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Parenting arrangements after divorce and separation: A 2018-2019 snapshot of the Survey of Family Courts

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Parenting arrangements after divorce and separation: A 2018-2019 snapshot of the Survey of Family Courts

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INTRODUCTION

The Survey of Family Courts (SFC) is a long-standing online survey that documents detailed information about the contents of court orders and separation agreements.¹ This snapshot of data collected between 2018 and 2019^{2 3} focuses on custody and access, legal representation, and the relationship between legal representation and custody arrangements by parents' gender.

METHODOLOGY

This report includes data from six participating superior courts located in five jurisdictions across the country: Manitoba, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon.⁴ Coders manually input data from court files into an electronic survey administered by Justice Canada. The survey collects data that are disaggregated by gender. It also captures whether or not parties were in a same sex relationship; however, due to the small sample size,⁵ this report does not provide a separate analysis of same sex couple data. The survey predominantly covers parents who were married and later divorced, and as a survey of court data, does not collect information on separating parents who do not use the court system.⁶ The findings of this report cannot be generalized beyond the participating courts, nor can any causal linkages be made regarding legal representation and case outcomes.

KEY FINDINGS

Custody and access orders and agreements

In 2018 and 2019, there were a total of 2,651 orders included in the SFC. Of all orders that dealt with custody and access⁷ issues (n=1795), 80% were court orders, 18% were registered separation agreements filed with the court, and 2% were variation orders⁸. Unless otherwise noted, order in this report will refer to court orders, variation orders, and separation agreements registered with the court to make them enforceable.

¹ The SFC collects detailed data on child and spousal support, income, custody and access arrangements, and demographic information.

² Includes cases with a date of decision between January 1, 2018 and December 31, 2019 inclusive.

³ See the 2017 JustFacts [Child Custody and Access](#) for earlier SFC data. Due to a change in the survey tool, it is not possible to report on 2016-17.

⁴ Data were not available for PEI cases between October and December 2019; some data were also missing for New Brunswick for the 2018-2019 period.

⁵ Five of the orders dealing with custody and access issues were from same sex couples.

⁶ Little information is available about the arrangements for separating parents who do not divorce, and those who were never married.

⁷ The new *Divorce Act* came into force March 1, 2021 and includes new terminology. "Custody" is now referred to as "decision-making responsibility and parenting time", and "access" was changed to "parenting time" (parents) or "contact" (non-parents).

⁸ A variation order changes the terms of a previous order.

Consent and contested orders

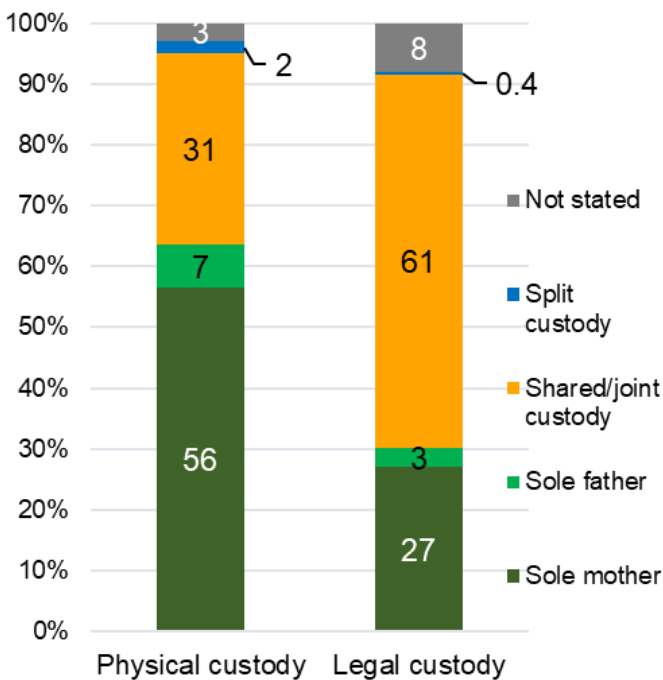
Separating parents often come to an agreement on arrangements for their children outside of the court system, as going to court is often considered a last resort for resolving custody and access issues.⁹ Court orders made on consent may result when parties have negotiated a position and are in agreement on the terms of their settlement. Contested orders indicate that a judge has decided on some or all of the issues of the case.

