody" regime is good for children. Dr. Kelly has written, with candor:

What underlies my general advocacy for acceptance of the concept of joint physical custody or, more accurately, an expansion of more traditionally limited visiting patterns that includes at one end of the spectrum more equal time-sharing, is the integration of existing joint custody research with 9 years of mediation, consultation, clinical experience, and research in a jurisdiction whose statutes have encouraged shared parenting. In California, far more couples are opting for a variety of shared parenting patterns that go beyond every-other-weekend visitation, and far more parents seem capable of managing the logistics and their child-related differences than any of us ever envisioned in 1980 . . . .

As the joint custody option has become more \textit{normative} in California, there are proportionately fewer saints and more just plain average parents who have agreed to share parenting in some manner. Neither particularly friendly nor models of maturity, they have heard or seem to understand that despite their marital failure, some postdivorce efforts directed toward "normalizing" their child's postdivorce experience by having both parents remain involved serves their child's interests as well as their own. For these parents, the shared custody option (whether 30% or 50%) seems not to be as demanding as Emery and others believe. Levels of satisfaction are quite high, and although some researchers have denigrated the importance of parental and child satisfaction, I am of the opinion that contentment with one's postdivorce arrangement is an important long-term variable, one not usually considered a measure of adjustment.

\textit{Id.} at 160-61. Kelly's summary of the research to date is found in Kelly, \textit{Longer-Term Adjustment, supra} note 3, at 130-31.

Kelly's views should be contrasted with those of another leading and well-respected researcher, Robert Emery, who claims that "[m]y objections are not with the goal of promoting joint custody. I agree that this is an important policy objective, but I disagree that this objective is strongly supported by existing research findings." Emery, \textit{ supra} note 3, at 143; see also Steinman, Zemmelman & Knoblauch, \textit{ supra} note 3, at 556 (citing Derdeyn & Scott, \textit{Joint Custody: A Critical Analysis and Appraisal}, 54 Am. J. Orthopsychiatry 199 (1984); Clingempell & Repucci, \textit{Joint Custody After Divorce: Major Issues and Goals for Research}, 91 Psychological Bull. 102 (1982)). Emery favors joint legal custody, but is unwilling to concur with Kelly's recommendation that the law advocate joint physical custody. See Emery, \textit{ supra} note 3, at 143.

\textsuperscript{68} \textit{See, e.g.,} R. EMERY, \textit{ supra} note 65, at 95 ("[T]he evidence is sufficiently strong
connection with the assumptions underlying shared parenting, some drafters expressed the frequently held and controversial belief that a law encouraging fathers to stay involved with their children would benefit children not only by increasing contact with a father, but by increasing compliance with child-support orders. 69

to permit a consideration of how, not whether, interparental conflict is tied to the development of negative outcomes among children from divorced families.

Kelly, Further Thoughts, supra note 3, at 161 ("There is ample clinical evidence regarding the negative effects of venomous divorce and postdivorce situations on children, and there are not yet sufficient data to advocate either sole or joint physical custody for these families."); see also Johnston, Kline & Tschann, supra note 3; Nelson, Parental Hostility, Conflict and Communication in Joint and Sole Custody Families, 13 J. Divorce 145 (1989); Scott & Derdeyn, supra note 3, at 490-92.

Goldstein, Freud, and Solnit, in Beyond the Best Interests, supra note 43, at 37-38, recommended that the state grant no legally enforceable visitation rights to the noncustodial parent where parents were in sufficient conflict that they could not agree on who should have custody of the child. Id. This suggestion, which they based in part on concern with the effects of parental conflict, has been criticized roundly and misunderstood, and has not been accepted in any jurisdiction to date, see Bruch, supra note 1, at 109, but it may be time to insist on a reconsideration of the authors' insights with respect to high-conflict parents.

69. See, e.g., New State Parenting Act, supra note 42, at 8 (quoting Professor Emeritus Vern Rieke):

"The state of Washington pays many millions of dollars a year to support children whose fathers don't pay . . . . It's a terrible problem, and I think it's come about because we've awarded exclusive custody of the children to the mothers in 90 to 95 percent of the cases. Fathers feel cut off, so they refuse to pay . . . . If both parents can stay involved in their children's lives, it should cut down on the need for support enforcement, and more important, it gives the children the advantage of continuing to have two parents . . . ."

Some commentators have expressed heated views about relying on this assumption and about the validity of empirical work attempting to test the assumption. See, e.g., Abraham, "The Divorce Revolution" Revisited: A Counter-Revolutionary Critique, 9 N. Ill. U.L. Rev. 251, 292-95 (1989) (quoting Hugh McIsaac, Director of Family Court Services for the Los Angeles Conciliation Court, accusing Lenore Weitzman of misrepresenting an empirical study on the interrelation of custody form and child-support compliance in her treatment of the question in L. Weitzman, The Divorce Revolution (1985)).

A recent empirical study by the researchers whose preliminary results Weitzman cited, concludes the following:

This series of regression analyses showed that although custody arrangement and amount of visitation were relevant variables, they were not compelling predictors of child support payment behavior. The more relevant variables dealt with the financial status and resources of the obligor and parental cooperation. Taken together, variables pertaining to these characteristics of obligors and their ex-spouses explained 20 percent of the variance in payment.

These statistical patterns fully jibed with the accounts of mothers in all custody categories and nonpaying fathers who were interviewed about their payment behavior. The two most common explanations for nonpayment offered by mothers were that the obligor was unemployed much or all of the preceding year or that he was angry with his ex-wife and withheld support
c. The educative function: focusing parents on postdivorce responsibilities—The drafters also sought to provide "guidance" or "education" to parents concerning their parental responsibilities.70 A number of writers from different disciplines have urged that the state provide some form of education for divorcing parents about the needs of their children during and after divorce.71 This educative function stems from two very different rationales. First, divorcing as a means of getting even with her. The third item mentioned with some frequency was that the ex-spouse did a poor job of managing his finances. . . . [W]hile visitation and paternal participation played only a modest role in explaining support payments, these variables played a more central role in explaining contributions outside of regular support payments. It is also relevant to note that custody type per se was neither a powerful predictor of payment of ordered child support nor of supplementary child care expenditures. The more critical variables dealt with the amount of time the noncustodian spent with the child and his involvement with the daily life of the child. Pearson & Thoennes, Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments, 22 FAM. L.Q. 319, 331, 335 (1988). Their conclusions were based on a longitudinal study (three years from initial to follow-up interviews as well as inspection of court files for objective data) of 426 families. Id. at 322. They are careful to point out that the sample "consisted of those who opted for joint residential custody; we had no reading on the child support . . . experiences of those who were ordered into this arrangement over the objections of one or both parents." Id. at 336. Thus, these researchers' findings "do not support the routine imposition of joint custody arrangements on divorcing couples," although the data "revealed the importance of access and paternal participation for the financial welfare of children" for predicting "financial and in-kind payments outside of support by absent parents." Id. at 336-37.

If policies encouraging increased access are implemented in hopes of increasing a child's financial well-being, then policy makers must stay alert to the fact that those policies may work simultaneously, and sadly, to the detriment of the child's psychological well-being, at least in situations where there is evidence of damaging ongoing parental conflict. See supra notes 67-68.

Unfortunately, it will be extremely difficult to test the relationship between a parenting plan requirement and better compliance with child support or extra economic benefits to the child in the Parenting Act's own jurisdiction. Six months after the Act went into effect, use of mandatory child-support schedules was instituted statewide. See WASH. REV. CODE §§ 26.09.100, 26.19.010-.020, .040 (1989); WASHINGTON STATE CHILD SUPPORT SCHEDULE COMM'N, WASHINGTON STATE CHILD SUPPORT SCHEDULE 1-4 (1988). These schedules require courts to order more "adequate" amounts of child support than previously. WASHINGTON STATE CHILD SUPPORT COMM'N, supra, at 1. Thus, the influence of the Act per se on compliance with support orders is confounded with the effect of the new schedule. 70. See COMMENTARY, supra note 26, at 11-12.

71. See, e.g., Elkin, Educational Preparation for Divorce—Another Missing Link in the Divorce Process, 21 CONCILIATION CTS. REV. at v (1983); Mnookin & Kornheuser, supra note 5, at 958 (referring in passing to the state's "important responsibility to inform parents concerning the child's needs during and after divorce").
parents need to be informed about their children's needs.\textsuperscript{72} Second, because of the emotional turmoil of divorce, parents need to have their attention focused on those needs.\textsuperscript{73}

The drafters of the Act had their own notions about and solutions to these concerns. To accomplish the first form of "education," some of the drafters developed a list of "parenting functions," both to instruct parents on what parental responsibilities might be considered and to provide standards for cases in which parents were having trouble agreeing.\textsuperscript{74} This list, however, does not describe the needs of children of divorce per se. Rather, it describes a number of basic needs of all children—food, clothing, education, and the like—whether their parents are divorcing or not.\textsuperscript{75}

The drafters hoped that the second "educative" goal—refocusing parental consciousness on the needs of their children\textsuperscript{76}—would be achieved by requiring parents to use a plan with specific components in all cases. Thus, the

\textsuperscript{72} See, e.g., Mnookin, Divorce and the Law, supra note 48, at 3. Mnookin believes in "encouraging parents to understand" their postdivorce responsibilities, but does not set forth a specific mechanism for achieving this goal. Mnookin, Divorce Bargaining, supra note 48, at 1035.

\textsuperscript{73} The traditional justification for state scrutiny of parental agreements concerning children at divorce has been the belief that divorcing parents are unable to put aside their own interests and to make agreements that reflect the child's needs as well as their own. Justice Black expressed this common conviction in the days preceding no-fault divorce, claiming that "[e]xperience has shown that the question of custody . . . frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice." Ford v. Ford, 371 U.S. 187, 193 (1962).

\textsuperscript{74} See COMMENTARY, supra note 26, at 20:

[T]he concept of parenting functions . . . has no equivalent in former law. It serves two purposes in this statutory scheme: (1) the concept of parenting function should guide the parties as they consider their responsibilities under their proposed parenting plans, and (2) should the court be required to formulate the parenting plan, the parties['] performance of these functions is used as a criterion for determining that permanent parenting plan.

The drafters' belief that a law can simultaneously serve as a (presumably helpful) "guide" to creating plans and as a rule declaring which parent will be favored in the event of a dispute is questionable. The former function implies neutrality; the latter is by definition nonneutral. A parent who inquires about his rights in the event of a dispute and is told that he fails to meet the statutory criteria may not feel inclined to use those same "criteria" to work out plan details.

\textsuperscript{75} The idea of parenting functions, devised by an ad hoc committee of the Washington State Council on Child Psychiatry, see COMMENTARY supra note 26, at 20, is codified at WASH. REV. CODE § 26.09.004(3) (1989), reprinted in Appendix.

\textsuperscript{76} "With the definition of parenting came the key shift of the new act, a focus on parents performing the parenting functions and meeting their responsibilities to their children." COMMENTARY, supra note 26, at 12.
commentary states that "[t]he components of the plan are set out to insure that parents think through carefully their parenting plan and arrive at arrangements that are realistic and are for the best interests of their children."77 Similarly, the drafters used a shift in language for the plan from the traditional "custody and visitation" terminology to the more neutral-sounding "residential care" or "decision-making" terminology to help parents shift their focus from concern with "control of" to "responsibility for" their children.78

Here the Act assumes that law, and specifically a legal device (a plan), has the capacity to make parents focus on their shared responsibilities. Furthermore, it assumes the plan device will be successful when implemented by professionals who may or may not be sympathetic to its intended effect. The Act was based, in the words of one drafter, "on a profile of marriage dissolution cases in which the parenting arrangements seemed to be successful."79 But the participants in those cases had chosen without state coercion to create a parenting plan or agreement.80 The

77. Id. at 26.
78. Id. at 2, 26. This shift from the emotionally laden "custody" and "visitation" language has been made in other jurisdictions as well. See, e.g., ME. REV. STAT. ANN. tit. 19, § 752(2)(A) (Supp. 1990) (referring to "[a]llocated parental rights and responsibilities"); VT. STAT. ANN. tit. 15, § 664 (1985) (referring to "[l]egal responsibility," "[p]hysical responsibility," and "[p]arent child contact").

An important additional reason for this particular change unquestionably was to avoid the negative political repercussions of the phrase "joint custody." COMMENTARY, supra note 26, at 10. Professor Martha Fineman has described such language changes as an "attempt to accommodate fathers' interests in a symbolically pleasing manner [that] . . . has worked to reallocate power between parents . . . [and] disadvantages functioning custodial mothers." Fineman, supra note 3, at 733.

I discuss the extent to which I believe the Act is and is not, in fact, a "joint custody" statute at notes 166-77 and accompanying text, infra.

79. New State Parenting Act, supra note 42, at 8 (quoting Professor Emeritus Vern Rieke).

80. If the drafters considered the fact that their case profile was based on agreements created without the explicit mandatory directives of the new law and that the ability to define both the parameters and detail of the agreement might itself have contributed to the success of the arrangement, they did not discuss this fact in their commentary or in their later depictions of the Act. Drafter Rieke, for example, referred to a study of his that showed that "couples who agreed upon terms before coming to court were much less likely to come back to court later to ask for changes or to complain that one party wasn't carrying out his or her responsibilities." Id. at 1. Although this result could be attributed to the "terms," it could be attributed equally well to the fact of agreement per se. In short, an equally valid hypothesis is that parents who get along well enough to set out terms are likely to continue to do so, while parents who are not able to agree to terms are likely to continue to disagree.
effect of requiring such a plan might be quite different. A nonhostile parent might see an "opportunity" to think about different planning issues on behalf of the child. A hostile one might discover a rich source of ammunition. Thus, the stuff of one parent's helpful articulation may be the fodder for another parent's war.

d. The preventive functions: decreasing parental conflict—A closely related goal, reflecting another nationwide concern, was to decrease destructive parental conflict, both at the time of divorce and over the long term. In the words of one commentator involved in some stages of the Act's drafting, "the statute was drawn to minimize two frequent occurrences inherent in the dissolution process: 1) continued conflict between the parents, which creates long-term harmful effects on the children, and 2) continuing use of children as pawns in one parent's struggle to control, annoy, or harass the other." The drafters believed, and there is now much empirical evidence for the proposition, that exposure to ongoing parental conflict is harmful to children. The drafters also believed that requiring a parenting plan would help resolve conflicts: "By bringing potential areas of conflict into focus during the dissolution process, the purpose of the law is to identify and resolve sources of conflict, or at least to provide a process for reasonable conflict resolution, to avoid future long-term or ongoing disputes." Thus, the drafters hoped that the need to decide the details of a plan would enable parents to articulate specific concerns that they may not have thought to express in the former two-dimensional custody-visitation framework, thus preempting problems.

81. This very requirement stands in contrast to (or at least strongly qualifies) the expressed goal of autonomous private ordering which, taken to its logical extreme, would permit, but not order, a plan to be filed by all parents.

82. See supra note 68 and accompanying text.

83. Gaddis & Sooter, supra note 57, at 13. Lenore Weitzman has pointed out that one of the basic rationales for joint legal custody "is that it will eventually reduce the conflict between divorced spouses." L. WEITZMAN, supra note 69, at 255.

84. See COMMENTARY, supra note 26, at 13; see also supra note 68 and accompanying text.

85. Gaddis & Sooter, supra note 57, at 13; see also Goodnow, New Law Tosses Out Old Concept of Child Custody, Seattle Post-Intelligencer, Dec. 31, 1987, at C1, col. 2 ("Joint planning is likely to reduce hostility in many cases, supporters say, because it will force parents to switch their focus from their own immediate battle to the long-term issues surrounding their child's welfare.").

86. One drafter tells the story of a client who continued battling over custody almost to the point of trial until her attorney finally discovered that she wanted to have the power to decide on the child's school. When they discovered that this
The drafters also believed that the specific terms of the plan would help eliminate, or at least more quickly resolve, future conflict by "prevent[ing] confusion for parents and child." Where parents disputed the meaning of a specific term, the plan would provide for a dispute resolution method (other than court if no prohibitions existed) that would permit a more efficient and less stressful solution to the problem and thereby better address the problem of ongoing parental conflict. The drafters thus assumed that the plan would serve as a contract, one term of which would require a form of alternative dispute resolution in the event of disagreements.

They also hoped, however, that the plan would "encourage flexibility to meet the changing requirements of . . . the child." It is unclear how the drafters expected the plan both to help resolve or prevent disputes in the future (and hence minimize conflict) by virtue of its specificity, and to permit sufficient "flexibility" for numerous unanticipated changes. Although the parties to a normal business contract often can modify it at their discretion and at any time, the parenting plan would remain, like all custody decrees, subject to the jurisdiction of the court during the child's minority.

decision-making function was the sole sticking point, the parties were able to settle immediately. The drafter therefore believes that the different aspects of the plan will help parents get issues on the table sooner and so resolve them. Interview with Drafter D (Sept. 13, 1988). In a later conversation, this same drafter stated that he had originally seen the plan as a voluntary mechanism to assist this process, not as a mandatory one. Conversation with Drafter D (July 25, 1989).


88. See COMMENTARY, supra note 26, at 27. In addition to the plan components per se as a means of decreasing conflict, there is evidence that the Act was designed to harness the adversarial tactics of attorneys. See, e.g., id. at 42. One drafter described the legislation in an interview as the "Domestic Law Restraint Act of 1987." Interview with Drafter B (Aug. 10, 1988). The two main devices for achieving this end were a list of substantive criteria for temporary orders where parties were disputing some aspect of the plan at the outset, see WASH. REV. CODE § 26.09.194 (1989), and—for purposes of controlling destructive tactics—sanctions for "bad faith negotiation," see infra notes 128-30 and accompanying text.

89. COMMENTARY, supra note 26, at 20.

90. Cf. U.C.C. § 2-209(1) (allowing parties to contracts for sale of goods to modify contracts without additional consideration).

91. "Moreover, even if the parties' initial agreement is accepted by the court, it lacks finality. A court may at any time during the child's minority reopen and modify the initial decree in light of any subsequent change in circumstances." Mnookin & Kornhauser, supra note 5, at 955. In Washington State, the substantive standard for modification is somewhat stricter. See WASH. REV. CODE § 26.09.260 (1989) (requiring the court to find a substantial change in circumstances and to find that a modification is necessary to serve child's best interests). In addition, the court must
2. Limitations on the parenting plan: the protective functions—Courts traditionally have relied on their *parens patriae* power to protect children in divorce actions as the courts see fit.\(^2\) Most statutory schemes, however, describe this broad discretionary power only in generalized language directing the court to consider the child's well-being.\(^3\) Statutory language describing specific conduct that may cause harm is a recent and still relatively limited phenomenon, and chiefly has addressed the problem of domestic violence and child abuse.\(^4\) Even in these new statutes, however, the court retains broad discretion as to whether it will limit an offending parent's contact with a child.

The Parenting Act assumes that courts need more specific direction concerning the nature of certain harms to children and "vulnerable" spouses.\(^5\) The primary, though not the only, statutory mechanism for limiting shared parenting is section 10, which lists behaviors considered harmful enough to require protection for a child or abused spouse.\(^6\) The drafters intended that section 10 "[b]etter identify and conduct a threshold hearing to determine, on the basis of affidavits and not mere allegations, whether there is "adequate cause for hearing the motion." Id. § 26.09.270; see Roorda v. Roorda, 25 Wash. App. 849, 852, 611 P.2d 794, 796 (1980) ("'Adequate cause' . . . requires something more than prima facie allegations . . . ."). Nevertheless, the possibility of modification continues to defeat the "finality" of the agreement.\(^7\)


93. See, e.g., CAL. CIV. CODE § 4601 (West Supp. 1990) ("[T]he court shall order reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interests of the child."); cf. WIS. STAT. ANN. § 767.24(4)(b) (West Supp. 1990) ("A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.").

94. See supra note 13.

95. See COMMENTARY, supra note 26, at 5; see also supra note 11. Some courts are beginning to show greater sensitivity to the harms of domestic violence. See, e.g., Desmond v. Desmond, 134 Misc. 2d 62, 509 N.Y.S.2d 979 (Fam. Ct. 1986); cf. Hall v. Hall, 408 N.W.2d 626 (Minn. Ct. App. 1987); id. (Popovich, C.J., dissenting); id. (Nierengarten, J., dissenting); id. (Crippen, J., dissenting).

96. WASH. REV. CODE § 26.09.191 (1989), reprinted in Appendix. I refer to this section of the law as "§ 10" because that name was commonly applied during the initial period of the Act's implementation and is commonly found throughout training materials and assorted commentary on the Act. See, e.g., Prochnau, A Roadmap of the 1987 Parenting Act, in THE 1987 PARENTING ACT: WASHINGTON'S INNOVATIVE APPROACH TO FAMILY LAW 38 (Oct. 15, 1987) (materials from a CLE Seminar sponsored by the Northwest Women's Law Center) [hereinafter WASHINGTON'S INNOVATIVE APPROACH]; Wechsler, Overview of the 1987 Parenting Act, in WASHINGTON'S INNOVATIVE APPROACH, supra, at 43. "Section 10" is the section number of the "limitations" list in the original bill presented to the legislature. 1987 Wash. Laws 2023 (ch. 460, § 10).
affirmatively protect the best interests of the child as well as at-risk parties by establishing specific criteria for limitations to be imposed on a party's continued involvement and/or access to the child, where circumstances or conduct make this necessary. 97 According to the commentary to the Act:

[W]hile the rest of the statutory scheme attempts to define the parameters of the parties' involvement with the care of the child, Section 10 operates to limit such involvement, in either the temporary or post-dissolution phases, depending on a parent's conduct or history of interaction with the other parent or the child. 98

The drafters of the Act, however, did not stop with a mere list of harmful behaviors. Because of evidence that "[the legal] system fails to protect persons who are vulnerable" and to "identify and protect unrepresented vulnerable parties," 99 they decided that parties, attorneys, and courts must all give serious attention to these behaviors. The result was a list of "mandatory" limitations that are to be applied in any case where neglect ("[w]illful abandonment . . . or substantial refusal to perform parenting functions"), abuse ("physical, sexual, or a pattern of emotional abuse"), or domestic violence is found. 100 The drafters also listed behaviors that may, but need not, be the basis of limitations on plan components. 101

Section 10 prohibits courts from requiring mutual decision making or alternative dispute resolution in cases where there are stipulated or litigated findings of any behaviors on the "mandatory limitation" list. 102 This prohibition applies regardless of whether the court is approving a settlement or entering an order following a hearing or trial. It also requires limitations on the child's residential time with the offending

97. COMMENTARY, supra note 26, at 12 (emphasis added).
98. Id. at 37.
100. See WASH. REV. CODE § 26.09.191(1)-(2), reprinted in Appendix. Domestic violence is defined in accord with the state's domestic violence statute. See infra note 153.
101. See WASH. REV. CODE § 26.09.191(3), reprinted in Appendix; see also text accompanying note 156.
102. WASH. REV. CODE § 26.09.191(1), reprinted in Appendix. Under the literal language of the statute, parents would still be free to list mutual decision making or an alternative dispute resolution process as their first choice in their plan in § 10 cases. It could not be the only choice, however, because then it would be "required" by the plan, not merely an option.
parent where there are such findings, although it does not specify the nature of those limits. 103 Furthermore, the only exceptions to these “mandatory limitations” apply to residential time, but not to decision-making or dispute resolution choices. The residential schedule need not be limited if the court expressly finds that:

[C]ontact between the parent and the child will not cause physical, sexual, or emotional abuse or harm . . . and that the probability that the parent’s harmful or abusive conduct will recur is so remote that it would not be in the child’s best interests to apply the limitations . . . or . . . the parent’s conduct did not have an impact on the child . . . . 104

Section 10 reflects recent heightened awareness, found nationwide, of the existence and dangers of various forms of child abuse and domestic violence. 105 The Act thus expresses the drafters’ belief that a parent who has abused or neglected a child endangers that child and should not be accorded automatically the right to share in decisions about or to spend unlimited time with that child. 106 Similarly, the Act incorporates the belief of many domestic violence experts that forcing a parent who has been a victim of violence to interact with the other parent, for purposes of shared decision making or mediation, harms both the previously victimized parent and the children of that relationship. 107 This latter belief is not


104. WASH. REV. CODE § 26.09.191(2), reprinted in Appendix. In its original form, § 10 allowed the court to refuse to “limit” residential time on the basis of findings of domestic violence only. 1987 Wash. Laws 2024. The amendment expanded this “escape clause” to all of the behaviors that would otherwise require mandatory limitations on residential time. 1989 Wash. Laws 1604.


107. The commentary states:
Section 10(1)(c) reflects the drafters’ view that mutual decision making and non-judicial dispute resolution should not be required in cases involving
without its challengers,\textsuperscript{108} nor does it lack its own tensions in Washington State, where courts are free to order unwilling spouses into mandatory mediation at the predecree temporary order stage,\textsuperscript{109} even though the Act does not permit a parenting plan to require postdissolution\textsuperscript{110} mediation where there is evidence that one of the section 10 mandatory limitations is required.\textsuperscript{111}

\textsuperscript{108} A number of experienced divorce mediators take issue with the conviction that mediation is contraindicated in families with a history of domestic violence. See, e.g., Wahrhaftig, \textit{Spouse Abuse and Mediation Practice: The Concerns Revisited}, 8 \textit{MEDIATION NEWS}, Fall 1989, at 3 (summarizing different views). Some of the most useful work in bridging these disparate perspectives and setting out guidelines for when mediation is appropriate has been done by Dr. Linda K. Girdner, a feminist anthropologist and mediator. See L. Girdner, Dealing with Spouse Abuse: Recommendations for Divorce Mediators (unpublished handout prepared for the July 1987 Annual Meeting of the Academy of Family Mediators) (copy on file with Jane W. Ellis). Girdner, who explicitly credits the groundbreaking work of Lisa Lerman for some of her recommendations, has recently edited \textit{Special Issue: Mediation and Spouse Abuse}, 7 \textit{MEDIATION Q.} 291-388 (1990), in which Girdner, \textit{Mediation Triage: Screening for Spouse Abuse in Divorce Mediation}, 7 \textit{MEDIATION Q.} 365 (1990), appears.

