

Legal representation and child custody determinations

Ryan Fortson and Troy Payne

When faced with a child custody dispute, many parents undertake great financial expense to hire an attorney to help with their legal proceedings, with the assumption that legal representation will assist their desired custody outcome. A study recently published in the *Journal of Juvenile Law and Policy* (Fortson & Payne, 2018) examined whether legal representation does in fact have an impact on the outcome of custody determinations. Particular attention was paid to whether legal representation of one parent had an impact on custody outcomes for the other parent.

Legal and physical custody

Superior court judges make all non-emergency custody decisions in Alaska. This includes divorce cases and cases in which an unmarried parent seeks a custody order. These custody proceedings start with one

parent has the child at least 70% of overnights) or shared custody (where each parent has the child at least 30% of overnights). Physical custody determinations also impact child support calculations.

Alaska law requires that judges grant parents joint legal custody and equally shared physical custody unless it is in the best interest of the child to deviate from this arrangement. Reasons to deviate include the nature of the relationship between the parent and the child, evidence of domestic violence or substance abuse, or, for physical custody, whether parents live in geographically distant locations.

With generous access granted by the Palmer clerk of court, the study examined cases in Palmer Superior Court where a final custody determination was made in 2011 or 2012. Uncontested cases (where both parents agree from the start on custody) and default cases (where the non-complainant does not

ers was 33.6 years of age, and of the fathers, 37.1 years of age. There was a substantial difference in median annual income between parents, with fathers making almost twice as much as mothers (\$38,752 compared to \$19,129). Most cases involved only one child (58.3%), with two children being in dispute in 26.7% of the cases.

In their initial custody requests (either in the complaint or answer), mothers overwhelmingly (68.9% of the time) requested sole legal and primary physical custody. However, independent of legal representation, mothers were successful in achieving both forms of custody in only 31% of these requests. Different initial custody requests were less frequent, but had higher success rates (see Table 1).

Fathers about half the time (51.5%) requested joint legal and shared physical custody, and were ultimately successful in this request 41.5% of the time, independent of

Table 1. Initial custody requests and success rates by party, independent of legal representation

| Mothers | | | | Fathers | | | |
|--|---------------------|-----------------|------------------|--|---------------------|-----------------|------------------|
| Initial custody requested (legal/physical) | Initial request (f) | Percent request | Success rate (%) | Initial custody requested (legal/physical) | Initial request (f) | Percent request | Success rate (%) |
| Joint/shared | 23 | 11.2% | 69.6% | Joint/shared | 106 | 51.5% | 41.5% |
| Joint/mother | 35 | 17.0 | 51.4 | Joint/mother | 7 | 3.4 | 42.9 |
| Mother/mother | 142 | 68.9 | 31.0 | Mother/mother | 4 | 1.9 | 100.0 |
| Joint/father | 2 | 1.0 | 50.0 | Joint/father | 23 | 11.2 | 4.3 |
| Father/father | 0 | 0.0 | — | Father/father | 65 | 31.6 | 30.8 |
| Other | 4 | 1.9 | 0.0 | Other | 1 | 0.5 | 0.0 |
| Total | 206 | | 38.4% | Total | 206 | | 35.0% |

Note: Success is defined as an outcome that matches the initial custody request. Success is not mutually exclusive; both parties could be successful in their requests and both could also fail. "Other" includes divided or hybrid custody awards and custody awarded to a third party.

of the parents filing a complaint with the court, which the other parent then has 20 days after service to answer. In cases where the parents disagree on custody, the judge will schedule a series of hearings and eventually a trial, though some parents resolve their dispute before going to trial.

There are two types of custody in Alaska: legal custody (which parent gets to make important life decisions about the child) and physical custody (which parent the child physically resides with). For legal custody, parents can request either sole custody (only one parent decides) or joint custody (both parents have decision-making authority). Likewise for physical custody, parents can request either primary custody (where one

file an answer) were excluded from the study because of the presumed lack of impact of legal representation in both situations.

Basic demographic data were collected on the parents and the children, as well as whether either or both parents were represented by an attorney at the time of the final custody order. Both the initial custody complaint and answer and the final custody order were gathered for later coding. In all, 206 cases were used in the analysis for the study.

Initial request success rate

Of the case files used in the study, 59% were divorce cases and 41% were unmarried custody disputes. The mean age of the moth-

legal representation. Fathers requested sole legal and primary physical custody about a third of the time, with a comparable success rate (30.8%) to mothers with similar requests.