Of all custody and access court orders,¹⁰ two-thirds (66%) were decided on consent, and 4% were contested cases decided by judges. Almost one-third (30%) were uncontested, meaning that one parent made the application and the other did not oppose it in court.

Legal custody orders

Legal custody refers to a parent’s right to make significant decisions on behalf of a child in areas such as health care, education, and religion. Joint custody was the most common legal custody arrangement identified in six-in-ten (61%) orders, while mothers held sole legal custody just over one quarter of the time (27%). Fathers had sole legal custody in 3% of orders. Less than one percent (0.4%) of orders had an arrangement in which there were multiple children in the family and each parent had sole legal custody for at least one child. Less than one percent (0.5%) indicated that someone other than a parent had legal custody.¹¹ No legal custody arrangements were indicated in 8% of orders. See Chart 1.

Chart 1
Custody in court orders in six superior courts, 2018-2019



⁹ Separating parents often choose to create a written separation agreement that may or may not be negotiated with the help of lawyers. The separation agreement outlines the terms of custody, access, visitation, relocation clauses, child support and expenses, spousal support, division of assets and debts, among other areas. Some separating spouses choose to file the separation agreement in court, which allows for enforcement of the terms of the agreement.

¹⁰ Court orders only. Numbers do not include separation agreements or variation orders.

¹¹ The non-parent caregiver category represents less than 1% of cases and was thus removed from the chart.

Physical custody orders

Physical custody refers to the primary residence and day-to-day care of the child. In over half of orders (56%), mothers were awarded sole physical custody of all the children in the family, while shared custody was awarded almost one-third (31%) of the time. Shared custody indicates that the child resides at least 40% of the time with each parent, or the equivalent of at least three full days a week. Fathers were awarded sole custody in 7% of orders, 2% of families had split custody arrangements,¹² and in less than one percent (0.7%) of orders children lived primarily with a non-parent caregiver. Three percent either did not indicate residential arrangements or may have had pre-existing arrangements that did not involve the court. See Chart 1.

In comparison to earlier data from the SFC, the proportion of shared physical custody reported in 2018-19 (31%) suggests an upward trend. Prior to 2006, 10% of orders indicated shared custody, and 27% of orders indicated shared custody in the period between 2012 and 2015.¹³

Legal custody by order type

Joint legal custody was indicated more often in consent orders than in contested cases (69% versus 59%). Sole maternal legal custody was slightly more common in contested orders than in consent orders (25% versus 21%). See Table 1 below.

Table 1
Legal custody by order type in six superior courts, 2018-2019

Legal custody		
Custody arrangement	Consent orders (n=1109)	Contested orders (n=49)
Joint legal custody	69%	59%
Sole mother	21%	25%
Sole father	3%	2%
Split legal custody	1%	0%
Other non-parent	1%	0%
Not stated	6%	14%

Physical custody by order type

A similar pattern can be seen for physical custody, where shared custody was more common in consent orders than in contested cases (36% versus 22%). Sole maternal custody was more common in contested orders that were decided by a judge than in orders where couples were able to come to a resolution on consent (61% versus 51%). See Table 2 below.

¹² Split custody refers to situations where there are multiple children in a family and each parent has at least one child living with them.

¹³ See the 2017 JustFacts [Child Custody and Access](#) for earlier SFC data.