\textsuperscript{109} WASH. REV. CODE § 26.09.015 states: “In any proceeding under this chapter [on dissolution], the matter may be set for mediation of the contested issues before or concurrent with the setting of the matter for hearing . . . .” King County has a local rule mandating mediation for all custody or visitation disputes unless waived by the court “for good cause.” KING COUNTY, WASH., LOCAL R. 94.04(c)(2). Family law practitioners in this county have informed me that the courts continued, in 1988 and 1989, to order mediation on occasion where there was a history of domestic violence, in spite of the clear policy underlying the new Act, and I have heard, in assorted interviews with practitioners in 1988 and 1989, both very positive and very negative reports concerning the experience of victims of domestic violence in Family Court Services mediation. One practitioner informed me in a recent (1991) conversation that of late such orders for mediation are rare and King County mediators are now well-versed in the dangers of mediation in these cases.

\textsuperscript{110} Washington State uses the term “dissolution” instead of “divorce.” WASH. REV. CODE §§ 26.09.002-.914 (1989). I prefer the simpler “divorce” and use the two synonymous terms interchangeably throughout this Article.

\textsuperscript{111} See WASH. REV. CODE § 26.09.191(1), \textit{reprinted in Appendix}. 
Section 10, like other parts of the Act, rests on a number of assumptions. Its very existence demonstrates a conviction that divorce is a proper occasion for the state to intervene—by limiting the terms of parenting plans in certain circumstances and by court scrutiny of those plans—to protect children and vulnerable former spouses from harm. Several leading scholars have argued that the traditional insistence that the state oversee the arrangements made by divorcing parents for their children is questionable at best.112

112. Goldstein, Freud, and Solnit have argued that "[d]ivorce or separation of married parents [sh]ould no longer be a sufficient ground" for state intervention in response to the question "What should constitute probable cause for inquiry by agents of the state into individual parent-child relationships and what should they be required to find before being authorized to seek modification or termination of a specific parent-child relationship?" J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 19, 33 (1979) [hereinafter BEFORE THE BEST INTERESTS]. Thus, the state would not be involved with parent-child arrangements at divorce unless "one or both separating parents, whether married or unmarried, bring to the court their disagreement about the custody of their children." Id. at 31.

Divorce, in short, would not be an occasion for state inquiry concerning harms absent a request from a parent for protection. This position accords with their earlier argument that there should be no enforceable right of visitation. In their view, the relationship of each parent with the child is a matter for the parents alone. If they disagree, the state decides only the custody issue, and the custodial parent decides on the child's relationship with the noncustodial parent from that time on. BEYOND THE BEST INTERESTS, supra note 43, at 38. Their position is based in part on their conviction that "the law does not have the capacity to supervise the fragile, complex interpersonal bonds between child and parent." BEFORE THE BEST INTERESTS, supra, at 11-12; see also, Wald, Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before The Best Interests of the Child, 78 MICH. L. REV. 645, 651 n.21 (1980) ("Although some parents may reach what seems like an 'undesirable' solution, and one parent may be 'coerced' into accepting an agreement... forcing parents to accept an arrangement neither wants often will do more harm than good.").

In the same year that Before the Best Interests of the Child was published, Mnookin and Kornhauser examined the traditional belief that "there are good reasons not to trust parents with child-rearing decisions following divorce" and asked if "this attitude really [is] appropriate today." Mnookin & Kornhauser, supra note 5, at 995.

Unlike Goldstein and his coauthors, they would create enforceable rights of visitation for the noncustodial parent, id. at 981-82, but questioned court scrutiny of divorce custody settlements on the ground that the procedure creates an illusion that the state has the capacity to supervise the upbringing of children of divorced parents when it does not, id. at 996.

Mnookin subsequently returned to the question of the state's role with respect to the "child protection" function of divorce:

When a divorce affects minor children, the state obviously has interests broader than simply dispute settlement. The state also has responsibility for child protection. To acknowledge this responsibility, however, is not to define its limits. Indeed, the critical questions concern the proper scope of the child-protection function at the time of divorce and the mechanisms that best perform this function.
The Parenting Act retains the traditional court scrutiny of divorce settlements and establishes a statutory list of plan restrictions. The statute is ambiguous on its face, however, as to the precise operation of section 10. On the one hand, the language implies that court or counsel have an affirmative duty to ensure that they do not allow certain arrangements if they find—presumably by inquiring directly of parties—any of the behaviors listed in section 10's "mandatory limitation" subsection. On the other hand, the statute can be read not to require such inquiry, leaving parents, rather than the legal system itself, to invoke the protective function.

The statute states, as an example of this ambiguity, that with respect to parental agreements concerning decision making, "[t]he court shall approve agreements of the parties allocating decision-making authority . . . when it finds that: (i) The agreement is consistent with any limitations . . . mandated by [section 10]."\(^{113}\) Section 10, in its turn, provides: "The permanent parenting plan shall not require mutual decision-making . . . if it is found that a parent has engaged in any of the following conduct . . . ."\(^{114}\)

These provisions can be read in two ways. Under one reading, if a plan makes no mention of section 10, the court can find that the plan is consistent with any "mandated" limitations only if it inquires into parental conduct to determine whether any limitations are, in fact "mandated." If the answer to the inquiry is "no," mutual decision making can be ordered. If the answer is "yes," the plan cannot "require" mutual decision making and will have to be changed before the court can approve it.


\(^{114}\) Id. § 26.09.191(1), reprinted in Appendix.
The court's duty to inquire could be obviated if counsel has anticipated the question by including in the plan her findings that no limitations are mandated. But counsel cannot include any such findings without a basis for believing that the findings are true.\textsuperscript{115} Thus, counsel who wishes to include such findings arguably has an affirmative duty to inquire about the existence of any conduct that would "mandate" the section 10 limitations.

This inquiry, however, would encounter immediate obstacles. An attorney may ask about section 10 conduct, and may "render candid advice" to the client concerning the legal effects of the conduct and the concern with protection that underlies those legal effects.\textsuperscript{116} But an attorney may not reveal the client's confidence if the client objects to mentioning the conduct in the divorce, unless it falls within the narrow "future crime" exception to the rule of confidentiality.\textsuperscript{117} The onus of inquiring, therefore, seemingly returns to the court.

\textsuperscript{115} Rule 11 of the Washington Rules for Superior Court places a duty upon the attorney to review every pleading, motion, and legal memorandum to ensure that "to the best of [his] knowledge, information and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law." \textsc{Wash. R. Super. Ct. 11; see also Wash. R. Professional Conduct 3.3, reprinted in note 116.}

\textsuperscript{116} The relevant rule of professional conduct in Washington, "Candor Toward the Tribunal," states:

(a) A lawyer shall not knowingly:
(1) Make a false statement of material fact or law to a tribunal;
(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

\textsc{Wash. R. Professional Conduct 3.3.}

\textsuperscript{117} The relevant rule in Washington states:

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in section\textsuperscript{(b)}...

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:
(1) To prevent the client from committing a crime; or
(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

\textsc{Wash. R. Professional Conduct 1.6.}
It is, however, a basic tenet of our adversarial system that with rare exceptions (e.g., judicial notice) facts are “found” only when the parties and their counsel choose to bring those facts to the court’s attention as evidence or stipulated findings. Thus, under another reading, in the absence of an express statutory requirement that the court itself inquire as to the existence of any section 10 conduct, arguably no “affirmative duty” to do so should be implied. Rather, a reviewing court faced with an agreement for mutual decision making need only look at the plan to see if it includes any findings of section 10 conduct. If it does, the court must then ensure that the plan complies with section 10’s terms; if it does not, the court may “find” that the plan is consistent with the statute because there is no evidence of any need for “limitations.” The phrase “shall not require,” which implies that at least one parent opposes such an order, bolsters this interpretation. This reading also accords with fundamental notions of client and family autonomy.

The statute may well be intentionally ambiguous, reflecting unresolved philosophical differences about the proper protective role of the state at divorce. Under the first interpretation, divorce per se is an occasion for inquiring into the possible existence of harms to children or spouses. Under the second interpretation, divorce per se is not enough; the state will set limits if and only if a divorcing parent brings evidence of harm to its attention.

Section 10 may also represent an unsatisfactory statutory effort to achieve another goal: limiting the behavior of, and educating, legal professionals—attorneys and reviewing courts—with respect to the need to give more serious attention to the dangers of certain arrangements for children and “vulnerable” spouses. The statute might have been written in such a way that attorneys would feel that they had to ask about and confront conduct that they might prefer to ignore, and the court would no longer have discretion to ignore the need for certain protections. The implications of the actual statutory scheme for client autonomy or the rule of confidentiality may have been ignored or even unanticipated. In any event, the ubiquitous tension between facilitating private ordering, on the one hand, and ensuring protection to vulnerable parties, on the other, was brought to the fore by

118. See generally E. CLEARY, MCCORMICK ON EVIDENCE 1-2, 919-20 (3d ed. 1984).
section 10. Not surprisingly, the question of precisely how section 10 was to work quickly became a subject of much controversy among legal professionals.\textsuperscript{119}

Second, section 10 assumes that the particular list of limiting behaviors is appropriate.\textsuperscript{120} Thus, the list of behaviors requiring "mandatory" limitations is arguably overinclusive or underinclusive, as is the list of behaviors allowing "discretionary" limitations.\textsuperscript{121}

Third, there are the closely linked, omnipresent questions of interpretation and application, especially in the nonreviewable negotiation and settlement process. Thus, the Act assumes, for example, that parties and attorneys can comprehend the words and then recognize the acts or omissions constituting "a pattern of emotional abuse."\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{119} See infra notes 265-76 and accompanying text.
\item \textsuperscript{120} Mnookin would, for example, limit the state's protective role at divorce to addressing the harms described in a state's child protection laws on abuse and neglect. See Mnookin & Kornhauser, supra note 48, at 1034; see also supra note 112. State laws on abuse and neglect have been criticized for their imprecision, and the appropriate grounds for state intervention in intact families have been debated extensively. See, e.g., BEFORE THE BEST INTERESTS, supra note 112; Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 STAN. L. REV. 625 (1976).
\item \textsuperscript{121} An argument could be made, for example, that if the drafters were truly concerned with the problem of parental conflict and its effect on children, they could have included language on conflict or harassment in the mandatory-limitation behaviors. The counterargument is that it is too hard to tell who is at fault in such a case and that the wrong parent may too easily be blamed. Indeed, that is a major reason for fearing the ostensibly helpful "friendly parent" provisions, see Schulman & Pitt, supra note 2, at 554-56, found in many custody laws. See, e.g., CAL. CIV. CODE § 4600(b)(1) (West Supp. 1991).
\item \textsuperscript{122} WASH. REV. CODE § 26.09.191(1)-(2) (1989). This phrase is particularly troublesome on its face. Moreover, whether some type of "emotional abuse" should be a ground for state intervention in the family has been debated vigorously by leading scholars. Cf., e.g., BEFORE THE BEST INTERESTS, supra note 112, at 75-77 (arguing against "emotional neglect" and "serious emotional damage" as grounds for intervention because we cannot be certain that parents caused the symptoms and because of lack of consensus about treatment, but recommending state-supported voluntary services to help parents deal with their children's emotional needs); Wald, supra note 120, at 701 (including as a proposed statutory ground for intervention "(c) A child is suffering serious emotional damage, evidenced by severe anxiety, depression or withdrawal, or untoward aggressive behavior toward others, and her parents are unwilling to provide, when financially able to do so, or to permit, necessary treatment for her."); see also C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 476-77 (3d ed. 1985); Kincanon, The Child Abuse That Doesn't Count: General and Emotional Neglect, 22 U.C. DAVIS L. REV. 1039 (1989).
\end{itemize}
Recognition of this or other listed conduct, like domestic violence, may well be influenced by experience and by personal values. The Act also assumes that where parties include section 10 limitations in their negotiated plans, they will know what limits on the child’s time will protect the child. Similarly, the law assumes that negotiating attorneys and courts are or will become educated sufficiently to judge the appropriateness of particular residential time restrictions.

Finally, section 10 assumes that the parents have the economic and emotional resources to litigate these issues. For parties, a dispute over section 10 has costs in attorneys’ fees and in additional stress. Lawyers’ enthusiasm for informing clients of section 10 and advising compliance might be dampened by the inability of many family law clients to pay for extended negotiation or litigation services. Court implementation of section 10 requires additional resources for scrutinizing agreed plans and, possibly, for extra hearings or trials. The legislature, however, allotted no funds to help ensure compliance with this section of the Act.

Other sections of the Act, which reflect concerns about possible inequalities between spouses that may affect the bargaining process and concerns about the knowing and voluntary nature of any settlement, also limit plan components. The Act forbids a court to order an alternative dispute resolution process, for example, if one spouse is unable to pay for it or would be “at risk emotionally or physically.” Similarly, the Act requires the court to determine whether the parents both knowingly and voluntarily agreed about the nature of decision making. Lastly, the Act requires the court to give special scrutiny to agreements in which children are to go frequently and for substantially equal periods of time between parental residences.

Appendix. Although the change helps eliminate the possibility that a single episode of “emotional abuse” will require a plan limitation, it tells parties, counsel, and court nothing further about the nature of the “emotional abuse” from which the statute protects children. The commentary is peculiarly silent on this point.

123. See, e.g., infra notes 268-70 and accompanying text (reprinting a debate between two family law practitioners about “domestic violence”).

124. See COMMENTARY, supra note 26, at 30; cf. Mnookin, Divorce Bargaining: The Limits on Private Ordering, supra note 48, at 1024-31 (expressing skepticism about the law’s ability to address and solve some of these “problems in bargaining,” in part because of the difficulty in recognizing unequal bargaining power).


126. WASH. REV. CODE § 26.09.187(2)(a)(ii), reprinted in Appendix; see also COMMENTARY, supra note 26, at 31.

127. WASH. REV. CODE § 26.109.187(3)(b), reprinted in Appendix. Although this
The Act attempts to set important limits on the planning process, as well as on the substantive components of the plan. In response to the reported use by parties and attorneys of custody-suit threats as a way of extracting concessions on support or property matters, the Act permits sanctions against parties for bad-faith negotiations and requires parties who file proposed plans to include a verified statement that the plan is submitted in good faith. The commentary states:

[T]he drafters sought to discourage practice of parties and counsel who conditioning [sic] their agreement on one aspect of the parenting plan upon concessions in another aspect of the plan by the other parent. For example, a parent threatens a battle over child’s residence unless the other parent agrees to a reduction in child support, or a parent attempts to condition residential time upon the timely receipt of child support.

This aspect of the Act accords with the views both of critics of classic adversarial tactics in the divorce context and of commentators concerned with the problem of coercive custody-suit threats. It reflects a hope that the required plan will influence the attitudes and strategies not only of the parties, but also of counsel. This latter concern assumes that lawyers initiate at least some destructive negotiation tactics, including abusive custody-suit threats. Despite a substantial body of anecdotal evidence of such tactics and threats, we are
only beginning to understand what role, if any, the attorney—as opposed to the client—plays in bad-faith negotiation at divorce.\textsuperscript{134}

The Act's solution to these problems also assumes, of course, that the threat of sanctions will affect (at least some) parties and attorneys, and that a statement of good faith will influence (at least some) people who otherwise might not act in good faith. I am not aware of any data about whether this is an effective approach to this problem in divorce bargaining.

In sum, drafters and commentators believed the regulatory scheme would serve a variety of important functions. They included the plan mechanism to facilitate individualized private ordering while still promoting increased shared parenting; to educate parents about their responsibilities; and to help decrease parental hostility at divorce and in the future. They also designed limitations and sanctions to protect vulnerable spouses or children from the other spouse or parent and from the potentially destructive bargaining tactics of attorneys.

\textsuperscript{134} See, e.g., Neely, \textit{supra} note 132, at 177. In the State of Washington, a survey of judges and lawyers showed that:

In response to survey questions on property division, both lawyers and judges reported that they were aware of cases in which women gave up community property to avoid custody battles. Almost half (47 percent) of the lawyers responding to the survey have represented at least "occasionally" female clients who conceded property in order to avoid a child custody dispute. Nine percent (9 percent) of the lawyers report their female clients usually or always compromised on property division in exchange for their husband's agreement not to seek custody.

A significant number of judges (48 percent) also responded that at least "occasionally" they were aware of situations in which mothers conceded more than 50 percent of the community assets in exchange for the father's agreement not to seek custody. . . .

Sixty-one percent of the lawyers said they had occasionally represented mothers who accepted less child support than the father's income would call for in exchange for the father's agreement not to contest custody. More than two-thirds of the judges (71 percent) believe that situations exist where mothers agree to accept less child support in exchange for fathers' agreement not to seek custody. This bartering of support in exchange for custody may have serious negative economic consequences for both the mothers and the children post dissolution.

\textit{Final Report of the Washington State Task Force on Gender and Justice in the Courts} 56, 70 (1989) (footnotes omitted) [hereinafter \textit{WASHINGTON STATE TASK FORCE, FINAL REPORT}]. The report does not indicate whether lawyers exploit these observations. See also K. KRESEL, \textit{supra} note 8, at 172-77 (reporting that lawyers may exercise less impact on the settlement process than is typically imagined, but that we still know very little about the actual role of attorneys in the negotiation process).
These goals are based on major assumptions about human behavior and—even more significantly—about the capacity of law (or legal devices such as plans) to shape that behavior. Custody reform has been plagued by a sometimes overt and sometimes unarticulated schism in belief concerning the law's capacity. In discussing whether the law should impose joint physical custody on unwilling parents, for example, two leading empiricists may have arrived at very different conclusions not simply because of their substantive preferences, but because they have very different notions of what the law can do to affect attitudes about postdivorce parenting. The same dichotomy holds true with legal scholars. Some scholars have advocated custody reforms based on a belief in the capacity of law to change societal norms. Others have refused to advocate certain reforms because they are uncertain about the law's capacity to effect such educative goals.

135. The Parenting Act is based on three assumptions about the capacity of a law to effect change. It aspires to refocus parental attention to decrease hostility at divorce and assumes that the law can affect the immediate emotions and attitudes of parties. It tries to decrease hostility in the long-term and assumes that the use of details in a plan to anticipate or resolve disputes, as well as the availability of an alternative dispute resolution process, will succeed in averting or lessening conflict over time. It also tries to encourage continued participation by both parents in the child's life after divorce, and assumes that a statute with certain substantive emphases can "instruct" the public effectively so that the "new" becomes the "norm" over time.

136. See, e.g., supra note 67.

137. See e.g., Bartlett & Stack, Joint Custody, Feminism and the Dependency Dilemma, 2 BERKELEY WOMEN'S L.J. 9, 28, 30 (1986):

Feminist critics of joint custody have focused on the concrete and immediate effects of joint custody laws. These critics have ignored another critical feature of the law: its expressive or symbolic power to alter social expectations and norms. . . .

We do not mean to overemphasize the yield from legal reform. Changes in the law, alone, are not likely to produce gender-based equality. However, an end to the law's complicity in inequalitarian norms may be a precondition of reform and even a catalyst for it.

138. See, e.g. Elster, supra note 38, at 34-35 (footnotes omitted):
An even more tenuous argument derives from the educative and socialization effects of the law. These effects have been used to justify a statutory presumption for joint custody and to argue against the maternal presumption. . . . On the one hand, these assertions sound plausible and may well be true. On the other hand, there is in general very little knowledge about the alleged educative effects of the law. This criterion, therefore, cannot be assigned great weight.

See also Fineman, supra note 3, at note 26.
The different views may be attributable to a different focus. Thus, some reformers may be looking at the immediate short-term effect of a law; others may be unconcerned or less concerned with the short term, because they are looking forward to a long-term change in society. Different reformers or scholars may also be focusing on the law’s effect on parties at different points in the divorce process. The parent who is just filing for divorce, for example, does not necessarily require the same type of legal guidance as one who is already embroiled in a contested case. Or the different groups may be focusing on a different type of client. The optimists may be concentrating on the easy case—the basically cooperative couple who works to create a plan that then helps avert or avoid disputes. The pessimists may see only the hard case where warring parents perpetuate conflict before, during, and after a divorce. We don’t know enough about either extreme, but more importantly, we don’t know much of anything about the great middle ground—the tense, unhappy, but not or not-yet intractably alienated, parents.

In fact, we are still embarrassingly ignorant about whether custody law can successfully perform any function other than resolving disputes. Although this ignorance may require us to hesitate before creating new policies without evidence that the proposed law can effect such change—and it is my personal belief that we have an obligation to hesitate, at a minimum, in that case—once a new law has been passed, we have a responsibility to examine its assumptions in action, not to dismiss it out of hand because we do not believe it can work or to praise the law lavishly because we are convinced, as an act of faith, that it will. To the extent that we act only on what we imagine to be possible, we are all responsible for the way in which our vision of the law’s capacity colors our shaping of policy, our study of how that policy works in the world, and the professional services we render to our clients.

139. This point is made about law in general by Melton and Saks, who then go on to argue for “a psychology of jurisprudence that would increase our understanding of (a) the forces that shape the law and legal reasoning . . . (b) the psychological meaning of law; (c) how that meaning is acquired; and (d) the ways the law shapes the behavior of individuals, groups, and communities.” Melton & Saks, The Law as an Instrument of Socialization and Social Structure, in THE LAW AS A BEHAVIORAL INSTRUMENT 235, 258, 268 (G. Melton ed. 1986).
C. The Regulatory Scheme

Drafters' goals are subject, as are all such legislative aspirations, to being cast in and communicated by the language of law. Before considering the initial fate of the Act's ambitious goals, it is useful to examine the actual written regulatory scheme devised by the Act's drafters and to situate that scheme in the larger context of recent divorce custody reform.

The regulatory scheme governs the private-ordering process of all divorcing parents even where no formal dispute has occurred between those parents. Everyone must file a plan covering certain arrangements, and everyone is subject to certain limitations on private ordering, given certain factual findings.\(^4\) The law also establishes rules for formal disputes. The regulations controlling agreements require that those agreements be "consistent with" the section of the Act that governs formal disputes.\(^4\) Furthermore, the outcomes predicted by the formal dispute rules may influence the settlement process itself.\(^4\)

Yet, for several reasons, it is useful to treat separately the perspectives underlying these regulations. First, the Act is unique in the ways in which and the extent to which it attempts to control the private-ordering process as opposed to the formal dispute. Second, we do not know how the formal dispute rules that the court is directed to apply affect—or do not affect—the agreement or settlement process.\(^4\) A description of the express role of the state— theoretical though it may be—with respect to arrangements made without a formal dispute, at least at the decree stage,\(^4\) articulates a

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141. Id. § 26.09.184(3)-(5), reprinted in Appendix.
142. This is the "bargaining in the shadow of the law" theory, propounded by Mnookin & Kornhauser, supra note 5.
143. See, e.g., Melli, Erlanger & Chambliss, supra note 8, at 1147:

The foregoing description of the actual divorce process raises the question of who is in fact casting the shadow of the law—the judge (as is typically presumed) or the litigants themselves. . . . It seems that, rather than a system of bargaining in the shadow of the law, divorce may well be one of adjudication in the shadow of bargaining.

The authors based this conclusion on their empirical study of court scrutiny of child-support provisions in 349 cases in Dane County (Madison), Wisconsin. Id. at 1138-39.
144. Some aspect of a plan may be disputed formally before the court enters the decree. Usually this occurs at the temporary plan stage. The case will end up on the
baseline against which the actual practice of over ninety percent of divorce cases can be measured. Discussing the formal dispute rules helps situate the substantive content of the Act with respect to other custody regimes across the nation. This section of the Article will therefore examine the regulations from each of these two perspectives: the regulation of private ordering and of formal disputes.

1. Private ordering—The legislative scheme governing private parental ordering can be divided into two basic parts: affirmative ("the plan") regulations and prohibitory ("the limitations") regulations. These parts correspond to the two predominant themes of the Act: shared parenting and limits on shared parenting.

   a. The parenting plan—In accord with relatively recent statutory revisions in a number of other states, the Act requires detailed "parenting plans." Thus, parents can no longer state simply that one parent has "custody" and the other "reasonable" or "liberal" "rights of visitation." Nor can they agree, as they could previously, to nothing more specific than "joint legal" or "joint physical custody." Instead, parents must specify terms with respect to three discrete plan components: a dispute resolution process, allocation of motion calendar, and in counties with Family Court Services, will likely be referred to that service for mediation, evaluation, or investigation. In King County, approximately 10% of the dissolution cases require a hearing at the temporary order stage and are referred to Family Court Services. Of that number, approximately 60% work out both a temporary and a permanent parenting plan in mediation.

   The remaining 40% (4% of total dissolutions) are left to their own devices, and may take a long time to complete, but virtually all of these cases settle without a full-blown trial. Interview with Marjorie Hellman, Director, King County Family Court Services (Aug. 1, 1989).