Examining custody outcomes among the study sample and again independent of legal representation, judges awarded some form of joint legal and shared physical custody in 62 out of 206 cases (30.1%). Mothers were awarded joint legal custody/primary physical custody and sole legal custody/primary physical custody an equal number of times (47 out of 206 cases each; 22.8%). Fathers were awarded sole legal and primary physical

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custody in 26 out of 206 cases (12.6%), with the remaining custody awards being either joint legal/primary physical to the father or some alternate custody arrangement, such as awarding custody to a non-parent (e.g., a grandparent).

Impacts of legal representation

With regard to legal representation, the cases in the sample were predominantly split between neither party having an attorney (42.2%) and both parties having an attorney (34.6%). Among those cases where only one party was represented, the father was more likely to be represented (13.6%) than was the mother (9.2%).

Looking at legal representation in terms of the type of custody ordered, where neither parent was represented, the judge awarded joint legal and shared physical custody 26.4% of the time. The judge awarded both joint legal/primary physical custody and sole legal/primary physical custody to the mother 25.3% of the time; the father obtained sole

Table 2. Success rate by party and legal representation

| Parent | Legal representation | | | | Total |
|---------------|----------------------|-------------|-------------|-------|--------------|
| | None | Mother only | Father only | Both | |
| Mother | 37.9% | 73.7% | 28.6% | 33.3% | 38.4% |
| Father | 32.2% | 21.1% | 53.6% | 34.7% | 34.6% |

Note: Success is defined as an outcome that matches the initial custody request. Success is not mutually exclusive; both parties could be successful in their requests and both parties could also fail.

necessarily show the impact of legal representation. A better measure is whether the parent achieves his or her desired custody outcome.

Highest success when only one parent represented

In relation to initial custody requests, the study showed that for both mothers and fathers, the highest rate of success came when only that parent was represented. There was no meaningful difference in success rates for either mothers or fathers when either no parent was represented or both parents had legal representation. In all instances, success hovered around one-third. But when only the father was represented, his success

is represented as compared to when both parents are represented. However, the success rate of mothers increased when only they were represented and decreased when only the father was represented. The converse is also true, with represented fathers having increased success rates and unrepresented fathers having decreased success rates. And although there was insufficient data to make the same comparison for fathers, mothers who requested either sole legal or primary physical custody faced substantially greater success rates when only they were represented and lower success rates when only the father was represented.

The study also looked at other factors for determining custody. Not surprisingly, find-

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legal and primary physical custody 11.5% of the time. (Results for awards of joint legal/primary physical custody to the father are not included because the small number of such instances prevents their statistical reliability.) Similar results can be found in cases where both parents are represented: joint legal/shared physical custody, 30.6%; joint legal/primary physical custody for the mother, 22.2%; sole legal/primary physical custody for the mother, 20.8%; and sole legal/primary physical custody for the father, 9.7%.

Though with smaller sample sizes, in cases where only the mother was represented, the most common outcome was that she would receive sole legal/primary physical custody (47.4%), as compared to 21.1% for both joint legal/shared physical and joint legal/primary physical custody for the mother. Where only the father was represented, the most common outcome was joint legal/shared physical custody (46.4%), as compared to 28.6% for the father receiving both sole legal and primary physical custody.

But pure measures of outcomes do not

rate in obtaining his initial custody request was 53.6%. And when only the mother was represented, her success rate was 73.7%. Conversely, when only one parent was represented, the success rate of the non-represented parent was lower (see Table 2).

In other words, the effect of legal representation is not so much dependent upon whether an individual parent in isolation has an attorney as it is a relational measure connected to whether neither, one, or both parents are represented. The analysis suggests that there is no meaningful difference in outcome between neither parent having legal representation and both parents having legal representation. The impact of legal representation comes when only one parent is represented, one conclusion of which may be that the need for an attorney is somewhat dependent on whether the other parent is represented.

Other ways of analyzing the data reinforce these findings. Where the parents' initial custody requests disagreed, there are comparable rates of success when neither parent

ings of domestic violence and findings of substance abuse were perfect predictors of custody outcomes, as was a father requesting that the mother receive custody. There was no impact of income on custody outcome, nor did the number or ages of the children have any measurable impact. The study also found no differences in outcomes between the four judges on the Palmer Superior Court.

While more research needs to be done to affirm and expand these findings, this study on legal representation and custody outcomes indicates that the primary impact of hiring an attorney, at least with regard to custody determinations, may be to counteract the attorney hired by the opposing party. This, though, does not take into account other benefits of legal representation, such as psychological benefits of being represented, drafting a workable custody order, or dividing property in a divorce.

Find full citations on page 9.

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