   In a study of 700 randomly selected dissolution files from 11 Washington State counties, for example, a "maximum of five out of the 700 cases were contested custody cases." WASHINGTON STATE TASK FORCE, FINAL REPORT, supra note 134, at 67.

145. See supra note 10.

146. See WASH. REV. CODE § 26.09.181 (1989). Washington is the first state to require all divorcing parents, regardless of their "custody" arrangement, to file a parenting plan. As the examples in note 10 demonstrate, the different state statutes vary immensely in the type and nature of detail suggested or required for those parents who must file a plan. See supra note 10.

147. The pre-Act statute required only "provision for child custody and visitation." See 1987 Wash. Laws 2018 (amending WASH. REV. CODE § 26.09.050); see also Gaddis, Joint Custody of Children: A Divorce Decision—Making Alternative, 32 WASH. ST. B. NEWS 10, 11 (1978) ("Joint custody has been with us for many years in the State of Washington. It has been recognized in earlier court decisions such as Wheeler v. Wheeler, 159, 37 Wn. 2d [sic] 222 P. 2d 400 (1950) . . . ").

decision-making authority,\textsuperscript{149} and residential provisions for "given days of the year, including provision for holidays, birthdays . . . vacations, and other special occasions."\textsuperscript{150} Every plan must contain each of these elements.\textsuperscript{151}

\textit{b. Limitations on the plan—}The Act subjects each of the plan components to different limiting factors. The court must review the components of all plans for compliance with any such limits before it places its imprimatur on an arrangement created by the parents themselves or through negotiation, mediation, or settlement conference.\textsuperscript{152}

\begin{enumerate}
\item \textit{Section 10—}A constant limitation on all components of the parental agreement is the "section 10" list of mandatory restrictions.\textsuperscript{153} Under that section, a finding of "[w]illful abandonment" or "substantial refusal to perform parenting functions"; of "physical, sexual, or a pattern of emotional abuse"; or of "a history of acts of domestic violence\textsuperscript{154} . . . or an assault or sexual assault which causes grievous bodily harm or the fear of such harm" requires, with exceptions applied only to residential time, various restrictions on each component of the parenting plan.\textsuperscript{155}

In addition, section 10 lists certain other behaviors or conditions for which the court "may" limit any plan component. Thus, an agreed plan can, but need not, restrict decision making, dispute resolution, and residential time where the court has found, for example, substance abuse that interferes with parenting functions or abusive use of conflict

\begin{itemize}
\item \textsuperscript{149} \textit{Id. § 26.09.184(4), reprinted in Appendix.}
\item \textsuperscript{150} \textit{Id. § 26.09.184(5), reprinted in Appendix.}
\item \textsuperscript{151} In its original version, the Act required that provisions for child support be included in the plan as well. That requirement was deleted by the Washington State Legislature in its 1989 session. 1989 Wash. Laws 1964 (codified at WASH. REV. CODE § 26.09.184 (1989)).
\item \textsuperscript{152} \textit{See supra note 144.}
\item \textsuperscript{153} \textit{WASH. REV. CODE § 26.09.191(1)-(2) (1989), reprinted in Appendix. WASH. REV. CODE § 26.50.010(1) defines "domestic violence" as "(a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; or (b) sexual assault of one family or household member by another."}
\item \textsuperscript{154} "Domestic violence" is defined by WASH. REV. CODE § 26.50.010(1); \textit{see supra note 153.}
\item \textsuperscript{155} \textit{See WASH. REV. CODE § 26.09.191, reprinted in Appendix. These findings can be incorporated into a plan arrived at through negotiation and settlement and then signed by the court. \textit{See Wechsler, supra note 56, at 6-9 (advising practitioners to "[a]dd specific findings in all cases where no dispute resolution process is ordered, in all cases where the parties have agreed to a dispute resolution process, and in all cases where sole decision making is ordered").}
\end{itemize}
by the parents that endangers the child’s emotional well-being.\textsuperscript{156}

(2) Limitations on specific plan components—Dispute resolution processes, decision-making processes, and residential schedules, as outlined in a parental plan, are each subject to judicial scrutiny under section 10 and under several additional statutory sections.

(a) Limitations on agreements concerning decision making—The Act refers expressly to the ability of parents to make their own agreements with respect to the decision-making component. It states that the “court shall approve” such agreements, requiring only that the agreements be consistent with section 10 and be “knowing and voluntary.”\textsuperscript{157} Section 10 states that the plan “shall not require mutual decision-making” where any of the mandatory limitation behaviors are found.\textsuperscript{158}

(b) Limitations on agreements concerning a dispute resolution process—The Act does not defer similarly to parental agreement on dispute resolution. Instead, it states that “[a] process for resolving disputes, other than court action, shall be provided unless precluded or limited by RCW 26.09.187 or 26.09.191 [section 10].”\textsuperscript{159} Section 187 states, in turn, that “[t]he court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under [section 10] applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process.”\textsuperscript{160} In addition, the court must consider a number of factors, of which parental agreement is only one. Among these factors is, for example, “[d]ifferences between the parents that would substantially inhibit their effective participation in any designated process.”

(c) Limitations on agreements concerning residential provisions—Agreements concerning residential time are also subject to limitations. When an agreed plan contains findings of any of the mandatory-limitation behaviors, the court must

\textsuperscript{156} WASH. REV. CODE § 26.09.191(3), reprinted in Appendix.

\textsuperscript{157} Id. § 26.09.187(2)(a), reprinted in Appendix (emphasis added).

\textsuperscript{158} Id. § 26.09.191(1), reprinted in Appendix (emphasis added).

\textsuperscript{159} Id. § 26.09.184(3) (1989), reprinted in Appendix.

\textsuperscript{160} Id. § 26.09.187(1), reprinted in Appendix (emphasis added). Section 10 states that the “plan shall not require . . . a dispute resolution process other than court action if it is found that a parent has engaged in any [of the mandatory-limitation behaviors].” Id. § 26.09.191(1), reprinted in Appendix.
appropriately and effectively limit the child's time with the endangering parent, absent additional express findings that the child was not or will not be harmed.\textsuperscript{161} Furthermore, the section governing provisions for residential time gives formal precedence to one factor that refers to primary caregiving functions, over private parental agreement.\textsuperscript{162} In addition, any agreement must be "knowing and voluntary."\textsuperscript{163} Finally, the Act requires the court to make certain findings before approving agreements in which a child may "frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time."\textsuperscript{164}

Thus, private ordering of residential time is subject to scrutiny for section 10 restrictions, to scrutiny for compliance with the "greatest weight" assigned to factor (i), which emphasizes the primary caregiver, and to scrutiny for frequent changes for substantially equal periods of residential time. The role of the reviewing court therefore looms large here too.

2. Rules governing formal disputes—How is a court to decide on the terms of a parenting plan when the parents have been unable to agree? The short answer is that—barring a finding of one of the section 10 "mandatory limitation" behaviors—this statute does permit, although it does not require, a court to order both "mutual decision making" and an alternative form of dispute resolution where the parents have not been able to agree on either of those two aspects of the plan. Additionally, the statute requires that the court make certain findings before it can order "sole decision-making" over the

\textsuperscript{161} Id. § 26.09.191(2), reprinted in Appendix; see supra note 104. In its original form, section 10 provided no guidance concerning what the phrase, "residential time with the child shall be limited," id. § 26.09.191(2)(a) (emphasis added) should mean in practice. A 1989 amendment explained that a limitation on time with an endangering parent "shall be reasonably calculated to protect the child from physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time." 1989 Wash. Laws 1603; see also WASH. REV. CODE § 26.09.191(2)(b), reprinted in Appendix. The amendment also mandated that if limiting the amount of time with the endangering parent will not adequately protect the child, the court "shall restrain the parent requesting residential time from all contact with the child." Id.

\textsuperscript{162} WASH. REV. CODE § 26.09.187(3)(a), reprinted in Appendix. The "parenting functions" referred to in § 187(3)(a)(i)—so-called "factor (i)"—are defined in WASH. REV. CODE § 26.09.004(3) (1989), reprinted in Appendix. Subsection (f) was added by the Washington State Legislature and not by the Ad Hoc Committee. See COMMENTARY, supra note 26, at 22-23.


\textsuperscript{164} Id. § 26.09.187(3)(b), reprinted in Appendix.
objection of one parent. Thus, although the drafters do not use the phrase "joint legal custody" and, in fact, claim that they have rejected "joint custody" as a "legislative concept," the Act properly belongs to that class of statutes across the country that permits "joint [legal] custody upon the request of one party." The criteria for deciding between sole and mutual decision making are set out in section 187 of the Act. The commentary explains the convoluted language by stating:

If the parties have not agreed, then the Court is to consider any limitations under Section 10, whether the parents have historically participated mutually in decision making, whether they have a demonstrated ability to cooperate, whether they want to cooperate and whether or not their geographic proximity would be any barrier to participation. Subject to these factors, the Court has the discretion to order mutual decision making or to vest decision making solely in one parent or the other.

The statutory criteria for the court to order a dispute resolution process where the parents have not reached agreement are identical to the criteria the court must use to evaluate an agreement. The court must consider any section 10 behavior and the ability of each parent to pay, as well as the vague "[d]ifferences between the parents that would substantially inhibit their effective participation in any designated process." The Act therefore belongs to the nationwide movement encouraging alternative dispute resolution in divorce cases, but also recognizes that the court may be the only appropriate forum in certain cases.

165. See id. § 26.09.187(2)(b), reprinted in Appendix.
166. COMMENTARY, supra note 26, at 10.
167. Schulman & Pitt, supra note 2, at 546. In fact, by requiring certain findings before the court can reject mutual decision making the Act arguably creates a "mild presumption" for joint legal custody. History and professional reactions to the Act confirm this interpretation. See supra notes 57-58 and accompanying text.
169. COMMENTARY, supra note 26, at 31.
170. WASH. REV. CODE § 26.09.184(3) (1989), referring to WASH. REV. CODE §§ 26.09.187, .191. All three sections are reprinted in the Appendix to this Article.
171. Id. § 26.09.187(1)(a), reprinted in Appendix.
172. See, e.g., ADR 3 Rep. 423 (1989) (summarizing results of a survey by Peter R. Maida of legislation in 27 states that mandate or suggest divorce mediation).
173. See supra note 107 and accompanying text. The commentary explains the
The Act's formal dispute resolution rules for deciding on residential time, born of political compromise, are not straightforward. On the one hand, the Act assigns a preference to a factor that refers to primary caretaking functions, by virtue of requiring expressly that the court give "greatest weight" to that factor among a number of factors. Because Washington State case law has held, in construing its former divorce custody statute, that a court is not required to set out its findings with respect to each statutory factor, the actual effect of this "weight" requirement is unclear at best. On the other hand, the Act does not preclude substantial sharing of residential time where parents do not agree, unless (unspecified) restrictions are to be placed on one parent's time because of the mandatory section 10 limitations. Even frequent transitions between parental homes for substantially equal periods of time may be ordered over one parent's objection, although such an order requires the court to make certain findings, including findings on whether the parents have a history of cooperation and this arrangement therefore arguably is discouraged by the Act.

This section, more than any other, evidences the compromises and political tensions between the pro- and anti-joint custody advocates.

Finally, the role of section 10 in a contested case should be noted. If a parent contests an allegation of "mandatory limitation" conduct, the other parent bears the burden of showing, by a preponderance of evidence, that the behavior occurred. But once that showing is made, a limitation

amorphous language on "differences" by stating that "[a] parent may not be forced to work with another parent if it would put that parent at risk emotionally or physically and a parent would not be forced to use a nonjudicial mechanism they [sic] could not afford." COMMENTARY, supra note 26, at 30. See also supra note 48.

174. See WASH. REV. CODE § 26.09.187(3)(a) (1989), reprinted in Appendix ("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 . . . shall be given the greatest weight."); see also supra note 36 and accompanying text.

175. In re Marriage of Croley, 91 Wash. 2d 288, 290-92, 588 P.2d 738, 740-41 (1978). This statement assumes, of course, that the Croley rule will also apply to the new Act. Arguably, it should not because there will be no way to review actual application of the "greatest weight" requirement if a court does not have to spell out exactly what weight it has given to each of the seven factors.

176. See supra note 164 and accompanying text. But see supra note 63 and accompanying text.

177. See supra notes 23-36 and accompanying text.

must be imposed unless the offending parent rebuts the presumption of harm by proving, again by a preponderance of evidence,179 either that contact will not harm the child and “the probability that the parent’s harmful or abusive conduct will recur is so remote that it would not be in the child’s best interest to apply the limitations [or that] the parent’s conduct did not have an impact on the child.”180 Thus the parent attempting to protect the child (or herself or himself) is not put in the position of having to carry the burden of proving both the existence of certain conduct and the need for protection against that conduct.

III. THE LAW IN PRACTICE

Drafters’ commentaries can instruct parties and professionals on the contours and goals of a regulatory scheme and, to a degree, on the actual application of a new law. But they are also understandably self-serving documents, putting forward the best face of their creation and avoiding discussion of troublesome assumptions about or underlying conflicts among those goals.181 Only when the word of law is transformed into the fact of practice can it assume its real shape and reveal the inevitable problems that result from any untested legislative aspiration. What happened with this new law, then, when it entered the world?

A sound evaluation of the Parenting Act and its many aspects requires observation over a period of time. It is therefore not possible yet to say whether the Parenting Act is working with respect to its desired goals for parents and children. It is possible, however, to describe how the law is working in some respects. The behavior of courts, counsel, and parties, gleaned from a study of completed parenting plans and from observations of and interviews with family law professionals, provides useful information, both for assessing initially the law’s “successes” and “failures” and for articulating key questions concerning this and other recent attempts at custody reform. The ways in which this new law

179. Id.
180. Id. § 26.09.191(2)(c), reprinted in Appendix.
181. See supra note 46.
was presented to and received by the professionals who would usher it into the world tell us something about the nature and even the possibility of reform itself. This Article therefore turns next to examine how the law has operated in its first year or so of implementation.

A. Methodology

My students and I gathered data from four main sources.182 First, I obtained materials used throughout the state to teach attorneys and superior court judges about the new law. In addition, I attended numerous training sessions ("CLEs"183) for attorneys, held just before and just after the effective date of the Act. At these sessions, I observed both the way in which the law was presented to practitioners and the reactions of attending attorneys.184

182. These sources do not include my interviews of drafters and other family law professionals, referred to in notes throughout this Article.

Much of the information for this section of the Article was collected by student participants working on their own research projects for a law school seminar that I taught at the University of Washington School of Law. The students were required to write a paper for this course and were told that they could choose an empirical project if they so desired. I suggested a series of possible topics as the course progressed. Most, though not all, of the students chose a paper related to one of those empirical topics. The shaping of the research was a collaborative effort; students worked in pairs or groups, and I reviewed questionnaires and made suggestions to facilitate the students' chosen inquiries and interests and, where possible, to permit data gathering for closely related questions in which I was interested. The names of each of these students will be mentioned in passing and their papers cited whenever the text (as opposed to the raw data) is directly quoted. I remain immensely appreciative of the excellent caliber of their work and of their willingness to share and coordinate their research efforts with my own. Their papers are available to the public in the Marian Gould Gallagher Law Library, University of Washington School of Law.

In addition, I was fortunate to have an excellent research assistant, Peter Fabish, who reviewed over 300 King County case files for additional information and updates. I was also fortunate to be assisted by the valuable skills and insights of a trained social scientist, Julie Hunt, Ph.D. Candidate in Psychology at University of Washington, who spent untold hours patiently analyzing the massive amount of data gathered from the King County files.

183. "CLE" is the term used throughout Washington State for Continuing Legal Education courses.

184. These "CLEs" were given by a variety of organizations including a public interest group (Northwest Women's Law Center), state bar organizations, educational institutions (including University of Washington School of Law) and the Washington State Office of the Administration of the Courts. The "trainers" at these sessions were often the same people: drafters of the Act, family law attorneys who had advised
Second, we examined more than 300 King County cases for which a decree of dissolution was issued during 1988 and in which there was a permanent parenting plan. We examined the content of permanent parenting plans filed during the first year of the Parenting Act to ascertain a number of variables, including types of arrangements made by parents within the confines of the new law and compliance in the private-ordering process with the express terms of the law by parties, attorneys, and the courts. The following
summer we completed a review of these same case files. We examined those cases in which section 10 allegations preceded the filing of the permanent parenting plan and traced those allegations throughout the file. In addition, we noted, inter alia, any formal legal action since the decree and whether any of the cases had been referred to King County Family Court Services (FCS) before the decree was granted.

Third, students conducted loosely structured interviews with thirty attorneys from two counties (King and Clark). They selected King County attorneys from the King County case files, word of mouth, and the King County Yellow Pages telephone directory listings for family law practitioners. The researching student selected the Clark County counsel after observing them in appearances before the county's Family Law Commissioner. The students asked attorneys to fill out background information sheets and then interviewed them in person for an average of one and one-half hours. Each interviewer worked from the same basic list of forty-three questions, but because of time constraints not all attorneys were asked all of these questions. One student tape-recorded the interviews; the other three took extensive handwritten notes. These interviews covered two basic themes: the attorneys' use of and opinions of the plan requirement and their use of and opinions of the section 10 limitations.

Fourth, three students observed ex parte proceedings approving agreed parenting plans and followed up with

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187. There were 24 attorneys from King County and 6 from Clark County. This work was completed by four different students and presented in three papers: J. Sutter, The Effect of the Parenting Act on the Practice of Family Law in King County (May 1989) (unpublished paper); J. McKeever & D. Noda, A Survey of King County Family Law Practitioners: Responses to the Mandatory and Discretionary Limitations of the 1987 Washington Parenting Act (May 1989) (unpublished paper); C. Hart, "My Clients Are Just Simple Folk"—Is the Parenting Act Working in Clark County? (Spring 1989) (unpublished paper). All three papers are on file at the Marian Gould Gallagher Law Library, University of Washington School of Law.

In addition, one student, using a similar questionnaire, interviewed 12 family law mediators, some of whom were and some of whom were not licensed attorneys. R. Cordero, A Survey of Family Mediators: Mediating Under the 1987 Parenting Act (Spring 1989) (unpublished paper) (on file at the Marian Gould Gallagher Law Library, University of Washington School of Law). Because her questions were not consistently the same as those used by the other researchers, I refer to this paper only on occasion.

188. Attorneys whose names appeared more than two times were listed by the students examining the files. The interviewing students then selected names from that list as well as the two other mentioned sources.
interviews of the observed regular ex parte and pro tem commissioners in four counties. They spent a minimum of one-half day observing each of the nine commissioners. These commissioners, who handle a number of different types of cases, were not told beforehand what, specifically, interested the observers. Following all the observations, the students or I interviewed each observed commissioner. Those interviews concentrated on the commissioners' views of their scrutiny of agreed parenting plans, including their scrutiny of section 10 limitations on different aspects of the plan and other statutory limitations on private parental ordering. The students then compared the information from observations with the information from interviews and, wherever possible, examined the parenting plans subject to ex parte proceedings on the day of the observation.

B. Findings

1. The parenting plan— a. The facilitative function: individualized private ordering—Family law professionals lost no time in pointing out that the plan's "ability to accommodate widely differing factual patterns" had its costs, including, ironically, a possible loss of parental autonomy. They were concerned particularly about the Act's requirement that the plan set out a detailed residential schedule covering "given days of the year." Some practitioners questioned the appropriateness of a detailed plan for couples who were already cooperative or had much older children and so preferred the flexibility granted them under the old "custody to x, reasonable visitation to y" formula. Others worried about the requirement of a very detailed residential schedule for couples whose lives were not sufficiently organized or predictable for such careful "planning" even in the immediate future or whose


190. Eakes and Brown were unable to interview one of the observed ex parte commissioners because of scheduling problems. I subsequently conducted that interview.

191. COMMENTARY, supra note 26, at 27.
cultures or personal proclivities were not conducive to the type or extent of planning required by the Act.\textsuperscript{192} Similarly, the practical problem for all families of predicting and providing concrete detail to cover the inevitable changes that would occur with time was not lost on members of the legal community.\textsuperscript{193}

\textsuperscript{192} Cordero reports:

Three of the mediators in this study commented on how groups outside of the white middle class might be affected by the Parenting Act in general and by mediating a parenting plan in particular. Their comments imply that many of the values the Parenting Act reflects are primarily middle class values. They refer especially to the quality and style of parenting skills and communication skills that the Act seems to assume will be available in most families; their opinion is that those skills have mostly been learned by persons having access to a greater amount of education than that available to the lower socio-economic classes.

One mediator sees the Parenting Act as being potentially helpful to lower socio-economic families who frequently are forced to deal with a high degree of chaos because of the struggle just to make ends meet. If they have the chance to mediate a parenting plan, her experience is that this serves to organize their thoughts and gain some “middle-class” communication and parenting skills, skills which are often sorely lacking. In contrast, going through the court system would insulate them from knowing what decisions need to be made and how to make them.

Another mediator working for a public interest group sees many very young parents of infants and toddlers; many of these parents have very poor parenting skills and so do not really have enough information to act in their children’s best interests. She refers them to parenting classes or other community services since she thinks the mediation context insufficient to educate them to the degree they need.

The third mediator in this group points out that for cultural minorities the definitions of parenting functions and of family can differ greatly from the norms of the majority culture. For example, in many minority cultures, the extended family is the basic social unit rather than the nuclear family. In those cultures, parenting functions are the responsibility of more individuals than just the parents of a child. How would a parenting plan under the Act provide for the “existing pattern of interaction” between the child and all of her/his parents and parent-surrogates? . . .

But mediating a parenting plan could still be a positive option for those minorities for whom it would be excruciatingly shameful to have to go to court since any involvement with a public legal forum would be regarded as a loss of face.

R. Cordero, \textit{supra} note 187, at 40-42. In a similar vein, the intricacy of the plan disturbed those attorneys who were experienced with pro se parties. \textit{See}, \textit{e.g.}, Goodnow, \textit{The Dissolution Dilemma}, Seattle Post-Intelligencer, Feb. 4, 1989, at C2, col. 2 (statement of Tony Vivenzio, Director of the Family Law Clinic of the Seattle-King County Bar Association). Many attorneys expressed concern about the increased expense of a dissolution for all clients, and especially those with little income. \textit{See} \textit{e.g.}, \textit{id.} (statements of Tony Vivenzio, Wendy Gelbart, and Yakima County Superior Court Judge Stephen Brown). For further discussion of increased costs, see \textit{infra} note 237.

\textsuperscript{193} A participant at a training session for state judges raised this problem. The response, by one of the trainers (“Speaker”), demonstrates the extent of the confusion
According to training materials, however, the use of less specificity because two parents preferred to work things out over time or needed more open-ended language because of uncertain work schedules or future plans or events would not be acceptable. At training sessions, attorneys were consistently instructed that “reasonable” or “liberal visitation” would no longer suffice. One training attorney, not a
drafter, did make a useful suggestion (though not a less expensive one) of retaining flexibility by granting "reasonable residential time" as long as parents agree and, in the event they later disagree, a specific schedule. The lay public, however, was told only: "Along with school days and weekends, this schedule considers occasions such as holidays, birthdays of family members and vacations. The schedule must be specific about these days and may not simply state 'reasonable visitation.'" 196

The public and their attorneys voted with their pens in deciding whether to comply with the requirement for residential schedules. Only 6%, 19 of the 306 King County cases, said only that visitation would be "as agreed" or "reasonable visitation" or "as child wishes," and so failed to comply with the statutory requirement that parents provide for "given days of the year." 197 This compliance rate seems


In fact, one drafter and trainer of attorneys and judges suggested that a "vague or general schedule" in a proposed plan would be a basis for a default judgment against the responsible party. Prochnau, supra note 96, at 60.

These materials also indicate, ironically, the ambiguity in the statute with respect to the required detail, and the possibility that the threshold issue of "how much detail" could itself become an issue in litigation:

What if the parent is unwilling to propose a specific schedule because of, for example, a variable work schedule? The parent who desires a more specific schedule would cite to first the plain meaning of § 8(5)—which appears to require such a designation. That parent could also argue that a specific schedule is needed to meet two of the objectives of the permanent plan: to maintain the child's emotional stability . . . and to minimize the child's exposure to harmful parental conflict.

On the other hand, about the most that can be argued in favor of a more vague schedule is that another of the objectives of the plan is to "provide for the child's changing needs as the child grows and matures . . ." § 8(1)(c).

Finally, if an argument could be constructed that it would benefit the child to have a vaguer schedule than [sic] counsel could cite to § 2 of the Act which continues to make "best interest of the child" a paramount consideration.

Id. at 61.

195. Hibbard, Drafting Plans and Other Pleadings, in PARENTING ACT: HOW TO GET TO THE FINAL PLAN 11, 11-22 to 11-23 (1988) (materials from a CLE Seminar sponsored by the Seattle-King County Bar Association) [hereinafter HOW TO GET TO THE FINAL PLAN].


197. WASH. REV. CODE § 26.09.184(5) (1989). It should be noted that 63% of the plans that failed to comply (12 of 19 cases) were plans for children in the 15- to 18-year-old range. This approach to planning for an older child may be more sensible—and realistic—than the considerably less flexible requirement of specifying the adolescent's location on "given days of the year."
very good, especially given the fact that attorneys and parties were coping with a detailed statute for the first time.\textsuperscript{198} There was no statistically significant difference in compliance on this score between cases where one or both parties had a lawyer and those where no lawyer was involved at all.\textsuperscript{199}

To what extent did the parenting plans realize the goal of individualized ordering of parent-child relationships following divorce? Not surprisingly, pragmatic concerns affected the extent to which the idealized, individually crafted plan materialized. In interviews, more than half the attorneys stated that they relied on some sort of form to be filled out by (or with the assistance of) the client.\textsuperscript{200} Other preprinted plan forms were prepared by an ad hoc committee of family law practitioners or by the county court systems for use by nonrepresented parties.\textsuperscript{201} Almost all of these forms consist

\textsuperscript{198} Compliance rates for the other major plan components—"decision making" and "dispute resolution process"—were also good. Ten percent of the cases omitted a "dispute resolution process" component. Four percent, 5%, and 8% of the cases omitted provisions for decision making concerning the child's education, healthcare, and religious upbringing, respectively. (It is conceivable that the higher rate of noncompliance regarding decision making for religion reflects some cases in which neither parent is religious.).

\textsuperscript{199} Nor was there a statistically significant difference, in relation to compliance with the other required components, between cases where attorneys were involved and those in which no attorney participated. The numbers are as follows:

Cases in which one or both parties were represented by counsel had slightly better compliance with respect to inclusion of a dispute resolution provision. Nine percent of cases (24/264) that had some legal representation failed to include such a provision. Seventeen percent of the cases (7/42) that did not include legal representation omitted that plan component.

The level of compliance was lower, however, with respect to the designation of a specific provider of dispute resolution services. Only 28% (74/264) of cases in which attorneys represented one or both parties named a specific provider. Thirty-eight percent (16/42) of cases in which both parties were unrepresented managed to include this detail.

Results were mixed with respect to compliance for the required decision-making categories. Only 5% of cases (2/42) with no attorney on either side failed to include provisions for decision making on education and health care, and only 2% percent (1/42) failed to provide for decision making on religious upbringing. The percentage of noncompliance for cases with one or two attorneys were 3% (9/264), 5% (12/264), and 8% (22/264) for education, health care, and religious upbringing, respectively.

Thus, parties with attorneys generally fared no better or worse than parties without counsel in terms of following the dictates of the somewhat complicated new law.

Attorney compliance rates do not indicate that courts can reliably depend on the presence of counsel (one or two) as compared to no counsel to ensure a complete parenting plan is being filed.

\textsuperscript{200} Some of these forms were prepared for and distributed at training sessions to attorneys. \textit{See, e.g.}, Halverson, \textit{A Parenting Plan}, in \textit{WASHINGTON'S INNOVATIVE APPROACH}, supra note 96, at 67.

\textsuperscript{201} \textit{See, e.g.}, \textit{EVERGREEN LEGAL SERVICES, GETTING YOUR OWN DIVORCE IN
of a limited list of alternatives for each plan component. Additionally, interviews revealed that:

The Act has not seemed to have generated much difference in the way attorneys suggest that residential time be divided when the client has not arrived at his/her own schedule. Most attorneys seem to be suggesting the traditional custody arrangement: the non-residential parent has the children on alternate weekends, one evening midweek, and on alternating holidays.

Our case-file study provided more information about the customizing of each of the required plan components.

(1) Dispute resolution provisions—Although there were numerous variations in alternative dispute resolution provisions, a closer examination revealed that an extremely large number of plans followed a very limited number of patterns. Fifty-eight percent of plans named “mediation” (as opposed to “arbitration,” “counseling,” “court,” or “other”) as the dispute resolution method of choice. "Mediation" and "court" (or

WASHINGTON (1988) (Form 3a: Parenting Plan).

202. See, e.g., J. Sutter, supra note 187, at 16-17 & app. F. Different attorneys use their forms in different ways, some giving more and some giving less time to working with clients to create their individualized plan. Needless to say, an attorney's time is money, and the optimal amount of individualized planning may be beyond the economic reach of many parties.

203. Id. at 25-26. The King County case study confirmed the predominance of this arrangement. See infra note 206 and accompanying text.

204. The breakdown of choices for dispute resolution was as follows:

<table>
<thead>
<tr>
<th>Method of Dispute Resolution</th>
<th>Cases</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediation</td>
<td>177</td>
<td>57.8</td>
</tr>
<tr>
<td>Court</td>
<td>50</td>
<td>16.4</td>
</tr>
<tr>
<td>No Provision</td>
<td>31</td>
<td>10.1</td>
</tr>
<tr>
<td>Counseling</td>
<td>22</td>
<td>7.2</td>
</tr>
<tr>
<td>Other</td>
<td>20</td>
<td>6.5</td>
</tr>
<tr>
<td>Arbitration</td>
<td>6</td>
<td>2.0</td>
</tr>
</tbody>
</table>

This preference for mediation may well reflect an expectation that disputes in King County are very likely to be referred for mediation at the court-affiliated King County Family Court Services (“FCS”) even if they begin on the normal motion calendar. It may also reflect the perceived availability of free mediation services through King County Family Court Services rather than a cultural current favoring mediation per se. (I say “perceived availability” because the legislature failed to provide extra funds for Family Court Services when it passed the Parenting Act, and that availability may well diminish with the increased demand for postdissolution mediation.) Haynes and Somers noted that “King County Family Court Services was
“no provision,” which is the functional equivalent of a designation of “court”) taken together accounted for 84% of the plans. Thus, only 16% of cases adopted an unusual option for dispute resolution.

At the same time, however, a number of cases indicated that parties had taken advantage of the opportunity for a “customized” dispute resolution process to work out future disagreements by naming a unique dispute resolution provider. Scattered among the providers in the 29% of cases that did name a specific person or organization were people affiliated with the parties’ religions, relatives, professional private mediators, and, in one case, a tribal court.

(2) Decision-making provisions—We considered two possible indicators of individualized planning for decision making. First, we examined the plans to see how many contained provisions for a decision-making area other than education, health care and religious upbringing. Fifty-two percent of plans included provisions for decision making on day care; 51% of plans included one or more provisions for nonrequired areas of decision making other than day care, an indication of individual party or attorney initiative. Second, we determined the amount of variation within individual plans by looking for plans that were neither all mutual nor all sole decision making for the three required areas. Thus, plans that gave sole decision making to one parent in one area and to the other parent in another area, or plans that gave mutual decision making in one or more areas while also designating some area or areas for sole decision making, were designated “mixed decision making” and were tabulated. Nineteen percent of the sample fit that description.

We cannot know from this data, of course, the extent to which these variations represent careful individualized planning and the extent to which they represent more refined forms of trade-offs in the plan negotiation process. In short,
we cannot tell whether the child is being cared for or whether the child's life is merely being divided up into smaller and smaller pieces that may or may not reflect the real needs and desires of individual parents and their children. Further study on the creation of plans is necessary to make this determination.

(3) Residential schedules—Residential schedules are conductive to highly individualized planning, and we found many variations. Closer examination again revealed, however, that a limited number of patterns for weekly residential time with each parent predominated. After we subtracted those cases in which the parties did not comply with the terms of the Act or gave no time whatsoever to one of the parents (through failure to comply or through legitimate limitation), 68% of the remaining cases fit into one of two standard residential time patterns.\(^\text{206}\)

(4) Representation—The representation of one or both parties did not increase or decrease the amount of individual variation for weekly residential patterns. Such representation did make a difference, however, with respect to the number of cases in which parties selected a dispute resolution method other than the predominant "mediation" or "court." Where neither party was represented by an attorney, the parties were significantly more likely to pick either "court" or an alternative like "arbitration" or "counseling" than in cases with one or two attorneys \((X^2 = 7.82; p < .0201; \text{d.f.} = 2)\). In addition, where neither party was represented by an attorney, the parties were significantly more likely to choose to add some sort of decision-making provision for an area other than the three required areas or the nonrequired but frequently named area of day care \((X^2 = 7.22; p < .007; \text{d.f.} = 1)\). Thus, to the extent that these variables are valid indicators of "individualized" planning, they were less likely, not more likely, to appear when either one or two attorneys were involved in the case.

\(^{206}\) Forty-one percent of those cases (94/228) opted for alternate weekends. An additional 26% (60/228) opted for alternate weekends plus one daytime visit per week or per alternate week.

Treatment of holidays and vacation periods also fell into a limited number of patterns. After we subtracted plans that did not specify holidays as required, 90% of the remaining cases (261) opted for one of two holiday patterns, either alternating holidays between parents (162/261 cases or 62%), or allocating all holidays to one parent (73/261 cases or 28%). Summer vacation patterns showed only slightly more variation.
These patterns became even more pronounced when we compared one-attorney, two-attorney, and no-attorney cases. As Table A indicates, two-attorney cases showed considerably less use of dispute resolution processes, other than mediation or court, compared to one-attorney and no-attorney cases. Similarly, the percentage of two-attorney cases that included extra decision-making provisions was much smaller than the percentage for one-attorney or no-attorney cases.

### Table A

**Representation and Individualized Planning**  
**By Percentage of Cases**

<table>
<thead>
<tr>
<th>Type of Plan</th>
<th>Number of Attorneys</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dispute Resolution Provision Other than &quot;Court&quot; or &quot;Mediation&quot;</td>
<td>None</td>
</tr>
<tr>
<td></td>
<td>24%</td>
</tr>
<tr>
<td>Nonrequired Decision-making Provisions (Including Daycare)</td>
<td>71%</td>
</tr>
</tbody>
</table>

**b. The normative function: shared parenting**—How much and what type of “shared parenting” did we find in parenting plans? The bare-bones requirement for parenting agreements under the former law—that parents state no more than “custody to x, reasonable visitation to y”—makes direct comparison of parent-child arrangements under the old and new laws impossible. Nevertheless, the King County case-file study provides valuable information concerning the amount of shared parenting agreed to under the new law, and several other sources of information from the state provide rough before-and-after comparisons. The data show greatly increased shared-parenting provisions following the effective date of the Act.
(1) Dispute resolution provisions—As mentioned earlier, 207 58% of parents selected “mediation,” the dispute resolution process requiring the most cooperation and thus arguably the most “sharing” between parents, in their plans.

(2) Decision-making provisions—Over half the cases specified mutual decision making, the functional equivalent of joint legal custody, for the three required areas. Fifty-six percent of cases designated decisions concerning “education” as mutual, 55% percent designated “health care” as mutual, and 57% percent designated decisions on “religious upbringing” as mutual. 208 Not surprisingly, the next most prominent category was sole decision making by mother (education—35%, health care—36%, and religious upbringing—32%). Fathers had sole decision-making in only small numbers of cases (education—5%, health care—5%, and religious upbringing—4%). 209

Although no direct before-and-after comparisons can be made for King County, a random sampling of dissolution files finalized in 1987 from eleven Washington State counties including King county is available. 210 Those files, involving a total of 597 children, showed that mothers received so-called “legal custody” of 61% of the children, fathers received legal custody of 13% of these children, and the decree assigned “joint” custody for the remaining 27%.

To compare the pre-Act findings with this post-Act study, we calculated the number of children in the latter and assigned the designation “joint” decision making to any case

207. See supra note 204 and accompanying text.

208. Haynes and Somers found that “[p]lans that allocated joint decision-making were proportionately more likely to use mediation for dispute resolution and less likely to use court action, even where the plans contained Section 10 violations.” K. Haynes & S. Somers, supra note 185, at 85. We confirmed this statistically significant finding for the sample of 306 cases. (X^2 = 38.04; p < .00005; d.f. = 1). Additionally, Haynes and Somers found that “[p]lans that allocated joint decision-making were less likely to fail to provide for any method of dispute resolution than plans that allocated decision-making authority to one parent.” Id. Again, we confirmed the finding and its statistical significance for 306 cases. (X^2 = 13.20; p < .0003; d.f. = 1).

209. The percentages may not add up to 100% for a given category, either because we eliminated those cases having no provision at all for that category of decision making or because we rounded off percentages. Plans omitted decision-making provisions for education in 4% of cases, for health care in 5% of cases, and for religious upbringing in 8% of cases.

210. WASHINGTON STATE TASK FORCE, FINAL REPORT, supra note 134, app. F-343. The 11 counties were selected in a manner that would provide a good demographic and geographical cross-section of the State. I was a member of this task force.
in which neither the mother or the father had sole decision making authority across the board. Thus, "joint" decision making could consist of all-mutual decision making, of some mutual and some sole decision making in the different categories, or of sole decision making in one category to one parent while the other parent received sole decision making in some other category. In addition, we removed from the sample the eight cases in which there were no decision-making provisions. On those assumptions, the post-Act results were: the mother received legal custody of 27% of these children, the father received legal custody of 4% of the children, and parents received "joint" custody of 69% of the children. The "pure joint legal custody" cases, with mutual decision making for all required categories, covered 49% of children.

### Table B

**Pre-Act and Post-Act "Decision Making" by Percentage of Children**

<table>
<thead>
<tr>
<th>Decision Making Method</th>
<th>Pre-Act</th>
<th>Post-Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sole Decision Making by the Mother</td>
<td>61%</td>
<td>27%</td>
</tr>
<tr>
<td>Sole Decision Making by the Father</td>
<td>12%</td>
<td>4%</td>
</tr>
<tr>
<td>Joint Decision Making</td>
<td>27%</td>
<td>69%</td>
</tr>
</tbody>
</table>

Assuming at least rough comparability in the samples from the pre-Act 1987 study and this post-Act study and even accounting for the possibility that the post-Act sample may

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211. The decision-making provisions were identical for all children within a given case in our post-Act study. As a result, the percentage of cases assigning a particular type of decision making is the same as the percentage of children.
have fewer of the extremely contentious cases,\textsuperscript{212} the number of formal joint legal custody or "mutual decision-making" agreements definitely has increased.\textsuperscript{213} Although these relationships do not establish that the new Act, with its plan requirement, caused this increase in shared decision-making provisions, there is at least a strong implication that this is the case.\textsuperscript{214}

(3) \textit{Residential schedules}—We could not quantify with precision, even with the Act's more demanding requirements, the amount of shared parenting with respect to residential time (the equivalent of physical custody). Some cases failed to specify a residential schedule, using only the old generalized language on custody and visitation.\textsuperscript{215} Furthermore, we had to make certain assumptions to compute the number of overnight visits scheduled with each parent in a given case on weekends, holidays and vacations.\textsuperscript{216}

\textsuperscript{212} See supra note 185.

\textsuperscript{213} Moreover, the percentages for joint legal custody are also considerably higher than those found in a Massachusetts study of 500 divorce agreements in which parents ultimately received joint legal custody in just over 20\% of the cases. See Phear, Beck, Hauser, Clark & Whitney, \textit{An Empirical Study of Custody Agreements: Joint Versus Sole Legal Custody}, 11 J. PSYCHIATRY & LAW 419, 425 (1983). Mnookin, Maccoby, and their colleagues found that a total of 79\% of their cases had decrees designating joint legal custody. See Mnookin, Maccoby, Albiston & Depren, \textit{Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?}, in DIVORCE REFORM AT THE CROSSROADS 37, 58-59 (S. Sugarman & H. Kay eds. 1990).

\textsuperscript{214} This inference is particularly strong because only one year separated the pre-Act and post-Act cases.

\textsuperscript{215} See supra note 197 and accompanying text. For example, in a number of default cases, the parent who failed to appear was assigned seemingly boilerplate "reasonable visitation." After examining the data from these 19 cases, we decided to include them as "no time" rather than exclude them as "unknown time." Later, we tested this decision by calculating the number of overnight visits in Table F, infra p. 133, without these cases. There was no statistical difference between those results and the results when the 19 cases were included.

\textsuperscript{216} Haynes and Somers allotted 2 "overnights" for every "weekend" and 7 "overnights" for "alternating holidays." They allotted 90 nights for summer, 7 nights for spring break and 14 "overnights" for winter break. See K. Haynes & S. Somers, supra note 185, at 31.

In 10 cases out of 306, the children within one family were not treated identically in terms of overnight residential schedules. (Only 1 case out of 306 varied the number of daytime visits for two children in one family, and that was only by three days.) One case gave slightly different amounts of overnight visits to the same nonprimary parent for each of two children. Two other cases would have been labelled "joint physical custody" for both the children, although the actual number of nights varied from child to child. (For our definition of "joint physical custody" or "joint residence," as opposed to "sole physical custody" or "sole residence," see infra note 217.) Seven of the 10 cases were "split custody" cases—cases in which each parent has primary residential custody of one (or half) of the children. Because we based our calculations on a given case, rather than on individual children, we had to
Using these assumptions, the case study shows that approximately 20% of cases involved children who were scheduled to spend at least 30% of their nights with one parent, and the remaining nights with the other. Measured by overnight visits, mothers received the bulk of the residential time in the great majority of cases. In 70% of cases, the children were scheduled to spend 71% or more of their nights each year with their mothers. In only 10% of cases did they have that number of nights scheduled with their fathers.

decide whether to exclude these cases, and, if not, how to treat the variations within a single case. We decided to retain the cases and to create an average “child time” per parent for each case. We added the total overnight visits for all children with the mother and then divided that number by the total number of children. The result was overnight child time with the mother for that case. Child time for the father in each case was the difference between 365 and the mother's child time. So, for example, if the mother had 81 nights with one child and 284 nights with a second child, while father had the reverse, the mother's child time would be $81 + 284 = 365$ divided by 2 = 182.5 nights. The father's time would be $365 - 182.5 = 182.5$. Our rationale was that there was a significant amount of parental sharing, albeit in a different form, in these cases, and that this approach would best reflect that essential fact. These cases had a variety of representational modes, and none of them contained § 10 findings in the final plan.

217. These are “joint residence” or “joint physical custody” cases. I selected this range of time because it corresponds most closely to the range used by other empirical studies. See Kelly, Longer-Term Adjustment, supra note 3, at 130-31 (“Research on joint custody has most often defined joint physical custody as a time-sharing arrangement in which the child is spending at least 30% of the time with one of the parents, and the remaining time with the other.”). Maccoby, Depner, and Mnookin, for example, define “dual residence” as those cases in which children “divided their overnights 7-7, 8-6, 9-5, or 10-4 between the two households” per two-week period. Maccoby, Depner & Mnookin, Coparenting in the Second Year after Divorce, 52 J. MARRIAGE & FAM., 141, 144 (1990). “Sole residence” cases are those in which a child was scheduled to spend 71% or more nights per year with one parent.

Mnookin and Maccoby's major study found that 20% of families had decrees for joint physical custody. See Mnookin, Maccoby, Albiston & Depner, supra note 213; see also Kelly, Longer-Term Adjustments, supra note 3, at 130-31 (reporting that three California studies, including that of Maccoby and Mnookin, have found that 20% to 30% of families have the children spend at least 30% of the time with one of the parents and the remaining time with the other). During the period of the Mnookin study, California encouraged joint legal and joint physical custody in its statements of statutory policy but did not require a plan. See CAL. CIV. CODE § 4600.5(a) (West 1983). Mnookin and his colleagues had data on the time that children actually spent with parents, not merely on the time scheduled on paper. For a description of these findings, see infra note 220.

The study of approximately 500 Massachusetts divorce files in the years 1978 through 1981 indicated that approximately 22% of cases resulted in joint legal custody decrees but only 2% of cases resulted in joint physical custody. See Phear, Beck, Hauser, Clark & Whitney, supra note 213, at 425. The statute at the time of the studied divorces said only that the court “may make such judgment as it considers expedient relative to the care, custody, and maintenance of the minor children of the parties.” Id. at 421 (quoting MASS. GEN. L. ch. 208, § 28).

218. Again, these figures are strikingly similar to those of Mnookin and his
The eleven-county random sampling of pre-Act 1987 cases indicated that for 79% of cases, the mother received "[sole] physical custody," for 18% the father had "[sole] physical custody," and for only 3% was "physical custody" denominated as "joint."\textsuperscript{219}

Again assuming at least a rough equivalency in the sample and in the meaning of "joint custody" with the time periods we have assigned for the post-Act study—and there is no definition of amounts of residential time for pre-Act "joint custody" cases—the data indicate a decrease in both the number of mothers getting "sole physical custody" and the number of fathers getting "sole physical custody." The number of "joint physical custody" cases increased by a substantial amount, rising from 3% to 20% of the cases.

\begin{table}
\centering
\caption{Pre-Act and Post-Act Residential Arrangements for Children By Percentage of Cases}
\begin{tabular}{l|c|c}
\hline
Residential Arrangement & Pre-Act & Post-Act \\
\hline
Sole Residence with the Mother & 79\% & 70\% \\
Sole Residence with the Father & 18\% & 10\% \\
Joint Residence & 3\% & 20\% \\
\hline
\end{tabular}
\end{table}

Thus, here too the relationship between the Act and a considerable increase in joint physical custody provisions is apparent, although actual causation cannot be proved.

No data are available as yet on the actual practice of these parties and their children as opposed to the terms of their agreements. It is therefore not possible to say at this time whether any aspect of shared parenting has increased in fact, as opposed to on paper.  

(4) Representation and appearance—Haynes and Somers found that “[m]ediation was chosen more often as the method for dispute resolution where both parties were represented by attorneys, than with any other representational status.” Table D shows the statistically significant breakdown for the 306 cases by mode of representation or appearance.

<table>
<thead>
<tr>
<th>Representation and Appearance</th>
<th>Number of Cases</th>
<th>Electing Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two Attorneys Nondefault</td>
<td>74</td>
<td>80%</td>
</tr>
<tr>
<td>One Attorney</td>
<td>137</td>
<td>61%</td>
</tr>
<tr>
<td>No Attorney</td>
<td>34</td>
<td>46%</td>
</tr>
<tr>
<td>Default</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One Attorney</td>
<td>46</td>
<td>30%</td>
</tr>
<tr>
<td>No Attorney</td>
<td>7</td>
<td>0%</td>
</tr>
</tbody>
</table>

\[X^2 = 41.51; \ p < .00005; \ d.f. = 4\]

220. Mnookin and his colleagues found that less than half of the 20% of cases with decrees designating joint physical custody actually maintained a dual residence pattern. However, some number of sole physical custody cases were de facto dual residence. The overall result was that 16% of their total sample “did in fact have dual residence.” Mnookin, Maccoby, Albiston & Depner, supra note 213, at 67.

221. K. Haynes & S. Somers, supra note 185, at 62.

222. When we compared the two-attorney cases to all other cases for percentage selecting mediation, the numbers were again significant. The significance held true whether all other cases included defaults (\[X^2 = 18.82; \ p < .000; \ d.f. = 1\]) or did not include defaults (\[X^2 = 10.34; \ p < .0013; \ d.f. = 1\]). Interestingly, all of the default cases in which the nondefaulting party selected “mediation” involved parties represented by counsel. None of the unrepresented parties in default cases chose “mediation.”
Similarly, when both parties were represented by attorneys, they were significantly more likely across the three required categories to choose some form of shared decision making than to choose sole decision making. Table E sets out the percentages of cases involving some shared decision making.

<table>
<thead>
<tr>
<th>Representation and Appearance</th>
<th>Percentage Number of Cases</th>
<th>Electing Shared Decision Making</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two Attorneys</td>
<td>74</td>
<td>91%</td>
</tr>
<tr>
<td>Nondefault</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One Attorney</td>
<td>137</td>
<td>70%</td>
</tr>
<tr>
<td>No Attorney</td>
<td>34</td>
<td>77%</td>
</tr>
<tr>
<td>Default</td>
<td></td>
<td></td>
</tr>
<tr>
<td>One Attorney</td>
<td>46</td>
<td>33%</td>
</tr>
<tr>
<td>No Attorney</td>
<td>7</td>
<td>0%</td>
</tr>
</tbody>
</table>

$X^2 = 60.46; p < .00005; \text{d.f.} = 4$

The relationships between representational or party-appearance status and residential time schedules were also statistically significant. Table F sets out the mean number of overnight visits and daytime visits scheduled per year with the nonprimary residential parent.

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223. For this analysis, "some form of shared decision making" means either all-mutual decision making or some "mixed" decision making. See supra text accompanying note 208.

224. Table E is based on the sample of 298 cases (306 cases minus 8 cases that had no provisions for decision making). Once again, when we compared two-attorney cases to all other cases the relationships were also significant. Two-attorney cases compared to all others including defaults were significant ($X^2 = 20.90; p < .0005; \text{d.f.} = 1$) as were they when compared to all nondefault cases ($X^2 = 9.73; p < .0018; \text{d.f.} = 1$). Only the default cases in which the one appearing party was represented by counsel selected some form of shared decision making. None of the default cases where the appearing party was unrepresented made such a choice.

225. A daytime visit is a visit during the day when there is no overnight visit. Thus,
If each overnight and each daytime visit is assigned one "residential unit," solely for purposes of comparison, the total mean "residential units" by representation and appearance

<table>
<thead>
<tr>
<th>Representation and Appearance</th>
<th>Total Visits</th>
<th>Nighttime Visits</th>
<th>Daytime Visits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Two Attorneys Nondefault</td>
<td>74</td>
<td>33</td>
<td>33</td>
</tr>
<tr>
<td>One Attorney Default</td>
<td>137</td>
<td>22</td>
<td>22</td>
</tr>
<tr>
<td>No Attorney</td>
<td>34</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>One Attorney No Attorney</td>
<td>46</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>No Attorney</td>
<td>7</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

For all data: p < 0.0005; d.f. = 4.
Daytime visits: F = 5.298
Nighttime visits: F = 9.546
Total visits: F = 16.44

If each overnight and each daytime visit is assigned one "residential unit," solely for purposes of comparison, the total mean "residential units" by representation and appearance a weekend visit was counted as two nights, but no days. A holiday visit for the day with no overnight visit was counted as one daytime visit.
also are set out in table F. 226

The greater amount of shared parenting in two-attorney cases does not appear to be an aberration. Mnookin, Maccoby, and their colleagues studied the role of counsel in their major California study. 227 They examined a subgroup of "150 cases in which the mother requested legal custody and the father made no request." 228 They found that "[j]oint legal custody was almost always awarded if both parents had an attorney." 229 Similarly, they examined almost their entire sample of 900 families and discovered that "[j]oint physical custody [in decrees] was highest in those cases when both parents had legal counsel." 230

Divorcing parents might have two attorneys for a variety of reasons, only one of which is the desire for more time with or decision making about a child. Is there something about the sort of parents who choose to (and can afford) retain two attorneys that leads to more parental sharing? We might hypothesize, for example, that wealthier parents have more ability, and therefore possibly more inclination, to agree to

226. Again, the relationship between two-attorney cases and residential time was significant compared to cases with one attorney or no attorneys. Two-attorney cases compared for overnight visits against all other cases including defaults were significant ($t = 3.70$; $p < .0005$; d.f. = 304) as were they when compared to all other cases not including defaults ($t = -2.49$; $p < .014$; d.f. = 251). Cases involving two attorneys again showed significant patterns for daytime visits when compared to the other cases. When compared to all cases including defaults, two-attorney cases were significant ($t = -3.39$; $p < .001$; d.f. = 304). The same was true for the two-attorney cases compared to all nondefault cases ($t = 2.37$; $p < .018$; d.f. = 251).

227. Mnookin, Maccoby, Albiston & Depner, supra note 213, at 37.
228. Id. at 62.
229. Id.
230. Id. at 41, 64; see also ABA FAMILY LAW SECTION, CHILD CUSTODY DISPUTES, supra note 5, at 107-08 (emphasis added), in which an unnamed participant from an unnamed jurisdiction stated during an ABA conference on child custody disputes:

We have a very interesting study coming out directed at examining joint custody. To me what was very interesting was the difference between the type of custody arrangements when two attorneys were involved versus the type of custody arrangements when no attorneys were involved. They were very, very different. The highest rate of joint physical custody was when both parties were represented by counsel. The lowest rate of joint legal and physical custody was when neither party was represented. One of the points that the study made that I agree, is what has to do with the use, the bargaining chip, and the use of compromise rather than really reflecting the custody arrangements that the parties both agreed to, both want, and in fact had been doing during the ongoing marriage.

The speaker is not connected in any way to the Mnookin and Maccoby study. Letter from Robert H. Mnookin to Jane W. Ellis (Oct. 23, 1990). I have been unable to identify the speaker or the study.
provide two-household arrangements after divorce.\textsuperscript{231} Or is there something about the two-attorney negotiation process that generates different results in plans? Is there, for example, more shared parenting in two-attorney cases than in one-attorney or no-attorney cases because of the structural nature of negotiation by two representatives who function by making trade-offs and who may use decision making or child time as chits in their settlement repertoire?

Evidence from other sources suggests ways in which the dynamics of divorce-attorney negotiation may influence these outcomes. An essay for practitioners on custody negotiation, on the one hand, warns that "[o]ften people agree to joint custody just to get the case over with. It's probably cheaper for your client and better for the child to meet serious custody problems now rather than later if joint custody is clearly inappropriate."\textsuperscript{232} On the other hand, this same essay concludes with a series of "leverage factors" that can be used to "gain advantage" over the other side. Among those factors are "[p]ressure to arrive at a joint parenting arrangement. You can induce settlement out of a litigious party by a cleverly crafted joint parenting agreement that the party can't refuse because it meets his or her priorities. The court may well join you in your efforts."\textsuperscript{233}

These tactics may be used in part because of a prevalent belief that it is essential not to litigate. Empiricists who have examined the role of the divorce attorney have found evidence of such a strong belief.\textsuperscript{234} The desire to avoid litigation is

\begin{flushleft}
\textsuperscript{231} We do know that the mean income of fathers, but not mothers, in these two-attorney cases was significantly higher than the mean income of parents in other modes of representation or appearance. Further analysis showed that both higher income and the presence of two attorneys are predictors of more overnight visits for the nonprimary parent and that income does not make as much difference as legal representation for both parents.

\textsuperscript{232} Friedman, Negotiating Child Custody Cases, in NEGOTIATING TO SETTLEMENT IN DIVORCE 133, 138 (S. Katz ed. 1987).

\textsuperscript{233} Id. at 141-42.

\textsuperscript{234} See Sarat & Felstiner, Law and Strategy, supra note 8, at 109 ("Although not all lawyers are equally dedicated to reaching negotiated agreements, most of those we observed advised their clients to try to settle the full range of issues in the case."); see also Erlanger, Chamblass & Melli, supra note 8, at 593:

The lawyers in particular describe a widespread professional belief that divorce litigation is traumatic and that good lawyers keep their clients out of court, especially in cases involving children. Most of the lawyers we interviewed say they feel responsible for encouraging informal settlement and will pressure parties to accept settlements that they, as attorneys find reasonable . . . .
\end{flushleft}
understandable and commendable, assuming there is no seriously harmful conduct by one parent, but whether the two-attorney negotiation process is the best means for arriving at parenting arrangements is another question. It may not be the best means if the presence of the two attorneys shifts attention from the important task of helping parents to focus on the needs of their children to negotiation tactics that do not give sufficient regard to these needs.

The two-attorney results become even more pronounced in relation to the limitations section of the Act, and those results will be discussed below.235

c. Educative and preventive functions: focusing parents' attention and decreasing parental conflict—(1) At divorce—Are the statutory devices for helping parents to reduce hostility and focus more on their parental responsibilities at divorce being used and received in the intended way?

With respect to any decrease in hostility at the time of the divorce, the anecdotal evidence is mixed. One state senator who had attempted to add a sunset provision236 to the Act, with repeal scheduled for 1992 absent evidence of the Act's effectiveness, reported that his action was based on numerous reports from attorneys that the Act was not decreasing client hostility, but was increasing costs.237

Actual interviews with attorneys revealed a decisive split in opinions concerning the Act's effect on immediate hostility and parental focusing on children.238 Sutter conducted a number of interviews and then analyzed those results in relation to the results gathered by two other interviewers. Her conclusions merit quoting at some length. One group of attorneys viewed the Act's effect quite skeptically:

All [twenty-four King County] attorneys interviewed emphasized that a hostile and unpleasant atmosphere frequently pervades the dissolution process. There were,

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235. See infra Part III.B.2.c.
237. Conversation with State Senator Phil Talmadge (July 25, 1989). We confirmed the senator's information concerning cost in interviews with attorneys and court personnel. All but two attorneys stated the cost of a parenting plan had significantly raised the cost of a dissolution. J. Sutter, supra note 187, at 32. Some of the increased expense, however, may be attributable to the inevitable start-up costs of creating forms and mastering a new law.
238. In King County, 10 attorneys reported no change; 14 reported some positive effects on clients. J. Sutter, supra note 187, at 13-14. In Clark County only 1 of the 6 attorneys thought the Act helped people calm down and think more about their children. C. Hart, supra note 187, at 21.
however, markedly different responses as to how the Parenting Act was or wasn't affecting this atmosphere. Ten of those interviewed felt that the Act was not helping... parents who were hostile or angry [to] focus on the best interest[s] of their children. In so many words, they said that it is unrealistic to try and change human nature by asking the parties to formulate a plan which requires rational thought at a time when they are very irrational. The most dubious said that parents generally are thinking about their own best interest at divorce. In their view, issues surrounding children only become an issue when they can be used to goad the other side.

The attorneys who felt most strongly that the emotions of divorcing parents would not be changed by the Act's requirements analogized the Act to no-fault divorce. They felt that the latter was an attempt to remove the process of blame from the dissolution process. Unfortunately, said this group of attorneys, this did not happen. Likewise, they felt that the Parenting Act try[ie]s to deprive angry, hurt and revengeful humans of the needed opportunity to 'battle it out'....

Indeed, some attorneys see the requirement that parents prepare a parenting plan as itself inflammatory. Parents are forced to consider specific details of post-dissolution child raising early in the dissolution process. This must be done at a time when they are basically blind to any point of view but their own. To expect them to cooperate with each other, particularly if one has been deeply hurt, may be unrealistic. Instead, they use each other's request to harass one another over endless details.239

Sutter found, in contrast to the first group, that:

On the other side of the issue are fourteen attorneys who see some of the positive effects on clients which I had hoped to find. Although they too recognize the pain and hurt of the parties, they feel the preparation of a

239. J. Sutter, supra note 187, at 13-14; see also Horenstein, Parenting Plans—Two Years Later (or I Told You They Wouldn't Work) FAM. L. NEWSL., Dec. 1989, at 3-4.
parenting plan helps the client, and in some cases, the
attorney, to focus on the children earlier than before the
Act and possibly prevent the devastating consequences
of a trial. Benefits [of the Act] mentioned included less
polarization developing between the parents,
communication staying open, parents recognizing that
they must work out the details, and the availability of
a structure within which to do this. These attorneys ex-
pressed more frequently the sentiment that the great
majority of parents do put their children[']s well-being
first, even in divorce, and that working on a parenting
plan helps them focus on what parenting is really
about.\textsuperscript{240}

Sutter admitted that she was “impressed” with this group of
practitioners and described how they effectively used the
parenting plan:

[These lawyers] reported that they use the parenting
plan to focus their clients on the many details of raising
children in cooperation with an ex-spouse. They spoke
of the challenges in dividing up parenting tasks because
of working mothers. They discussed teenagers who
don't want to visit Dad, little children who can't survive
too much switching back and forth. They were giving
the plan great importance by being closely involved in
its preparation, by questioning clients about each
choice.\textsuperscript{241}

The interviewed attorneys thus revealed two distinct sets
of attitudes concerning the capacity of the plan device, and for
some attorneys the capacity of any law, to change the
emotions or behavior of divorcing parents. These attitudes
were closely linked to their views of the Act's ability to help
parents to calm down and better focus on their children's

\textsuperscript{240} J. Sutter, supra note 187, at 14-15. Only one of the Clark County attorneys
thought the plan device helped parents to think more about their children. C. Hart,
\textit{supra} note 187, at 21. \textit{But cf.} R. Cordero, \textit{supra} note 187, at 39 (reporting the very
favorable views of mediators). One attorney-mediator reported that the plan was
valuable because it forced attorneys to focus more on the parent-child relationship.
\textit{Id.} at 40.

\textsuperscript{241} J. Sutter, \textit{supra} note 187, at 16.
needs.

This evidence tells us something about attorneys' opinions, of course, rather than about the actual experience of clients. Furthermore, although attorneys do tend to speak in generalizations about the Generic Divorce Client, this evidence does not tell us whether different attorneys would react differently or similarly to the same clients. To the extent that referral to Family Court Services for mediation or evaluation in connection with a contested temporary or permanent plan is a valid indicator of parental conflict at divorce, the percentage of such referrals was the same percentage as under the former law. This sample, however, may be slightly biased in favor of less-contentious cases because all of its cases were both filed and completed within 1988. If that is so, then the number so referred may be slightly greater than under the former law, rather than the same as under the former law.

Finally, a defect in the law, which has been cured subsequently by amendment, may have caused more conflict or, at the very least, prevented the positive effects of the Act from taking place. In its original form, the Act required all parties to file a proposed permanent plan with their petition or response or risk a default judgment against them. Not only did this pressure attorneys to demand decisions from clients that the clients might not have been prepared emotionally to make, but clients were later loathe to give up their opposing "plans" in the Family Court Services mediation process because they had become emotionally attached to them because of their significant investment of time and money. In the 1989 legislative session, an

242. Approximately 10% of King County cases are referred to Family Court Services for mediation, evaluation, or investigation following a formal legal conflict during the divorce. Interview with Marjorie Hellman (July 21, 1988). Of the 306 King County cases, 30 (or almost exactly 10%) were so referred.


244. Sutter noted that "[a] common sentiment [is that this early filing requirement] interferes with the positive effects which creating a parenting plan might have on the divorcing couple." J. Sutter, supra note 187, at 20-21.

245. Interview with Marjorie Hellman (Aug. 1, 1989). Almost no one disagrees that the new Act makes divorces more expensive for many parents in time or attorneys' fees. See supra note 237 and accompanying text. There is, not surprisingly, disagreement about the value of that extra expense. Attorneys' estimates of the actual cost of creating a permanent plan ranged from $200 to $1500. Some of the variation is doubtless because of the amount of disagreement between the parties. Some may
amendment changed this procedure and a "cooling period" was built into the Act's planning process.\textsuperscript{246}

Another "focusing" device is the change in language and "legislative concept" from "custody" and "visitation" to the ostensibly neutral functional terminology of the Act.\textsuperscript{247} Although some commentators have claimed that "the entire concept of custody and visitation has been abrogated under Washington law, at least as it applies to parents,"\textsuperscript{248} this is a subject of strident debate among the state's family law professionals. After putting the new language into practice, some interviewed attorneys insisted that eliminating the term "custody" with its connotation of property and possession has helped promote a focus on the importance of shared parenting following divorce. Other professionals insist that such a change has made and will make no difference whatsoever.\textsuperscript{249}

turn on the experience of the attorney. Again, longitudinal studies are necessary to assist policy makers in deciding if the added burden of creating a parenting plan results in comparable benefits in the future, whether those benefits are measured in decreased conflict after divorce, subjective satisfaction of parents and their children, or other variables related to the Act's goals.

\textsuperscript{246} That portion of the act as amended now reads in pertinent part:

(1) SUBMISSION OF PROPOSED PLANS. (a) In any proceeding under this chapter, except a modification, each party shall file and serve a proposed permanent parenting plan on or before the earliest date of:

(i) Thirty days after filing and service by either party of a notice for trial; or

(ii) One hundred eighty days after commencement of the action which one hundred eighty day period may be extended by stipulation of the parties.

(c) No proposed permanent parenting plan shall be required after filing of an agreed permanent parenting plan, after entry of a final decree, or after dismissal of the cause of action.

(d) A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed plan as required in this section.


\textsuperscript{247} COMMENTARY, supra note 26, at 2, 10, 12.

\textsuperscript{248} Freed & Walker, supra note 2, at 463.

\textsuperscript{249} J. Sutter, supra note 187, at 9-10, reports:

Twelve of the twenty-three [King County] attorneys who answered this question... saw no change in client attitudes as a result of the changed terminology. This number includes many who were following the Act's guidelines by discussing "parenting rights and responsibilities" and "decision making" instead of "custody" and "visitation".

A frequent reaction to the new words is that they merely codify the arrangements present in joint custody which existed prior to the Act.

C. Hart, supra note 187, at 19, also found in his interviews that some Clark County
It is probably impossible to gauge the precise effect, if any, of such a change of terminology on the attitudes and actions of affected professionals or their clients (who may or may not have been through divorce before). Nevertheless, there is a visible and intense ideological schism between those legal professionals who believe a change in legal language can affect the behavior of professionals and clients alike and those who insist that a rose by any other name smells as sweet.\textsuperscript{250} Thus, once again, there are two distinct and disparate groups of attorney attitudes concerning the effect of a legal change. In summarizing the data from the King County attorney interviews, Sutter noted, interestingly, that “only those attorneys willing to use the new language noticed any change at all in the behavior of divorcing clients.”\textsuperscript{251} Not surprisingly, the King County cases revealed numerous divorce actions during the first year of the Act in which parents, represented and not represented by attorneys, continued to use the old terminology in papers filed with the court.\textsuperscript{252}

(2) Postdecree—It is too early to tell what effect the requirement of a plan is having, if any, on postdissolution conflict between parents. Any definitive evaluation of this regulatory device’s value in relation to its major goal of decreasing conflict over time requires a long-term before-and-after study. Some observations can be made now, however, concerning the content of plans and anecdotal evidence on conflict.

Two aspects of parenting plans bear directly on whether postdissolution conflict might be reduced: the provisions for dispute resolution and the provisions, if any, for future

\textsuperscript{250} I observed a number of attorneys at one CLE seminar who hooted with laughter when a speaker suggested that the change in language might make a difference; those who were laughing were, in turn, booed by attorneys of the opposite viewpoint. The Washington State Bar Association and the Superior Court Judges Association sponsored the CLE seminar, entitled \textit{Family Law Bench and Bar on Effective Practice}, on November 19, 1988.

\textsuperscript{251} J. Sutter, supra note 187, at 12. She states further that “even this change, after only a fifteen month experience with the Act, is minimal.” \textit{Id.; see also} Fineman, supra note 3, at 746-53.

\textsuperscript{252} See K. Haynes & S. Somers, supra note 185, at 19-20. This is not too surprising given that the revised King County Local Rules also continued to use the old language. \textit{See KING COUNTY, WASH., LOCAL R. 94.04.}

The presence of one or two attorneys did not improve compliance with the new statutory terminology. For example, 11 cases used the phrase “reasonable visitation.” All 11 cases involved either one or two attorneys.
changes to the plan. Ten percent of the examined files (31/306) had no provision for a dispute-resolution method. Some plans complied, yet revealed fertile ground for future disagreements. Most noticeably, 71% of plans both named a method without naming a specific provider and did not include a fall-back provision in the event the parents disagreed as to the provider. Only 9% of plans provided for payment of the expenses of the required dispute resolution process. Thus, the dispute-resolution provisions may help avoid formal litigation, but may also provide fodder for arguments over provider and cost.

Did plans indicate that parties and counsel had anticipated the need for future changes in a way that was likely to minimize emotional and financial costs for parents who needed such changes? The statute does not encourage this. Although requiring great detail in residential schedules, it does not address the extent to which parents would be free to alter those details without returning to court for a formal modification.

253. In addition, many plans did not include statutorily required language concerning use of the method and sanctions for misuse. The Act originally stated:

In setting forth a dispute resolution process, the permanent parenting plan shall state that:

(a) Preference shall be given to carrying out the parenting plan;
(b) The parents shall use the designated process to resolve disputes relating to implementation of the plan, except those related to financial support, unless an emergency exists;
(c) If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorneys' fees and financial sanctions to the prevailing parent; and
(d) The parties have the right of review from the dispute resolution process to the superior court.


254. During attorney training sessions during the first months of the Act, one drafter admitted that the Act needed clarification in that respect. His materials included a list of proposed amendments, one of which was titled "Adjustment vs. Modification." It read:

(2) A court may order adjustments to the permanent parenting plan without requiring a threshold hearing or a showing of substantial change in circumstances if a proposed modification is a change only in:

(a) The dispute resolution process; or
(b) The residential schedule of not more than 24 full days in a calendar year and not more than five full days in a calendar month.

COMMENT: This change was proposed to allow changes in the residential schedule without requiring a full-fledged modification of the plan, including a threshold hearing. That is, this will allow relatively minor changes in the residential plan to be made between the parties without a modification action. Presumably, this will allow changes through the dispute resolution process or
To contend with this problem, different authorities and trainers offered different solutions to practitioners. Two commentators recommended including “provisions that would provide for changed circumstances . . . . The inclusion of such provisions can avoid the necessity of later modification actions.”

They failed to explain, however, how one could predict such changes with sufficient specificity to meet the requirements of the plan. Another commentator attempted to solve this problem by offering up a formulaic solution, according to which parents would link a child’s age to residential schedule changes over time.

In interviews, attorneys indicated continuing concern over the problem of future changes and different ways of dealing with it. Some reported that they tried to avoid the need for future modifications by spending extra time trying to cover every detail. Others, in the words of one interviewer, “anticipated modifications and set in the body of the plan a mechanism for such at certain ages in the child’s life.”

In spite of this concern, however, only 23% of the King County case files (69/306) contained provisions of any sort addressed to future changes. Of that small number, very few files provided for specific arrangements for the future; most referred to future changes in general terms. Haynes and Somers found frequently the following provision:

“Both parents acknowledge that as the children grow and change, revisions may be required in the Plan and, though unable to predict such revisions, agree to remain flexible with respect to access, parental responsibility, etc. Both parents agree that adjust-

upon motion to the family law calendar.

Kelly, Proposed Amendments to the Parent [sic] Act, in HOW TO GET TO THE FINAL PLAN, supra note 195, at 4-2.

Thus, even in these proposed amendments, Kelly relegated flexibility in the future to the limited realm of “relatively minor changes,” and might allow even those agreed changes to be subject, “upon motion,” to court scrutiny.

255. Applewick & Wechsler, supra note 194, at 29.

256. See Sawyer, supra note 194, at 117-18:

Please keep in mind that if you are dealing with preschool children, their developmental needs will change as they become of school age and go into adolescence. Therefore, I suggest that you make some appropriate provisions for those changes in your initial parenting plan. One area that comes to mind is gradually increasing the length of time that the child or children have with the non-school year residential parent each summer.

257. J. Sutter, supra note 187, at 18.
ments shall be made without showing substantial change in circumstances." 258

They also found that:

provisions for future changes fell into three general categories: those that provided for modifications at certain ages of the child; those that provided for modification at certain time intervals; and those that provided for modification at the occurrence of a specific event unrelated to either the age of the child or time intervals. 259

Some of the failure to include provisions concerning the future may be attributable to the practical difficulty of naming specific plans in advance; 260 some may be attributable to confusion concerning when any change would require a modification proceeding or formal approval by the court. The legislature, although aware of the problem, has to date passed no amendments resolving the question of parental freedom to agree to changes in a plan without court approval or a full-blown modification procedure. 261 If written plans are not updated to reflect changes that parents have made as children grow and change—because parents believe they would have to return to court and do not wish to incur the costs of doing so—their efficacy in helping parents to resolve disputes in a meaningful way is diminished severely. Thus, an important preventive function of the plan may be undone.

Finally, some evidence, albeit anecdotal, is available concerning the amount of postdissolution conflict to date. King County Family Court Services appears to have some increase in requests for postdissolution mediation concerning disputes over details of plans compared to the number of such requests under the prior law. 262 Without a careful study of this group

258. K. Haynes & S. Somers, supra note 185, at 32 (quoting language from the files).
259. Id. at 33.
260. See supra notes 193, 255-57, and accompanying text.
261. Bills have been introduced in legislative sessions on at least two occasions. See H.B. 2887, 51st Leg. (1990); H.B. 1536, 50th Leg. (1988). The most recent such effort, the 1990 Substitute House Bill 2887, did not make it out of committee, probably from lack of attention as much as from any organized opposition. Conversation with Michele Lamb (Apr. 4, 1990); see 12 LEGISLATIVE DIGEST AND HISTORY OF BILLS 789 (1989-90).
262. Interview with Majorie Hellman (Aug. 1, 1989) (20 months after the effective
of returning parents, the reported increase in use of the court-affiliated and free mediation service is difficult to interpret. Some or all of these people might have gone to court without an agreement to mediate; indeed, some may have gone to court and been referred to mandatory mediation. It also may be that including a dispute resolution provision brings people to mediation who would otherwise have done nothing or relied on some sort of self-help rather than return to court. Or plan details may lock parents into positions that could be shifted more easily were they not carved in stone. The finding is worrisome, however, in light of findings by Phear and associates, who found in their dissolution-file study that:

[T]he parents who chose to try to continue to maintain their joint legal responsibility for their children tended to draw up agreements that covered a greater number of their children's needs. However, this group also returned to court more frequently, reflecting an additional and possibly continuing source of stress to the children involved.263

2. The limitations: section 10 protections—This study examined the implementation of the key limitation of the Act, section 10.264 The experiences are likely to be similar in all jurisdictions concerned with both parental autonomy and the protection of vulnerable children or spouses at divorce.

a. Professional reaction—The limitations section of the Act immediately concerned practitioners and judges. They discussed repeatedly in training sessions the possibility of an implied "affirmative duty" to ascertain the existence of any section 10 conduct. One drafter who gave many of the

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seminars around the state wrote:

[T]he Section 10 limitations affect so pervasively the operation of the Parenting Act that counsel should consider first whether Section 10 limitations are applicable. In fact, even if the parties agree or a default is taken, findings with regard to Section 10 limitations will probably be required by the court.\textsuperscript{265}

More than one drafter believed that courts should reject some parental agreements, no matter how mutually satisfactory. Another speaker, an experienced family-law attorney, at an early and heavily attended CLE seminar, passed out materials to the many hundreds of attorneys in the audience, stating that:

It is generally preferred and encouraged that the parties come to agreements concerning the components of parenting plans. A thorough reading of Sections 9 and 10, however, indicates that the best interest of the child standard and the Section 10 limitations take precedence over agreements of the parents. . . .

It is advisable, therefore, that the following findings be included in all agreed parenting plans which provide for residential time with both parents, mutual decision-making or alternate dispute resolution mechanisms:

(1) No Section 10 limitations are present which would affect operation of agreements . . . .\textsuperscript{266}

This advice implies that attorneys must ask clients about, not simply inform them of, section 10.

Attorneys also expressed concern over the effect of section 10 on the negotiation and settlement process. Two practitioners asked, for example:

Did the Legislature intend that the allegations be included even if the parties agree to not impose restrictions? What if one party alleges, the other party denies, but the parties can agree to a residential schedule and

\textsuperscript{265} Prochnau, supra note 96, at 62 (emphasis added).
\textsuperscript{266} Wechsler, supra note 96, at 53-54.
joint decision making? We surmise that if one party vehemently denies the allegation, but it is necessary to include it anyway, we will find an increase in litigation to “clear my name.”

Such comments evidence the tension between the statute’s approach to protection and the professional belief in the importance of avoiding litigation.

Other practitioners voiced concern about perceived problems in applying certain of the limitations. They wondered what should be done with a client who reported behavior that was, in the opinion of counsel, only arguably the behavior described in the statute. I overheard numerous comments by attorneys at training sessions concerning their distress that they would have to worry more about “domestic violence” allegations in divorce. A spirited exchange between two experienced attorneys who appear to be talking right past each other demonstrated the problem attorneys were having with even the idea of such allegations. In the March 1988 newsletter of the Washington State Bar Family Law Section, an editorial appeared entitled The New Parenting Law—Yuppie Custody? With respect to section 10’s inclusion of domestic violence, it said:

Even more troubling is the restriction on parental contact for those who have been guilty of domestic violence. It is hard to reconcile this restriction with the intent of the law to minimize the changes in the relationship between parent and child. It may, in some cases, even be contrary to the best interests of the child. Consider the hypothetical case of a good father whose one flaw has been to allow himself to be provoked into

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267. Hall & George, Reactions to the Parenting Act, TRIAL NEWS, July 1988, at 1. One instructor at a CLE seminar offered no less than four optional clauses to address § 10 allegations: (1) No limiting factors; (2) parental agreement not to impose limitations (for use when the factors are “resolved or are de minimus [sic]”); (3) parties don’t agree as to the existence of the limiting factor but agree, or don’t agree, to certain provisions (for use when “one party will not admit to the validity of the limiting factor, but will agree to very real limits... a way to proceed without the problem of having someone hang up on a label”); and (4) provisions for use “when there is a real limiting factor.” Hibbard, supra note 195, at 11-14 to 11-15. Presumably, by “real,” the writer meant “real and acknowledged by both parents.”
committing domestic violence. Let us further suppose that the mother is a disaster as a parent — indifferent, unavailable, perhaps even a drug abuser. The act leaves the court no discretion.

... The legislature, in enacting the Parenting Act, may be responding to some yuppie ideal of rational people who rationally deal with each other about their children despite the end of their relationship. These people are undoubtedly too well-mannered to abuse their children or threaten their spouses. However, not everyone lives up to this ideal. The real world has many less articulate people who, in the stress of a failing relationship, may resort to ways that are not socially acceptable to express their anger at their spouses. They may still love their children. The question is should the law punish them for their misconduct through their children... Whether we have done the children any service in imposing [this punishment] seems doubtful.²⁶⁸

A former chairperson of the King County Bar Association Family Law Section responded as follows:

It was with great dismay that I read the editorial.... With the passage of the Parenting Act, attorneys who have represented victims of domestic violence were able to see that the ramifications of domestic violence, as they impact parenting, were finally being recognized. The issues of control, power and manipulation of the legal system against the victim were finally going to be dealt with. The victims at last could believe that they would no longer be disenfranchised by the legal system.

The writer of the editorial demonstrates the classic view of domestic violence in his statement: "A good father whose one flaw has been to allow himself to be provoked into committing domestic violence." This is not "Yuppie Custody," this is a total failure to recognize that good parents don't subject their spouses to domestic

violence. . . .

We, as attorneys, need to educate ourselves, examine what we are fostering, and not continue to speak blindly about rights that the parent long ago put into jeopardy by his own actions. The Parenting Act forces parents to deal with their own actions, confront the denial, and promotes a way to good parenting. Only through that recognition and confrontation of the domestic violence of the relationship can the children then benefit from good parenting from both parents. Then, the decisions of those parents will become "in the best interests of the children."  

The editor replied that "[t]he response by [the letter writer] assumes that spousal abuse and child abuse are irretrievably bound together, perhaps two sides of the same coin. This is undoubtedly true in many cases; it is also undoubtedly not true in many cases."  

Finally, numerous attorneys—and even two drafters—expressed concern that section 10 would lead to an increase in conflict at divorce, and, specifically, in allegations of child abuse, domestic violence and the other named behaviors. Some practitioners were also concerned that the first printed parenting-plan forms created for the public began by asking whether there were any such limitations.

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270. Id. at 4.

271. Interview with Drafter D (Sept. 13, 1988); Goodnow, New Law Tosses Out Old Concept of Child Custody, Seattle Post-Intelligencer, Dec. 31, 1987, at C1, col. 3. ("These exclusions, designed as safeguards, could lead to trumped-up charges of abuse by parents intent on cutting off their spouse from the other child, Dunne said.") (quoting statement by drafter John Dunne). I also overheard comments to this effect at numerous CLE sessions in 1987 and 1988.

It is probably not incorrect to say that some family law practitioners viewed § 10 as nothing other than a weapon to be thrown at an innocent spouse by a vindictive one. See, e.g., Fields, Dilemmas for the Domestic Lawyer: Preventing A Simple Divorce From Turning Into a Felony Prosecution, Considerations Under the New Parenting Act, in VULNERABLE ACCUSERS, VULNERABLE ACCUSED 2-05 (1988) (materials from a CLE seminar sponsored by the Washington Association of Criminal Defense Lawyers).

272. Again, I overheard comments about this is at numerous CLE sessions in 1987 and 1988. See also, e.g., Parenting Act Form of Evergreen Legal Services, supra note 201.
Judges were very concerned about whether the new law required them to inquire about section 10 conduct when they scrutinized negotiated plans. They feared a conflict with the law's important goal of fostering parental cooperation. Participants at a judicial education session wondered how the state would cope if the Act increased demand for mental health evaluations in section 10 cases, and how individual parties would pay if the state couldn't cope with the demand.

273. The following exchange took place at a judicial training session:

Speaker One: [T]here is going to be a different role taken by the courts . . . . The statute requires that the court shall apply section 9 and section 10 criteria to the plan that is worked out in the settlement conference. . . . So, if the parties have an agreement and they say, we're going to use so-and-so to mediate, or arbitrate or to conciliate our disputes, but section 10 says "you shall not do it" then you can't do it . . . .

Speaker Two: One question if I may interrupt . . . . It seems to me the whole thrust is to get parents to agree and cooperate. Here we're saying they've agreed, and then we're going to argue with them about the terms of their agreement. I find that a little difficult to [unintelligible].

Speaker One: Well, I'm just the Siskel and this is the Ebert . . . . This is one way I view it, now it may be that the parties can put their own findings and their pleadings and the court will not scrutinize and it's up to you to determine whether or not—how far you have to go with this. I think you do have to take a look at and ascertain whether there are any section 10 limitations. My feeling is the statute is directed towards the viewpoint . . . the court is the only one left to look at the section 10 limitations on behalf of the child.

Speaker Two: Wouldn't that require that the court basically interrogate whichever party is presenting the decree . . . . as to whether any limitations exist? It's not uncommon for a parent who is coming in to repress the fact that there has been abuse or does not [sic] protect the child.

Speaker One: That's what I perceive is to be the case. That there will be those kind of questions . . . . when it's an agreed order.

Transcript, supra note 193, Tape B at 20-21. Other inquiries included whether "the court then is obligated to appoint an attorney . . . [for the child]." Id. at 21. The inevitable question concerning payment for such an appointment arose as well. Id. at 23.

274. Thus, a speaker noted:

Some of the outcomes that I see are that it's possible that only those who can afford expert evaluations will be able to substantiate or refute section 10 guidelines. . . . You're going to have to ask if you have people within your Court system, those people to evaluate or you're going to have to make a finding without having an evaluation or you're going to have to use your external resources. In those cases, those resources are generally not free. . . . As was mentioned, also, this morning, if indeed the agreed orders are scrutinized and they're scrutinized with any degree of consistency, we then have that whole other population that we never saw before coming back for evaluations. I don't know how many that will be . . . . We've always dealt with the contested cases, but if we start dealing with the uncontested cases, I think we're all in the, could get into a mire that none of us necessarily
One member of the Ad Hoc Drafting Committee, a proponent of the goals of the section 10 limitations, candidly admitted the extent to which the statute had failed to resolve the court's role in reviewing negotiated plans:

There's been a lot of questions about the problem for judges with agreements and I've had a couple thoughts about this . . . . First of all, I think there was a real tension between the legislature's desires . . . to protect the children from serious abuse and to get, and require us to all become more involved in protecting children. The[re was] tension between that and the practicalities of judicial and county economy. . . . There was also, I think, an intention to protect children . . . where one parent is simply ignorant of their [sic] rights to be able to protect that child, that you be able to inform them of that, or that you be able to override that agreement where that problem is obvious. I think you've got a continuum of possibilities just as you had under the old Act. Under the case law, you certainly had the option not to approve agreements that you felt were not in the best interests of the child and some would argue, under the case law, you had that duty. But you have the continuum of . . . how much you are required to discover or interrogate the parties to find out if there's a limitation. In some counties where you don't even have live testimony, you may decide that the fact that the limitations box hasn't been checked on the parenting plan form may be enough in and of itself, that that has put the parent on notice that they [sic] should check that box if it's there, if they don't check it, you can assume safely that limitation is not available. In other cases where you do have live testimony, you may feel that a cursory questioning of the parent is enough. Other judges may feel that you have to go further. What are the possibilities once that parent discloses to you, or it comes to your attention, that there is such a limitation? One possibility is the most extreme, is ap-

predicted would happen to us.

Id. at 23.
pointing an attorney for the child, obviously. Another extreme is just refusing to sign it and saying, you go figure it out, I suppose. Another possibility is, if you have this new requirement to report child abuse, is to say, I'm not going to sign this agreement until you come back with a report from [Child Protective Services], as [to] what they think is appropriate. That is an agency that is supposed to investigate and make recommendations as to child abuse and that would be another option.

... [A]nd I understand, I understand these are not perfect options and my experience with [Child Protective Services] is that they're very slow to report and we have difficulty in getting the reports available to the Court. Maybe one of the things would be to put in your court order that [Child Protective Services] is ordered to produce a report within a certain time. ... I'm not suggesting that these are perfect solutions. These are things I'm floating right now and I agree that there's some real problems in this area. 273

In spite of these concerns, however, it appeared that at least some of the drafters and commentators expected courts to inquire actively into the existence of the mandatory limitation behaviors in all cases, settled or not, and to apply the limitations where necessary. A draft of the new Washington State Family Law Deskbook Chapter on the Parenting Act, used in training materials, stated that “the court has an affirmative duty to inquire and to be sure that the agreement of the parties is consistent with the limitations imposed by the act.” 276

b. The attorney’s screening role—Attorney interviews on the Parenting Act revealed how the inevitable use of attorney discretion plays a central role in the making of threshold decisions—whether to include a section 10 allegation in papers or whether even to mention the existence of section 10 to

275. Id., Tape F at 26-27.
clients—concerning implementation of the Act’s express limitations on plans. The attorney’s ethical obligation to maintain the client’s confidence also influences these decisions. Interviews revealed the very different views of legal professionals on how to handle the mandatory limitations.

Almost one third of the interviewed attorneys stated that they do not necessarily bring up section 10 with clients.\textsuperscript{277} Two of the King County attorneys expressly stated that they never bring up section 10 unless section-10-type behavior is mentioned by the client.\textsuperscript{278} One of these attorneys described section 10 as a potential “minefield” for clients who were susceptible, because of the strain of divorce, to “power of suggestion.”\textsuperscript{279} The rest determine case by case whether to inquire explicitly into or even mention the possibility of section 10 claims.\textsuperscript{280}

Once those attorneys who believe in inquiring do so, they use a second discretionary filtering process, deciding what to put in the plan and deciding whether to refer to section 10 at all when they do not include limitations. Over half of the King County attorneys reported that, where the facts permitted, they would include a statement in the plan that there were no limitations.\textsuperscript{281}

Where attorneys discover section 10 conduct or clients bring up claims on their own initiative, attorneys must decide whether to include a section 10 allegation in formal papers. Here again, attorneys differed as to how they should proceed. Some expressed the sentiment that “some inappropriate behavior” is pretty typical of people going through a divorce and should not be elevated to an official ground for limitation.\textsuperscript{282} In some cases, often involving domestic

\textsuperscript{277} Five out of 24 of the King County attorneys and 4 out of 6 of the Clark County attorneys (for a total of 9/30 or just under 1/3) did not always raise § 10. C. Hart, \textit{supra} note 187, at 26; J. McKeever & D. Noda, \textit{supra} note 187, at 19 & app. F.

\textsuperscript{278} See J. McKeever & D. Noda, \textit{supra} note 187, at 19.

\textsuperscript{279} \textit{Id.} at app. F(2)(Attorney L).

\textsuperscript{280} \textit{Id.} at app. F.

\textsuperscript{281} \textit{Id.} at 22. Thirteen attorneys report they would affirmatively state that “there are no section 10 limitations,” although only one attorney believed he was obligated to refer to the statute; eight report that they would not refer to § 10 if no limitations exist. Four of six Clark County attorneys say that they include a statement of no § 10 limitations, if possible. C. Hart, \textit{supra} note 187, at 28. We did not verify any of these reports.

\textsuperscript{282} J. Sutter, \textit{supra} note 187, at 31.
violence claims, attorneys appear to be choosing on their own to disregard the terms of the statute. Some suggested that the parent should choose whether to include a claim.

McKeever and Noda, who characterized their attorneys as "cautious" or "expansive" with respect to handling section 10, report that "cautious" attorneys make their own evaluations of client claims before including them in papers. They noted that:

Many attorneys have well-developed, yet informal, systems in place to evaluate the strength of their clients' claims. An informal system may consist of a mental rather than a written checklist that an attorney follows to evaluate a client's claims. Some attorneys intensely cross-examine clients to obtain the full facts surrounding claims. One attorney makes his clients sign an affidavit of truthfulness regarding Section 10 claims. This attorney stated that the affidavit is useful to put clients on notice to tell the truth, and is an efficient way to sift out unsubstantiated claims, since clients reconsider signing this affidavit if they are exaggerating. . . . Generally, these attorneys who proceed with caution regard Section 10 as a dangerous weapon for use in only the most extreme circumstances,

283. Sutter describes interviewing attorneys who noted that "a one-time domestic quarrel, ending with a call to the police[,] will usually result in a domestic violence charge." *Id.* These attorneys decided without regard to the explicit statutory reference to domestic violence that "[t]his charge might be given far too much weight in determining parental rights." *Id.; see also* C. Hart, *supra* note 187, app. F at 95 (transcript of interview):

I think in discussing it further with my client, the happening of an event . . . Let me just start over here. In my practice, I don't want [§] 10 type claims to be the deciding factor in a custody award. If it's an isolated event, or if it doesn't touch and concern the child—maybe husband had too many occasions to scream at his wife and maybe hit her a couple of times. I don't want child custody to be determined on that. If all the other evidence is shown that he's really good with the children, and if my client comes in and talks to me about these types of things happening, and I get the feeling that she's not really bothered by them now that the divorce is taking place, I'm not going to put in a [§] 10 type claim. If my client tells me that "that's what I want", and of course I tell them what their options are, I think that some of them would be in bad faith, and if they were in bad faith, I wouldn't do them.

285. *Id.* at 9-11.
after much fact-finding and evaluation has been done.\textsuperscript{286}

As a rule, all attorneys inquire whether there is any specific corroborating evidence. The attorneys who had an "expansive" approach to section 10, however "would still ask questions, but those questions might not be as lengthy or as probing. Much more reliance and emphasis would be placed on the client's reasonable belief that a Section 10 violation had occurred."\textsuperscript{287} Thus, the attorney's trust in the client, or in divorce clients in general, as well as the attorney's personal values concerning what behavior should affect a parenting plan seem to be important variables in determining whether the attorney includes a section 10 allegation in papers or even informs the client of the possibility of the protective limits.\textsuperscript{288}

An attorney's ethical obligation to maintain client confidentiality\textsuperscript{289} also plays some role in relation to section 10. A number of interviewed attorneys said that they have had clients discuss section 10 claims yet request confidentiality.\textsuperscript{290} Almost all attorneys who were asked about how they have handled or would handle such requests in light of the statute's limitations section stated that they were bound to maintain the client's confidence.\textsuperscript{291} In an extreme case, where they believed a child had been or might be harmed, a majority of attorneys would urge the client to make a claim or report the behavior to a public agency.\textsuperscript{292} They felt obligated ultimately, however, to defer to the client's decision not to allege the behavior and would withdraw as counsel rather than reveal the behavior.\textsuperscript{293} Most attorneys emphasized, however, that any dilemma presented by the rule of confidentiality on the one hand and the limitations section of the Act on the other, although real in theory, was rare in

\begin{itemize}
\item \textsuperscript{286} Id. at 10.
\item \textsuperscript{287} Id. at 11.
\item \textsuperscript{288} This observation on the role of attorney trust (or distrust) of clients accords with research on divorce attorneys done by other empiricists. See, e.g., Speech by Professor Austin Sarat at 1990 Annual Meeting of Association of American Law Schools (Jan. 4, 1990).
\item \textsuperscript{289} See WASH. R. PROFESSIONAL CONDUCT 1.6, reprinted in note 117.
\item \textsuperscript{290} J. McKeever & D. Noda, supra note 187, at 14.
\item \textsuperscript{291} Id. at 14-15; C. Hart, supra note 187, at 25.
\item \textsuperscript{292} J. McKeever & D. Noda, supra note 187, at 15-16; C. Hart, supra note 187, at 25-26.
\item \textsuperscript{293} J. McKeever & D. Noda, supra note 187, at 15; C. Hart, supra note 187, at 25.
\end{itemize}
fact because most clients with section 10 claims were anxious to bring the harmful conduct to light. 294

Some King County attorneys and at least one Clark County attorney, presumably believing that counsel has an affirmative duty to inquire into section 10 and set limits where section 10 behavior is found, expressed the belief that there was an unresolved tension between the mandate of section 10 and the rule of confidentiality. 295 The tension between the attorney’s ethically required allegiance to the adult client and the possibly conflicting needs of the client’s child for protection from serious harm is nothing new to the practice of custody law. 296 Section 10, however, with its perhaps purposeful ambiguity, brings that problem unmistakably to the fore.

Concerns about the possibility that section 10 would increase parental conflict at divorce were not borne out in attorney interviews. Eighty percent of those interviewed stated that the section either made no difference or helped to decrease hostility. 297 Other limited anecdotal evidence with respect to section 10’s effect on parental hostility does not indicate that section 10 is increasing or inflaming conflict. 298

c. Completed plans—Data from 306 cases showed that

296. See, e.g., ABA FAMILY LAW SECTION, CHILD CUSTODY DISPUTES, supra note 5, at 85-89.
297. McKeever and Noda reported that of the 20 attorneys who answered this question, 5 thought § 10 helped, 4 found it “a hindrance,” and 11 thought it made no difference. J. McKeever & D. Noda, supra note 187, at 23. Almost all of these attorneys had dealt with § 10-type claims before the Parenting Act went into effect. Id.

The results in Clark County attorneys interviews were similar. All five attorneys who answered the question had handled pre-Act cases with § 10-type allegations. One thought § 10 helped with its specificity; one thought it hindered his work because the vague language means that almost everything can be considered a § 10 behavior, and three saw no change. C. Hart, supra note 187, at 20-21.

Thus, 14 attorneys thought that § 10 made no difference in terms of parental hostility, 6 thought it helped to decrease hostility, and 5 thought it made the situation worse.

298. One family law court commissioner did a very small sampling of post-Act cases (25) and concluded that the percentage of cases with § 10-type allegations in initial papers was no greater under the new law than under the old. See DuBuque, Practice on the Family Law Motion Calendar: Some Preliminary Observations Under the Parenting Act, in FAMILY LAW INSTITUTE, supra note 194, at 86.

The director of King County Family Court Services reports a slight increase in domestic violence claims in the cases referred to her department since implementation of the Act. Interview with Marjorie Hellman (Aug. 1, 1989).
thirty percent of the final plans referred to section 10 and stated that there were no section 10 limitations. Eighteen percent referred, explicitly or implicitly, to the existence of section 10 conduct. In spite of the urging of various trainers, over one half of the plans (54%) did not refer at all to section 10. As attorney interviews made clear, this could mean either that attorneys or parties representing themselves did not believe that they needed to mention section 10 where no section 10 behaviors existed or that they did not choose to mention an existing section 10 behavior and therefore could not honestly include a finding of “no section 10 limitations.”

Fifty-six cases (18%) of the total sample contained permanent parenting plans that referred directly or implicitly (by setting an explicit limit or restriction on the plan) to section 10. Twenty-five of these cases involved “mandatory limitation” behaviors, thirty-one involved “discretionary limitation” behaviors.

Compliance with the required plan components was mixed. The statute states that the “court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies.” Thirty-nine percent of the cases (22/56) failed to comply with this statutory directive and listed mediation, arbitration, or counseling as the method instead of court. The statute

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299. See supra notes 265-66 and accompanying text.
300. See supra notes 281-84 and accompanying text. A total of 26 cases contained § 10 allegations somewhere in the file, but did not refer to § 10 in the final plan.
301. These included abandonment, sexual abuse, physical abuse, and domestic violence.
302. WASH. REV. CODE § 26.09.187(1) (1989), reprinted in Appendix (emphasis added). This language implies that behavior requiring mandatory § 10 limitations and behavior allowing discretionary § 10 limitations are to be treated the same. A later section of the statute creates some ambiguity as to this point, however. Section 26.09.191(1) states that the “plan shall not require . . . designation of a dispute resolution process other than court action if it is found that a parent has engaged in any [of the § 10 mandatory limitation behaviors].” Id. § 26.09.191(1), reprinted in Appendix.
303. Thus, 61% did comply. The compliance rate for the 25 “mandatory” limitation cases was somewhat better (76% or 19/25 cases) than for “discretionary” limitation cases (48% or 15/31 cases).

Some number of the noncomplying cases specified mediation and listed King County Family Court Services as the mediation provider. In these cases, the named provider may reflect a party’s or attorney’s expectation that in King County a “court” dispute resolution method may very well result in a stipulation or order for referral
also states that the plan shall "not require mutual decision-making" where behavior requiring mandatory limitations is found.\textsuperscript{304} In all but two of the twenty-five mandatory limitation cases, sole decision making was given in all three areas (education, health care, and religious upbringing) to only one of the parents.\textsuperscript{305} Finally, the Act mandates that residential time \textit{shall} be limited under some circumstances and \textit{may} be limited in other circumstances.\textsuperscript{306} "Limits" could consist of supervised visits or visits with another condition such as "no drug use." They could also consist of less time (e.g., fewer overnight visits, less daytime contact, or no contact at all between the child and the offending parent).\textsuperscript{307}

There is, of course, no way to measure whether the amount of time was, in fact, "limited" when there is no set residential time for plans without limitations.\textsuperscript{308} Therefore, to attempt to ascertain whether any "limitations" existed, we examined relationships between amount of residential time and existence or nonexistence of section 10 conduct.\textsuperscript{309} The results, set out in Table G, show that the nonprimary residential parent in a significantly higher percentage of cases received either no overnight visits or no residential time if the plan listed section 10 conduct, especially if it listed "mandatory limitation" conduct.\textsuperscript{310}

\textit{to Family Court Services for mediation. See supra notes 109, 204, and accompanying text.}

\textsuperscript{304. WASH. REV. CODE § 26.09.191(1) (1989), reprinted in Appendix.}

\textsuperscript{305. Both of the two exceptions involved representation by an attorney. In one case, one party was represented; in the other case, both parties had attorneys. See infra note 329 and accompanying text.}

\textsuperscript{306. WASH. REV. CODE § 26.09.191(2) (1989).}

\textsuperscript{307. Wechsler & Appelwick, supra note 276, at 45-23.}

\textsuperscript{308. See WASH. REV. CODE §§ 26.09.184(5), .187(3) (1989).}

\textsuperscript{309. Fifty-nine percent of the 56 plans did not require any supervision of the offending parent during residential time with the children. Whether less time or, in any event, less overnight time (in those instances where some time is allotted to the offending parent) provides sufficient protection is, of course, a subject of debate and would depend on the nature of the offending behavior and other factors. Of plans listing behavior requiring mandatory limitations, 52% did require some sort of supervision; only 32% of the plans with behavior allowing discretionary limitations had provisions for supervision.}

\textsuperscript{310. In our study, 34% of the § 10 cases (19/56) allotted no residential time to the noncustodial parent. These express denials of visitation constituted 6% of the total sample. The number of cases in which "visitation" with a noncustodial parent is denied outright traditionally has been minuscule. The random sampling of 381 divorce files from 1987 in 11 Washington State counties, for example, found a total of 8 cases (2%)
### TABLE G

**SECTION 10 STATUS AND CASES WITH NO OVERNIGHTS OR NO RESIDENTIAL TIME**

<table>
<thead>
<tr>
<th></th>
<th>Number of Cases</th>
<th>No Overnights</th>
<th>No Residential Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 10—Mandatory Limitation</td>
<td>25</td>
<td>72% (18)</td>
<td>52% (13)</td>
</tr>
<tr>
<td>Section 10—All</td>
<td>56</td>
<td>63% (35)</td>
<td>34% (19)</td>
</tr>
<tr>
<td>Non-Section 10</td>
<td>250</td>
<td>14% (35)</td>
<td>11% (28)</td>
</tr>
</tbody>
</table>

In those plans that did grant some residential time to a parent whose conduct was listed in section 10, the mean number of overnight visits was significantly smaller than it was for nonprimary residential parents without such behaviors. Thus, the mean number of overnight visits for the nonresidential parent was twenty-one per year in all section 10 cases (fifty-six), as compared to seventy-eight overnight visits per year for non-section-10 cases \( t = -7.42; p < .0005; \text{d.f.} = 304 \). In mandatory-limitation cases, the mean number of overnight visits was only eleven compared to the same seventy-eight in non-section-10 cases \( t = -6.08; p < .0005; \text{d.f.} = 273 \). However, the mean number of days per year did not differ significantly between all section 10 cases (mean = twenty-six days) and non-section-10 cases (mean = twenty days). The same is true when just the mandatory limitation section 10 cases (mean = twenty days) are compared to non-section-10 cases.

These findings appear to demonstrate that section 10 limitations in the permanent plan do result in considerably less overnight residential time for the abusive parent, especially where a mandatory limitation behavior is found. They in which visitation was denied outright. Washington State Task Force, Final Report, supra note 134, app. F-355. This figure is strikingly similar to that found in a study of 485 divorce files in Middlesex County, Massachusetts (selected from the years 1978 through 1981). There, a total of 9 out of 485 cases (or 1.9%) allowed no visitation. Phear, Beck, Hauser, Clark & Whitney, supra note 213, at 428.
also demonstrate that section 10's reference to residential time limitations largely has been interpreted in practice to mean fewer overnight visits per se. It has not been interpreted to mean fewer daytime visits. Indeed, cases involving mandatory limitation behaviors show the same mean daytime visits as non-section-10 cases. Nor does it appear that parties or attorneys believe these visits must be supervised. Therefore, section 10 may be providing needed protection to the extent, and only to the extent, that children are protected by fewer overnight visits with a parent who has committed conduct described in section 10.

Certain other variables should not be disregarded. Not all final plans containing a section 10 limitation grant the same degree of "protection." Specifically, appearance (whether one party defaulted) and representation (especially cases in which both parties had their own counsel) made a significant difference in the degree of protection afforded by the plan.

A large percentage—45%—of section 10 cases were "defaults," i.e., cases in which one parent failed to make a formal appearance in the divorce action. Conversely, a large percentage—48%—of default cases included section 10 limitations in the final plan. Default status in section 10 cases frequently resulted in no overnight or no daytime visits for the nonprimary residential parent. Furthermore, in those section 10 cases where residential time was granted to the nonprimary residential parent, default cases resulted in fewer overnight visits (mean = twelve per year) than cases in which both parents appeared (mean = twenty-nine per year). Default judgments also resulted in significantly fewer days per year to the nonprimary residential parent. The mean days of residential time to that parent was only six per year in default

311. See supra note 309.
312. In some instances this may be adequate to protect against harms. At the same time, however, fewer nights but a number of days equal to those in non-§ 10 cases, suggests that the result may deprive the offending parent but not necessarily protect the child.
313. This percentage should be compared to the overall sample of 306 cases, which includes all of those § 10 cases but still had only 17% defaults.
314. Only 12% of cases in which both parents appeared had a § 10 limitation in the final plan.
315. In fact, 54% (19/35) of the § 10 cases in which the offending parent received no overnight visitation were cases in which that parent failed to make an appearance. Similarly, 65% (15/23) of the § 10 cases with no daytime visits for one parent were defaults.
cases as compared to forty-two in nondefault cases ($t = 4.34; p < .0005; \text{d.f.} = 54$).

None of these relationships is surprising given that one parent in each case failed to appear and either challenge allegations or request more time. We do not know, however, why these parents defaulted or, more importantly, if defaults were more prevalent after the effective date of the Act than before.

Significantly fewer two-attorney cases and one-attorney nondefault ("one-attorney") cases appeared in the section 10 group than in the non-section-10 sample ($X^2 = 41.27; p < .00005; \text{d.f.} = 4$).\footnote{Only 13\% of the § 10 cases (7/56) were two-attorney cases, as compared to 27\% for the non-§ 10 cases (68/250). One-attorney cases made up 39\% of the § 10 group (22/56) and 48\% of non-§ 10 cases (121/250). Conversely, the percentage of two-attorney cases with § 10 findings—9\% (7/75)—was disproportionately small compared to the overall percentage—18\%—of § 10 as opposed to non-§ 10 cases.}

We analyzed the one-attorney and two-attorney section 10 cases after eliminating the default cases with their unusual patterns.

The number of two-attorney section 10 cases is very small (only seven cases out of the fifty-six total or thirty-one nondefault cases). As a result, we will have to see if similar correlations show up in other samples before we can draw any definitive conclusions about two-attorney cases. Nevertheless, the patterns in these cases are so different from those found in the one-attorney section 10 cases, and—given that these are all cases in which there is a finding that a section 10 behavior has occurred—are arguably so contrary to the intent of the statute that they deserve attention.

I noted earlier that section 10 cases showed a pattern of fewer overnight visits than non-section-10 cases, but an equal number of, or in some cases more, daytime visits.\footnote{See supra pp. 158-60.} When we eliminated the default cases from the sample, the pattern of increased days became much more pronounced. Furthermore, as Table H demonstrates, the distinction between one-attorney and two-attorney cases is stark. If each overnight and each daytime visit is assigned one "residential unit," solely for purposes of comparison,\footnote{This comparison does not imply that each "day" is equivalent to each "overnight visit," although in a given instance the amount of actual visiting time may be the same. Rather, it is a way of emphasizing the result of the sorts of patterns (decrease in overnight visits, increase in daytime visits) that appear in the § 10} then one-attorney
cases show forty-two fewer "total residential units" in section 10 cases than in non-section-10 cases, but two-attorney cases show seven more "total residential units" in section 10 cases than in non-section-10 cases.\textsuperscript{319}

\begin{table}[h]
\centering
\begin{tabular}{lccc}
\hline
Representation and Section 10 Findings & Day Visits & Night Visits & Total Visits \\
\hline
One Attorney & & & \\
Section 10 Findings & 36 & 17 & 53 \\
No Section 10 Findings & 20 & 75 & 95 \\
Difference & 16 & -58 & -42 \\
Two Attorneys & & & \\
Section 10 Findings & 74 & 52 & 126 \\
No Section 10 Findings & 28 & 91 & 119 \\
Difference & 46 & -39 & 7 \\
\hline
\end{tabular}
\caption{Effect of Representation and Section 10 Findings on Residential Time}
\end{table}

The steep increase in daytime visits in these two-attorney cases, along with the large number of transitions between parental homes,\textsuperscript{320} suggests that attorneys in these cases may believe and may be telling clients that trading overnight visits for more daytime visits with an abusive parent is a legitimate form of complying with the statute. It is important nondefault cases.

\textsuperscript{319} There were only two no-attorney, nondefault cases in the § 10 cases. We did not include them in these analyses.

\textsuperscript{320} The mean number of monthly transitions between parental homes for two-attorney cases was 12.0; for one-attorney cases, it was 5.7 ($F = 7.79; p < .0005; d.f. = 4$).
to remember that these are cases in which the parties have agreed in the final plan that there is section 10 behavior. It is impossible not to wonder whether a major dynamic in such cases is the accused side saying to the accuser: "Okay, I'll agree to a finding of section 10 in the final plan and save you the cost of litigation, but in return you had better give me more time—at least more daytime—with the child." Thus, daytime visits may be serving as a chit in the bargaining process when parties and their counsel are confronted with the need to comply with section 10. Especially in cases of serious harm where unsupervised daytime visits will not provide sufficient protection to a child, that speculation is not reassuring. It suggests that some attorneys, at least while negotiating with other attorneys, may be more concerned with working out any agreement than with the limitations decreed by the statute and the intention behind that law.

This speculation is bolstered by the fact that a disproportionate percentage (50%) of the twenty-six cases in which section 10 claims were made early on in the case, but in which there were no limitations in the permanent plan, were cases in which both parties were represented by attorneys. One

321. Representation and appearance also influenced treatment of the other plan components in § 10 cases. In the seven cases where both parties were represented by attorneys, 86% of the § 10 cases (6/7) listed a dispute resolution process other than court. In all other modes of representation and appearance, half or more of the § 10 cases complied with the statutory requirement that court, and not an alternative dispute resolution process, be listed. Even if the statute is interpreted to require court for mandatory-limitation behaviors only, the results are no better. Only one two-attorney case had such a § 10 provision, and it listed "mediation." Two thirds or more of cases in all other modes of representation or appearance complied by requiring "court."

Similarly, of the seven § 10 cases with two attorneys, five (71%) had mutual decision making in one or more areas. This can be compared to 18% of the one-attorney cases (4/22). For mandatory-limitation cases, the only two-attorney case again failed to comply and assigned mutual decision making. One of the nine one-attorney cases also failed to comply with the law. All other cases (one-attorney, no-attorney, and default) provided for the statutorily required sole decision making. Finally, I should reiterate that only one of the seven two-attorney cases had a mandatory § 10 limitation in the permanent plan, although we found allegations of mandatory-limitation § 10 behavior in the files of five of those same seven cases.

In theory, of course, attorneys should know the statute and its purpose better than nonattorneys. Parents going on their own, however, to pick up forms offered by the county or public interest groups, in many cases expressly are informed on those forms about the § 10 limitations. As seen in attorney interviews, a parent with counsel might never even learn of that part of the new law. See supra notes 277-80 and accompanying text.

322. In the overall sample of 306 cases, both parties had attorneys in 75 cases (25%).
might hypothesize that the involvement of two attorneys means a greater likelihood that (intentionally or unintentionally) false allegations were better aired, examined, and appropriately eliminated in the negotiation and settlement process, and in some cases skilled attorneys may well have facilitated that outcome. We know for at least some of these cases, however, that clients report having been ignored or inappropriately discouraged by their counsel.\textsuperscript{323} Professor Austin Sarat has reported his observation, based on considerable data, that divorce lawyers often distrust their clients.\textsuperscript{324} Lawyers may simply not believe valid claims, and may therefore dismiss them as "unreasonable." Two attorneys discussing a case may reinforce these anticlient attitudes.\textsuperscript{325}

The question of when not to settle in light of alleged or admitted harms is, however, not an easy one. Not least of the attorney's problems is the fact that clients themselves may

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Of the 26 cases in which § 10 allegations appeared earlier but not in the final plan, 13 cases (50\%) involved such dual representation. Of the remaining 13 cases, 2 involved two pro se parties and 11 had one attorney representing one of the parties. In the latter group, the second party was pro se in 8 cases and defaulted in the other 3.

There were no significant patterns for these two-attorney cases with respect to dispute resolution or decision making. Nor did two-attorney cases allot a significantly different number of daytime visits to the accused parent as compared to one-attorney cases. The three default cases, however, did allot considerably fewer days (mean = 2) than one-attorney (mean = 33), two-attorney (mean = 28) and no-attorney cases (mean = 30).

323. Two students recently completed an in-depth study of five of these two attorney cases. L. Kalina & F. Porter, Section [10] Restrictions in the Parenting Plan: Real or Imaginary? (June 1990) (on file at the Marion Gould Gallagher Law Library, University of Washington School of Law). In three of these five cases, clients wanted limits and report that they were discouraged or ignored by their counsel. \textit{Id}. at 52-53. In two of those cases, a parent (one mother, one father) strongly and with reason (in the opinion of interviewers who also studied the court files) desired limitations on the other parent's time and was discouraged by counsel. \textit{Id}. at 16, 20-21, 52-53. One of these parents returned to court without representation to obtain a protective order and limits on time with the child shortly after her paid counsel negotiated a plan with no limits and much shared time. \textit{Id}. at 20-24. In the third case, a parent asked for, and believed her attorney had negotiated, sole decision making as a protective limit. \textit{Id}. at 28. The parenting plan, however, assigned mutual decision making in all areas. \textit{Id}. at 28 n.4.

324. Speech by Professor Austin Sarat, \textit{supra} note 288; see also Robbins, \textit{Self-Defense: Never Assume You're Home Free}, FAM. ADVOC. 9-10 (Winter 1990) ("[Y]our best client can become your worst adversary. . . ").

325. According to several authors, "some attorneys have difficulty asserting demands they view as unreasonable. Their goal in divorce advocacy may be to protect the interests of everyone to some degree; they may also see 'unreasonable' advocacy as damaging to their professional reputation." Erlanger, Chambliss & Melli, \textit{supra} note 8, at 601.
exert strong pressure for settlement.\textsuperscript{326} Clients do get upset and do exaggerate on occasion.\textsuperscript{327} Furthermore, some experienced attorneys may believe that an offending parent may get worse and harm a child more if a section 10 claim is litigated, because without making an issue of a claim, that parent might have drifted off and left the child alone. Finally, many attorneys may be as ignorant as the general public concerning the nature of the harmful behaviors listed in section 10. Lack of education about the verification and handling of domestic violence cases is among the most obvious examples.\textsuperscript{328}

Whatever the actual origin of the case results or comments by interviewed attorneys, the data make clear that there is a great need for more explicit policy and professional education concerning the nature as well as the amount of “limits” on parenting arrangements needed to protect children (or vulnerable spouses) from the various harms articulated in the statute. In addition, some attorneys may need to learn in no uncertain terms that some facts, with their concomitant rights, must not be bargained away, at least not without the express approval and encouragement of parents.\textsuperscript{329} At the very least, further study of the role of attorney-to-attorney negotiation in relation to protection for children and vulnerable spouses at divorce is essential.

d. Court scrutiny—The statute is ambiguous as to the court’s role in reviewing agreed or settled plans with respect

\textsuperscript{326} Id. at 592-94 (discussing pressures to settle in addition to direct attorney pressure, including the financial and other disruptions created by divorce and the desire to get the divorce over with as soon as possible). It would be interesting to discover if clients are more (or less) apt to push for settlement where there are two attorneys and thus—or so a client may fear—a greater possibility of expensive and stressful litigation.

\textsuperscript{327} Two of the five cases studied by Kalina and Porter contained serious § 10 allegations, but the parents who made the claims deny wanting limits. In one case, both parents describe the claims as “exaggerated truths.” The parents who admitted to “exaggerated truths” do not report that their attorneys were in any way responsible for these exaggerations. L. Kalina \& F. Porter, \textit{supra} note 323, at 40.

\textsuperscript{328} \textit{See supra} notes 268-70 and accompanying text. One participant in an ABA conference on child custody stated that “[i]n many domestic violence cases, attorneys are not familiar with a lot of ways in which to handle them. . . . Now one of the things that I encounter is that attorneys are being attacked for representing battered women. The assumption is that I ‘automatically believe the battering.’” ABA FAMILY LAW SECTION, \textit{CHILD CUSTODY DISPUTES}, \textit{supra} note 5, at 106-07.

\textsuperscript{329} If one interprets the statute to require limits where “mandatory limitation” behaviors exist, then attorneys should not “bargain away” those limits even with the express approval of parents.
to section 10.330 There was nothing ambiguous, however, about how the observed court commissioners behaved as they reviewed plans. In none of the four observed counties, including King County, did the court commissioners inquire—through court checklists or orally—about section 10 conduct.331 Research from other jurisdictions over the years makes these findings predictable.332 In the legal regimes in those other jurisdictions, however, courts had the legitimate excuse of unambiguous statutorily granted judicial discretion.333 In the Parenting Act, however, the statute specifically directs the courts to limit parental arrangements when plans include section 10 findings.334 In addition, under one much-touted interpretation, the courts also have an affirmative duty to inquire about section 10 conduct before approving any plan.335

Interviews with commissioners elicited a number of different views concerning the court’s role. In one county, the commissioner, who had practiced family law for years before going on the bench, said that he considered the Parenting Act to be another unsuccessful attempt to legislate human nature.336 While being observed, this commissioner, like the others, made no inquiries concerning section 10. On being interviewed, he stated that the volume of cases on his docket prohibited him from looking too closely at all the “niceties” of permanent plans.337 In the other three counties, the eight commissioners who were interviewed also emphasized the extraordinary demands of their dockets, demands that had only been exacerbated by the requirement that all parents file

331. See P. Eakes & J. Brown, supra note 189, at 10-11 (observing that each dissolution took two to three minutes and no questions were asked regarding § 10); C. Hart, supra note 187, at 34-35. One county commissioner, however, stated that nearly all plans used a standard form plan, provided by the county, that asked about § 10. She added that where the form plan was not used she doubted she would notice the lack of any explicit mention of § 10 because of the demands of her docket. See P. Eakes & J. Brown, supra note 189, at 25.
332. See, e.g., Melli, Erlanger & Chambliss, supra note 8, at 1145 (“[W]e found the role of the judge as reviewer to be extremely limited. In only one of the 349 court files examined . . . was the stipulation of the parties not approved by the court.”); Erlanger, Chambliss & Melli, supra note 8, at 598 (“As Mnookin & Kornhauser (1979) acknowledge, the existing review process is widely considered to be a ‘rubber stamp,’ with harried judges eager to finalize any arrangements made by the parties.”).
335. See supra note 276 and accompanying text.
337. See id. at 35.
a lengthy parenting plan. Of the eight commissioners observed and interviewed more than one year after the Act’s effective date, two had never read the Parenting Act, and one of those two had no idea what section 10 was. All but one of the eight commissioners interviewed by Eakes and Brown and by Hart said that they do not ask about possible section 10 behaviors when an agreed plan does not refer to section 10. Two others stated flatly that it is not the province of courts to question agreed or defaulted plans. Section 10, in their opinion, only applied in contested cases.

Important and valid theoretical arguments support the view that courts ought not to intervene in cases where parents have agreed or settled. Furthermore, the Act can be interpreted to require only that the court apply section 10 limitations where parties include findings of section 10 behavior in the plan. However, the Act is not ambiguous with respect to the court’s obligation to check, and if necessary change, the terms of plans that do contain section 10 findings. Data show that in King County the courts did not thoroughly check even the limited number of cases that included such findings.

The three researchers who interviewed court commissioners all reported that the commissioners often said that they varied their scrutiny of plans depending on whether both parties were represented by counsel. The operative rule was: If both parties had attorneys, the plan could be “presumed” to be within the terms of the Act. The case study demonstrates the questionable nature of this assumption.

338. The average estimate for pre-Act dissolution settlements was 6 to 8 pages. The estimate for papers since the Act is 15 or more pages. P. Eakes & P. Brown, supra note 189, at 22-23.

There is no reason to disbelieve the commissioners’ descriptions of their dockets. Superior Court Management Information System records indicate that over 6,000 dissolution petitions were filed in King County alone in 1987. Superior Court Management Information System, Washington State Divorces Granted by County by Month (1987) (on file with Jane W. Ellis).

339. See P. Eakes & J. Brown, supra note 189, at 33-34.


342. See supra note 112.

343. See supra pp. 97-99.


345. Cf. supra text accompanying notes 339, 341.

346. See P. Eakes & J. Brown, supra note 189, at 16; see also C. Hart, supra note 187, at 35 n.64. Despite interview reports, Eakes and Brown did not observe any difference in the practice of commissioners with cases where there was no representation at all (pro se) as compared to cases with one or two attorneys. See P. Eakes & J. Brown, supra note 189, at 17.
IV. CONCLUSION: FINDINGS AND IMPLICATIONS FOR RESEARCH AND REFORM

Shortly after the Parenting Act was passed, one family court commissioner described it as a "noble experiment." The phrase is replete with hope and with tentativeness. This Article has concentrated on the implications of this particular reform, implications that should concern any state that has adopted or that is considering adopting a similar statutory approach. The Article also provides insight into the way in which some of the essential goals of contemporary custody reformers play out in practice—raising questions about the role of the state at divorce, the functions of custody law, and the role of legal professionals.

Only when we grapple with the dilemmas presented by a specific regime can we be sure we are on solid ground in formulating meaningful generalizations about divorce custody law. What, then, can we say we have learned from this initial examination of this particular reform? This conclusion begins with a brief overview of the most important findings detailed in Part III and then considers the broader implications of these findings.

A. Summary of Findings

1. The substantive results— a. Shared parenting—Written agreements in cases completed during the first year of the Act’s implementation showed a substantial amount of shared decision making and of shared residential time. These amounts were considerably greater for both forms of “custody” than those found in a sample of roughly comparable pre-Act cases in the same jurisdiction when its laws had no plan requirement and turned on a “best interests” standard. Although the data do not prove causality, they suggest strongly that the Act and its plan device result in a substantial increase in both forms of shared parenting, at least in written agreements.348
b. Limitations on shared parenting—The effect of the Act's express limitations on parental sharing where certain harms have been "found" in settled cases is more difficult to measure because so many important decisions are made in the informal and invisible negotiation process. In cases where parents stipulated to the existence of a section 10 behavior, however, they complied substantially with the limitations required by the Act. A large percentage of the "mandatory limitation" cases complied with the requirement that the dispute resolution process be through a court and that one parent have sole decision-making authority.\textsuperscript{349} Furthermore, significantly fewer mean overnight visits were granted in those cases than in non-section-10 cases.\textsuperscript{350} Thus, assuming that to allow considerably fewer overnight visits per se comports with the intent of the drafters and is a valid form of "protection," the plans generally complied with the limitations on residential time for those section 10 cases. The effect of the limitations section appears very different, however, when viewed in terms of the informal processes preceding completion of the final plan and when studied in relation to the results in cases where two attorneys were involved. These findings are discussed below.

c. Other aspirations: facilitative, educative, and preventive functions—Although some plans included customized terms, the great majority contained a limited number of formulas for decision making, residential time, and dispute resolution methods.\textsuperscript{351} There was no direct evidence of the plan device's ability to get parents to focus more on their children's needs and to be (or at least act) less hostile at the time of divorce. Attorney interviews, however, provided evidence of strongly held and differing opinions concerning the Act's capacity to diffuse parental conflict and to assist parents in concentrating on the needs of their children.\textsuperscript{352} Finally, data on long-term effects of the plan, particularly with regard to the important question of parental conflict, will be available only with the passage of time.\textsuperscript{353}

2. The role of legal professionals—The most striking results in this study concerned the role of legal professionals and the

349. See supra notes 302-04 and accompanying text.
350. See supra pp. 158-60.
351. See supra Part III.B.1.a.(1)-(3).
352. See supra notes 238-41 and accompanying text.
353. See supra Part III.B.1.c.(2).
relationship of certain plan results to representation by counsel.\(^{354}\)

a. The role of attorneys—Representation by one or two attorneys in a case—as opposed to no representation—does not guarantee better compliance with the requirement that all plans include provisions for dispute resolution, decision making, and residential schedules. Nor does representation correspond to more individualized plan terms. Plans written in cases with two attorneys, however, did have significantly more "shared parenting" in all its forms: mediation for dispute resolution, "shared" decision making, and larger amounts of shared residential time.

Attorneys were confused and they disagreed, at least in part because of statutory ambiguity, about their responsibilities under the protective provisions of section 10 of the Act. Interviews confirmed that attorneys had very different notions of their roles vis-a-vis section 10 and of the nature of the parental behavior that would require plan limitations. Thus, some attorneys made no mention to clients of the section 10 provisions of the Act, while others not only mentioned it but felt obliged to ask parents to tell them whether any section 10 behavior had occurred. Similarly, a number of attorneys sometimes went out of their way to explain the availability of protections, while others felt comfortable dismissing out-of-hand a client's report of harmful behavior (often domestic violence), seemingly without regard for (or perhaps without knowledge of) the statute's explicit characterization of that behavior as requiring protections for vulnerable spouses and children.\(^{355}\)

The case-study data showed that, when two attorneys were involved in a case, their presence led to a disproportionately small number of settled cases with section 10 limitations in the final plan and a disproportionately large number of settled cases in which a section 10 claim was made early on but failed

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354. The study also found that in default cases where one parent did not make an appearance, there was significantly less shared time and a much greater number of § 10 limitations. See supra notes 313-15 and accompanying text. We do not know how the number of pre-Act defaults compares to the post-Act number, however, and that information is essential before any conclusion about this reform and the role of defaults can be reached.

355. See supra notes 278-88 and accompanying text.
to appear in the final plan.\textsuperscript{356} Although the presence of two attorneys may help decrease inflammatory claims, evidence in this study suggests that attorneys also may have discouraged legitimate and desired limitations.\textsuperscript{357}

We did not observe directly how attorneys implemented, or failed to implement, the educative and preventive goals of the Act—using the plan to refocus parents and to help decrease parental conflict at divorce. We do know, however, that attorneys as a group are divided in their views concerning the ability of this (or any) legal device to affect the attitudes or emotions of divorcing parents.\textsuperscript{358} The attorneys thus mirror the sharply divided views of scholars and of empiricists about what custody law can and cannot do.

\textit{b. The role of the court in reviewing uncontested plans}—With two exceptions, the commissioners and judges of four different counties conveyed an impression that the new Act made no difference in their scrutiny of agreed or settled plans except that the added length of settlements made them more time consuming to review.\textsuperscript{359} These officials also labored under the shadow cast by unresolved statutory ambiguity concerning their responsibilities under the new law.\textsuperscript{360} While being observed, none of them, however, inquired about the existence of a section 10 harm, or compliance with the mandatory limitations required by the Act.\textsuperscript{361} In interviews, they indicated that such inquiries were either economically infeasible given their caseloads or were not called for by the statute.\textsuperscript{362} Several commissioners indicated that, in any event, inquiries concerning section 10 conduct would be wrong (inadequately intrusive) in settled cases.\textsuperscript{363}

\begin{itemize}
  \item [356.] See supra note 322 and accompanying text.
  \item [357.] See supra Part III.B.2.b.
  \item [358.] See supra notes 136-39, 238-40 and accompanying text. We also know that the presence of one or two attorneys did not result in better compliance with one aspect of the Act designed to refocus parental consciousness: the attorneys did not replace the old terms "custody" and "reasonable visitation" with the new terms denoting parental function. See supra note 252.
  \item [359.] See supra Part III.B.2.d.
  \item [360.] See supra pp. 97-99.
  \item [361.] See supra note 331 and accompanying text. A large percentage of case files in the King County sample had no provision indicating either the presence or the absence of a § 10 behavior. See supra p. 157. Those cases could mean either that no § 10 behaviors existed or that the behaviors existed, but parties (perhaps under the influence of counsel) chose not to bring them up.
  \item [362.] See supra notes 337-38 and accompanying text.
  \item [363.] See supra note 341 and accompanying text.
\end{itemize}
B. Implications for Reform and Research

1. Political consequences—To the extent that the Parenting Act is accurately characterized as a series of compromises between two competing political concerns—shared parenting and limits on shared parenting—shared parenting advocates appear to have had certain “success” on paper at this early date while the “success” of those who oppose joint custody is much more equivocal.\(^{364}\)

There is reason to believe that the Act and its plan device may contribute to a substantial increase in shared-parenting agreements.\(^{365}\) We need to know, of course, whether the paper arrangements hold up in practice. Assuming they do—a big if—and absent the presence of the serious harms addressed by section 10’s mandatory limitations, this possible effect may be a great advantage to divorcing families if—and this is also a big if—the required plans help foster the short-term or long-term parental cooperation to which the Act’s drafters aspired.\(^{366}\) If instead, plans generate more conflict than the old “custody to x, reasonable visitation to y” formula, or if clients report little initial or long-term benefit from the plan, then the requirement is a disservice, not a help, to the public.\(^{367}\)

Furthermore, we should not forget that the idealized parenting plan assumes intermediaries who do not subvert the reform’s goals by offering only boilerplate language to their clients or by using the plan solely to effect a paper compromise that may not reflect the real plans or desires of the parties

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364. The one possible exception to the “success” of shared-parenting advocates concerns the results in default cases. As noted, the data does not tell us how the number of defaults before the Act compares to the number after the Act. See supra text accompanying note 210. Shared-parenting advocates may want to study whether the Act’s plan requirement is leading to an increase in nonparticipation by parents who would have participated more under the traditional custody/visitation decree.

365. See supra Part III.B.1.b.

366. The California study calls into question the extent to which agreements for joint physical custody are followed in practice. See supra note 220. We do not know whether the demanding detail required by a plan results in any higher correspondence between written provisions and family practice.

367. Even findings of postdecree conflict equal to that under nonplan regimes would call for serious debate of the plan requirement because the expense of creating a plan could no longer be justified on grounds that it would reduce that long-term conflict. That central question cannot be answered on the basis of data from the first year or two after implementation of the act.
and their children. As one Washington practitioner wrote (anonymously) to this author after listening to a talk on some results of this study:

[You] should realize how little lawyers care what the papers say about parenting. We care about whether the documents are palatable enough to avoid going to trial [and] whether the documents will force or avoid difficulties in the future. I'm perfectly willing to agree to joint decision making [and] big visitation if I know the parenting plan provisions are meaningless.368

We do not yet know how such attorney attitudes and behavior influence client attitudes and negotiation postures in creating plans. Most importantly, the effect of the plan on parents and children is yet to be studied. A small handful of interviews indicates that a few parents dismiss the plan idea as useless, but a number of others, including parents with section 10 claims or with attorneys they did not like, report that they have felt reassured by the certainty and specificity of their plans.369 A reassured parent may be a better parent.

The initial results for advocates of limits on shared parenting are more uncertain. The primary caretaker preference, as drafted, is not a “victory” unless and until an appellate court is willing to rest on grounds other than the indeterminate “best interests” and, at a minimum, to require specific findings with respect to the “greatest weight” language in the statute.370 Furthermore, the results of the protective provisions of the Act are questionable, at least in the less-contentious cases examined in this study. Evidence from interviews and court files indicates that the proponents of section 10 have reason to be concerned about whether attorneys are mentioning and explaining section 10 to clients, whether attorneys may be ignoring or dismissing valid section 10 claims, whether unfounded facts are being alleged by represented parties, whether well-founded allegations are

368. Anonymous Comment on Evaluation Sheet for Fourth Annual Family Law Institute (May 8, 1990) (a family law CLE seminar presented by the University of Washington School of Law):


370. See supra note 36 and accompanying text.
being inappropriately bargained away in two-attorney negotiations, and whether the limitations that are included in plans, at least in two-attorney cases, actually provide the protection envisioned by the statute.\textsuperscript{371} Observed courts do not appear to have interpreted the Act to require them to inquire about section 10 conduct when they scrutinize agreed plans. Nor do courts appear to be fulfilling consistently their unambiguous duty to ensure that plans conform with section 10 where there are section 10 findings.\textsuperscript{372}

Advocates of statutory protections cannot begin to hope for "success," however, until the Act's ambiguity concerning the operation of section 10 is cleared up.\textsuperscript{373} And unravelling that ambiguity raises the larger question of what the state's role should be—or should not be—in attempting to perform any protective function at divorce.

2. The protective function of custody law—The Parenting Act demonstrates, at a minimum, that statutory changes aimed at better protecting divorcing parties and their children against postdecree harms should be unambiguous as to the respective duties, if any, of counsel or court in implementing those protections. Furthermore, even where statutes are clear about required limitations, professional attitudes, experience, and, arguably, professional ethics may need to change before a law's protective goals can be realized.

I believe that the state should create or retain a list of harmful behaviors requiring limitations on parent-parent or parent-child arrangements after divorce. The conduct listed under the mandatory limitation section of section 10, with the exception of the uninformative "pattern of emotional abuse," provides a useful list of such harms.\textsuperscript{374} Similarly, there should be a presumption that such limitations will be applied where there are findings of these harms. That presumption can be rebutted as provided in the Parenting Act.\textsuperscript{375} The more difficult question, of course, is how—or whether—these mandatory limitations should be applied to the private-ordering process.

The state should not, in my opinion, authorize legal profes-

\textsuperscript{371} See supra Parts III.B.2.a.-e.
\textsuperscript{372} See supra Part III.B.2.d.
\textsuperscript{373} See, e.g., supra notes 265-67 and accompanying text.
\textsuperscript{374} See supra note 153 and accompanying text.
\textsuperscript{375} See supra notes 178-80 and accompanying text.
sionals to inquire about, and then judge, the behavior of divorcing parents in hopes of ensuring such protection in all cases. Data gathered in this study indicates that at least some of the drafters of the Act expected attorneys and reviewing courts to do exactly that. 376 Was such intrusion into the lives of all divorcing parents the goal of the section 10 proponents? The commentary, though not without ambiguity, indicates that the goal was to protect children and vulnerable parties rather than to use divorce as an occasion to police parents. 377 Furthermore, the commentary's repeated concern with the importance of applying the statutory limitations 378 can be interpreted not as a client-policing device, but as a device to control attorneys or courts who may not have given sufficient attention to these harms in the past. At the same time, the commentary refers to the fact that earlier law failed to "identify" vulnerable parties. 379 Thus, the goals can reasonably be construed as recognizing and protecting at-risk parties and children, and ensuring that counsel and court understand that limitations must be applied in cases where the mandatory-limitation behavior has occurred.

Is there a less intrusive and more effective means to achieve these goals than the recommended questioning of each divorcing parent by counsel or court? The short answer is yes. A custody statute can and should require in unambiguous terms that information on the availability of protective limitations in cases involving serious harms be communicated to the client. 380 Such a clear legislative directive would both inform parents and avoid the problem of the attorney who believes she need not bother to mention section 10. This requirement would not achieve other goals, however, including protecting children from egregious harms, "identifying" vulnerable parties, and controlling ignorant or biased legal professionals.

a. Child protection—What can be done, if anything, about the difficult problem of the client who reports that the other

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376. See supra notes 265-67 and accompanying text.
377. See, e.g., COMMENTARY, supra note 26, at 12. The Act's use of the phrase "shall not require" throughout § 10 also indicates a concern with protection rather than forcing a certain result against the parent's own wish.
378. COMMENTARY, supra note 26, at 12-13, 28, 30-32, 36-41.
379. COMMENTARY, supra note 26, at 12.
380. A statute could require counsel or, where a party is unrepresented, require the county court administration to provide written information on the availability of § 10-type protections before that party completes a plan. Individual jurisdictions might require attorneys to certify that they have informed clients of the protective sections.
parent has indeed committed an egregious harm against their child, but states that she does not want it mentioned in the parenting plan? Or the client who admits to such a harm, but requests a zealous denial by his attorney? Although in all other situations, client autonomy should take priority over any paternalistic protective function, here the tension between that autonomy and child protection becomes most pronounced. These troubling and, fortunately, unusual situations cannot, however, be resolved by custody reform alone. The problem is one of professional ethics. 381 Explicit modification of the rules of confidentiality and client advocacy would be necessary before an attorney would be permitted to inform the court of the behavior, unless the extremely narrow “future crime” exception was implicated by the case.

The decision to make an exception to these rules for the sake of child protection should not be made without extensive debate, including consideration of the realistic possibilities of offering an option that is better than the situation were there no state intrusion. To pretend that a foster home is an improvement over residency with a parent who insists he will do his best to protect the child, but prefers—perhaps with good reason—that the section 10 claim not be raised, would be unfortunate at best and unconscionable at worst. Furthermore, even if the profession did decide that an exception to the rule of attorney-client confidentiality would be appropriate in some circumstances, such as those described in the “mandatory limitations” section of the Act, such an exception should be triggered only if an attorney has a well-founded belief that the nonabusive parent is unable to protect the child from further harm. Finally, any intervention resulting from such an exception should be the least intrusive alternative possible. 382

Unless and until there is a modification to the rules, attorneys should urge clients to bring the harmful behavior to light, tell the client that the attorney does not wish to pursue a harmful course of action on behalf of the client, and withdraw from any case in which the client insists that the attorney advocate a position that may result in a serious harm.

b. Identifying vulnerable parties—How can the goal of “identifying” vulnerable parties be achieved without

381. See supra notes 289-91 and accompanying text.
382. The “least intrusive” alternative is a basic principle of Goldstein and colleagues. See BEFORE THE BEST INTERESTS, supra note 112, at 24.
interrogating every divorcing parent? Again, it is important to ask what the legislature intended. If it intended to ensure that parties would learn of and take advantage of statutory protections, then mandatory inquiries by court or attorney will not succeed. Domestic violence is a useful example. Experts in domestic violence know that clients may be overcome with shame or guilt and therefore may not be forthcoming about the violence in their homes. They may recommend, as a result, that attorneys ask clients to think about any harms that may have occurred and to bring a list of those harms to the attorney during the next visit. That is a counseling technique, however, and good counseling cannot be mandated. Telling an attorney who is ignorant of the realities of domestic violence that she must ask about it risks subjecting an already vulnerable client to humiliation or insensitivity at the hands of an attorney who lacks information, insight, and empathy. Expecting such a party to respond to inquiries by an anonymous court at the moment a divorce arrangement is being approved is unrealistic. This approach also requires a party who prefers not to bring up the violence to commit perjury. Thus, solutions other than coercive questioning must be found to contend with the need to inform and assist victims of domestic violence.

\textit{c. Controlling professionals—}Analogous arguments can be made in connection with the problem of the ignorant or biased attorney who injects his personal values into a case and decides that he can simply dismiss a mandatory-limitation claim out of hand or actively dissuade a client from seeking protections that the client desires. But requiring the same attorney or judge to question the client does not solve that problem either. Again, solutions other than statutory mandates are necessary to deal with professional ignorance or bias, and these solutions are discussed below.

\textit{3. Professional intervention— a. The role of the attorney—}The data suggest strongly that legal professionals need further education about the protective functions of custody law, the dynamics of attorney negotiation, and their role in
assisting or impeding law reform.\textsuperscript{386} Attorneys need more information on how to communicate with and counsel clients about legal protection in cases that involve or might involve serious harms, how to evaluate whether a claim of harm is well-founded and "worthy" of protection,\textsuperscript{387} how to help a client or the court decide what sort of protections are appropriate in a given case, and how to make the tremendously difficult evaluation of when to recommend and work toward settlement and when not to. They also need education concerning the risks of joint custody "compromises" in cases where parents are extremely hostile.

Interviews also revealed the disparate attitudes held by legal professionals on the ability of a legal reform to change the attitudes and emotions of clients, at least in the short term.\textsuperscript{388} It is impossible not to wonder whether the attitude of attorneys may itself be a potent variable affecting the proposition that a legal device can have either an immediate effect on parties' emotions or a long-term effect on societal norms. Attorneys who, for example, consider a change from the word "custody" to the word "parenting" nothing other than a lot of silliness, may not be inclined to use the new word or may use it only with disdain. Attorneys who consider the plan to be a useful means of providing structure for important decisions to emotionally vulnerable clients may communicate that attitude. Thus, the lawyer's role in facilitating or impeding change through the use of a legal device like a plan is another important area for further research and possible change.

To list these concerns about legal professionals and divorce custody is only to illustrate, again, their difficulty. And all of these observations add up to one larger recommendation. The role of the divorce attorney is one of such complexity, human delicacy, and human toughness that it may no longer be justifiable to allow practice in this area without certification based on specialized education. Without that requirement there is little likelihood that the profession will be able to police itself properly. At a bare minimum, educational

\textsuperscript{386} See supra Part III.B.2.a.

\textsuperscript{387} This need appears to be particularly great in the area of domestic violence where the profession evidences a wide range of different values concerning what acts should "count" as domestic violence that is "worthy" of § 10 limitations at divorce. See, e.g., supra notes 268-70.

\textsuperscript{388} See supra notes 238-40 and accompanying text.
programs on the difficult issues discussed above must be made available and, wherever possible, should be made mandatory. It may take a generation of such education to effect change, but to do anything less is to mock any ambition of caring about the lives of divorcing parents and their children, let alone the child's "best interests" at divorce.

b. The role of the court—This is not the first empirical study to expose the fact that court scrutiny of divorce custody settlements is superficial at best. The number of divorces and the economic realities of court dockets in many, if not all, jurisdictions, suggest that the possibility of change is remote at best. Over ten years ago, Mnookin and Kornhauser examined possible justifications for judicial scrutiny of parental agreements, including the possibilities that court review might improve the quality of out-of-court negotiations and that it might ensure better child protection. They found these arguments "questionable" at best:

Given the resources devoted to the task of scrutinizing agreements, there is little reason to believe that the process operates as much of a safeguard when there is no parental dispute to catch the judge's attention. Moreover, the process itself often imposes substantial transaction costs . . . [that] might otherwise inure, at least in part, to the benefit of the children.

This study does not indicate that the possibility of court review improves the quality of negotiations. Ironically, some judges and commissioners claimed that they have a special responsibility to scrutinize cases settled by parties without legal representation. Yet the data in this study showed that it is the cases involving counsel, and especially two-attorney cases, that arguably require formal court scrutiny. This is a dubious use of taxpayers' money.

The rationale for court inquiry about section 10, at least as

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389. There are a variety of ways to require such courses. Specialization has already been mentioned. In addition, law schools could require more courses, requirements for continuing legal education could include minimum hours for family law, and, finally, courts could order that certain courses must be taken by counsel before practice in that area is allowed. There are many arguments to be considered in relation to each of these proposals, and I defer to experts in the field of professional education and professional responsibility.
390. See supra note 338 and accompanying text.
391. Mnookin & Kornhauser, supra note 5, at 995 (footnote omitted).
392. See supra note 346 and accompanying text.
expressed in training sessions concerning the Act, was the need to ensure that parties knew of the limitations section of the Act and to ensure compliance with its terms. The problems of interpreting section 10 to require inquiries by counsel or court into parental behavior have already been discussed. Court scrutiny, furthermore, is not the best way to accomplish the more-circumscribed goal of informing parties of the availability of section 10 limits.

If the state is loathe to eliminate all review of completed plans for fear that compliance with its regulations may diminish without scrutiny (a proposition that can itself be tested), it might consider limiting court review to those cases that include section 10 findings. It might also do a cost-benefit analysis on the viability of replacing court scrutiny of all plans with an audit system that would select a limited number of random cases to gauge compliance with the law and, specifically, with section 10.

At a bare minimum, whether the use of state resources for individual judicial scrutiny of settled plans is a necessary or even a reasonable expense should be debated. The money might be spent much more usefully, as Mnookin and Kornhauser and others suggested many years ago, on information and counselling services for divorcing parents. It could also be used for mandatory education for legal professionals who wish to qualify to handle parent-child issues in divorce.

c. The role of the legislature—To the extent a new law precludes investigation without inordinate expense, it is transformed from experiment to unexamined edict overnight. This is nothing new, of course. We pass laws based on unexamined assumptions all the time and don’t return to examine the result. Where the laws affect economically sound adults, this

393. There are dangers here, however. The specter of special treatment, as opposed to the routine inspection now given to all plans, might create an incentive for some parties or attorneys to eliminate valid § 10 findings to avoid that scrutiny. Some members of the bench and bar might find the idea of no regular court scrutiny threatening because it eliminates the need for legal services in cases where people retain attorneys simply because they are intimidated by the idea of going to court. That is no justification, however, for maintaining an expensive and ineffective system of "review."

394. Such a debate is now going on among family law practitioners in the State of Washington, and the issue continues to be a controversial one. See Family Law Newsletter, 12 FAM. ADVOC., Jan. 1989, at 71.

395. See Mnookin & Kornhauser, supra note 5, at 995; see also Cavanagh & Rhode, supra note 8.
is less of a problem. The system is self-correcting to the extent the adults can afford to appear in court to litigate the interpretation or application of the new statute. When the law affects parties and nonparties who have little or no resources (i.e., children and many divorcing parents of both genders), the state has more responsibility for tracking the result of what it has imposed and correcting problems as they come to light. Thus, legislatures should be sensitive to the need for investigation and must be willing to allocate time and money to follow up on reforms that so extensively regulate the intimate lives of its citizens and that cannot be tested with ease or frequency in a public forum. Politicians, like legal professionals, must recognize the extent to which and ways in which human lives are touched by their handiwork.

In addition, the legislature also has a responsibility to acknowledge and act on the fact that no legal change, including a statutory attempt to provide better protection to vulnerable spouses and children at divorce, will come to pass without sufficient training to ensure proper implementation of a law. To leave education of professionals to the marketplace, or to only one session that skims the surface of a new law, is to guarantee that a given reform will amount to no more than rhetoric.

We still do not know whether these rigorous regulations are helpful to family members during or after divorce. Longitudinal research about the experiences of families who divorce under the new Act is imperative before a reasoned judgment of this law can be made. Other jurisdictions should therefore hesitate to impose the demanding plan requirement on divorcing parents and should, at most, recommend that parents may wish to use that structure in their decrees. Should future studies indicate a strong positive consensus from parents or a decrease in postdecree conflict, a statutory plan requirement might then be in order. States should add a statutory list of harmful behaviors requiring limitations so that informed clients may avail themselves of necessary protections should they so choose without fear that certain serious harms will be ignored. Whether or not a state decides to proceed with formal legal reform, however, work can and must be done to improve the practices of family law professionals and to solve problems that have likely existed for many years under cover of less-regulated custody regimes.
§ 26.09.004 Definitions. The definitions in this section apply throughout this chapter.

(1) "Temporary parenting plan" means a plan for parenting of the child pending final resolution of any action for dissolution of marriage, declaration of invalidity, or legal separation which is incorporated in a temporary order.

(2) "Permanent parenting plan" means a plan for parenting the child, including allocation of parenting functions, which plan is incorporated in any final decree or decree of modification in an action for dissolution of marriage, declaration of invalidity, or legal separation.

(3) "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.

§ 26.09.184 Permanent parenting plan. (1) OBJECTIVES. The objectives of the permanent parenting plan are to:

(a) Provide for the child’s physical care;
(b) Maintain the child's emotional stability;
(c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;
(d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in RCW 26.09.187 and 26.09.191;
(e) Minimize the child's exposure to harmful parental conflict;
(f) Encourage the parents, where appropriate under RCW 26.09.187 and 26.09.191, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and
(g) To otherwise protect the best interests of the child consistent with RCW 26.09.002.

(2) CONTENTS OF THE PERMANENT PARENTING PLAN. The permanent parenting plan shall contain provisions for resolution of future disputes between the parents, allocation of decision-making authority, and residential provisions for the child.

(3) DISPUTE RESOLUTION. A process for resolving disputes, other than court action, shall be provided unless precluded or limited by RCW 26.09.187 or 26.09.191. A dispute resolution process may include counseling, mediation, or arbitration by a specified individual or agency, or court action. In the dispute resolution process:
(a) Preference shall be given to carrying out the parenting plan;
(b) The parents shall use the designated process to resolve disputes relating to implementation of the plan, except those related to financial support, unless an emergency exists;
(c) A written record shall be prepared of any agreement reached in counseling or mediation and of each arbitration award and shall be provided to each party;
(d) If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorneys' fees and financial sanctions to the prevailing parent;
(e) The parties have the right of review from the dispute resolution process to the superior court; and
(f) The provisions of (a) through (e) of this subsection shall be set forth in the decree.
(4) ALLOCATION OF DECISION-MAKING AUTHORITY. 
(a) The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agreement related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in RCW 26.09.187 and 26.09.191. Regardless of the allocation of decision-making in the parenting plan, either parent may make emergency decisions affecting the health or safety of the child.
(b) Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent.
(c) When mutual decision making is designated but cannot be achieved, the parties shall make a good-faith effort to resolve the issue through the dispute resolution process.

(5) RESIDENTIAL PROVISIONS FOR THE CHILD. The plan shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria in RCW 26.09.187 and 26.09.191.

(6) PARENTS' OBLIGATION UNAFFECTED. If a parent fails to comply with a provision of a parenting plan, the other parent's obligations under the parenting plan are not affected.

(7) PROVISIONS TO BE SET FORTH IN PERMANENT PARENTING PLAN. The permanent parenting plan shall set forth the provisions of subsections (3) (a) through (c), (4) (b) and (c), and (6) of this section.

§ 26.09.187 Criteria for establishing permanent parenting plan. (1) DISPUTE RESOLUTION PROCESS. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under RCW 26.09.191 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:
(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;
(b) The parents’ wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and
(c) Differences in the parents’ financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

(2) ALLOCATION OF DECISION-MAKING AUTHORITY
(a) AGREEMENTS BETWEEN THE PARTIES. The court shall approve agreements of the parties allocating decision-making authority, or specifying rules in the areas listed in RCW 26.09.18(4)(a), when it finds that:
   (i) The agreement is consistent with any limitations on a parent’s decision-making authority mandated by RCW 26.09.191; and
   (ii) The agreement is knowing and voluntary.
(b) SOLE DECISION-MAKING AUTHORITY. The court shall order sole decision-making to one parent when it finds that:
   (i) A limitation on the other parent’s decision-making authority is mandated by RCW 26.09.191;
   (ii) Both parents are opposed to mutual decision making;
   (iii) One parent is opposed to mutual decision making, and such opposition is reasonable based on the criteria in (c) of this subsection;
(c) MUTUAL DECISION-MAKING AUTHORITY. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocating decision-making authority:
   (i) The existence of a limitation under RCW 26.09.191;
   (ii) The history of participation of each parent in decision making in each of the areas in RCW 26.09.184(4)(a);
   (iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision making in each of the areas in RCW 26.09.184(4)(a); and
   (iv) The parents’ geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) RESIDENTIAL PROVISIONS.
(a) 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 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.

(b) The court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time only if the court finds the following:

(i) No limitation exists under RCW 26.09.191;

(ii) (A) The parties have agreed to such provisions and the agreement was knowingly and voluntarily entered into; or

(B) The parties have a satisfactory history of cooperation and shared performance of parenting functions; the parties are available to each other, especially in geographic proximity, to the extent necessary to ensure their ability to share performance of the parenting functions; and

(iii) The provisions are in the best interests of the child.

§ 26.09.191 Restrictions in temporary or permanent parenting plans. (1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a
parent has engaged in any of the following conduct: (a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (b) physical, sexual, or a pattern of emotional abuse of a child; or (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(2)(a) The parent’s residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; or (iii) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(b) The limitations imposed by the court shall be reasonably calculated to protect the child from physical, sexual, or emotional abuse or harm that could result if the child has contact with the parent requesting residential time. If the court expressly finds limitation on the residential time with the child will not adequately protect the child from the harm or abuse that could result if the child has contact with the parent requesting residential time, the court shall restrain the parent requesting residential time from all contact with the child.

(c) If the court expressly finds that contact between the parent and the child will not cause physical, sexual, or emotional abuse or harm to the child and that the probability that the parent’s harmful or abusive conduct will recur is so remote that it would not be in the child’s best interests to apply the limitations of (a) and (b) of this subsection, or if the court expressly finds the parent’s conduct did not have an impact on the child, then the court need not apply the limitations of (a) and (b) of this subsection. The weight given to the existence of a protection order issued under chapter 26.50 RCW as to domestic violence is within the discretion of the court.

(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 provisions of the parenting plan, if any of the following factors exist:

(a) A parent’s neglect or substantial nonperformance of parenting functions;
(b) A long-term emotional or physical impairment which interferes with the parent’s performance of parenting functions as defined in RCW 26.09.004;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child’s psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

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

(4) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(5) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, proof, and procedure.