Table 2
Physical custody by order type in six superior courts, 2018-2019

Physical custody		
Custody arrangement	Consent orders (n=1123)	Contested orders (n=54)
Sole mother	51%	61%
Shared physical custody	36%	22%
Sole father	7%	4%
Split physical custody	3%	0%
Other non-parent	1%	0%
Not stated	3%	13%

Types of access in sole physical custody orders

Almost all orders (95%) indicating sole physical custody included access terms for the other parent. The following table indicates the types of access ordered by the courts.¹⁴ See Table 3 below.

Table 3
Types of access in sole physical custody orders in six superior courts, 2018-2019

Types of access in sole physical custody orders	Total (n=1131)
As agreed by the parties	59%
Reasonable/liberal	41%
Scheduled/specified	19%
No information/no visiting	9%
At discretion of child, discretion of one spouse	6%
Other details provided	6%
Supervised visiting	6%
Information/no visiting	1%

For the largest proportion of sole physical custody orders (59%), access terms were made on agreement by the parties themselves. Four-in-ten (41%) orders included reasonable or liberal access arrangements, meaning that arrangements were left open and flexible. Due to the nature of these two categories it can be expected that they will overlap.

Scheduled or specific access arrangements were indicated in 19% of orders. Terms under this category typically stipulate arrangements for periods such as holidays, long weekends, and special occasions. It was less common (6%) for access arrangements to be determined at the discretion of an older child or one spouse.

Supervised visits and no contact orders are stipulated in situations where there are concerns about safety. Supervised visits were indicated in access terms in only 6% of orders. In 9% of cases neither information nor visiting was allowed with the non-custodial parent, while in 1% of cases the non-custodial parent was allowed to have information regarding the child(ren), but no visits were allowed.

¹⁴ Percentages do not add up to 100%, as some orders indicated more than one type of access.

Other issues: Restraining orders, non-removal clauses, and relocation cases

The SFC collects general information on whether orders included restraining clauses, non-removal clauses, or dealt with relocation. Restraining clauses are put in place to ensure the safety of the child or parent and suggest concerns about family violence. Non-removal clauses can indicate concerns about child abduction, family violence, and sometimes high conflict situations. Only 2% of custody and access cases involved a restraining clause, while 7% of orders indicated a non-removal clause.

In contrast, relocation in the SFC refers to moving residence permanently, with or without children, and does not necessarily suggest family conflict. Relocation was an issue in 8% of custody and access cases.

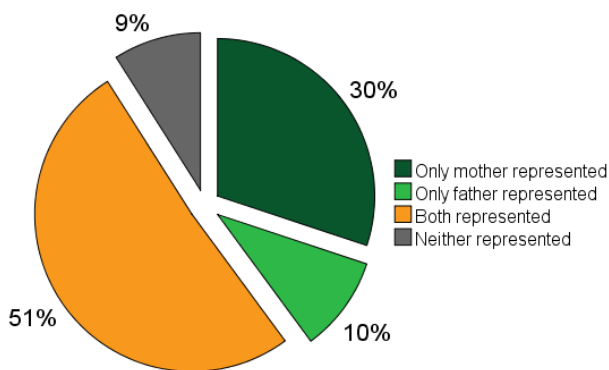
Legal representation

Some parents have a lawyer advising them and acting for them throughout the process, including the court proceedings. Others receive advice from a lawyer at certain stages, such as the negotiation and/or drafting of separation agreements, but then represent themselves in court. Others remain unrepresented throughout the process.

The SFC captures data on whether parties had legal representation for the particular court order or for the separation agreement being registered, but does not capture whether parties had legal representation at earlier stages of the legal process, nor whether alternative dispute resolution services such as mediation were used. It is important to note that the SFC does not collect information on legal aid, which may affect whether a person has access to legal representation.

In the majority of custody and access cases, mothers had a lawyer representing them (81%), while fathers had representation more than half of the time (61%).¹⁵ When examining the data in terms of family unit, both parties had lawyers in just over half (51%) of the orders, only the mother had legal representation in 30% of cases, and only the father had a lawyer 10% of the time. In 9% of cases, neither party had legal representation. See Chart 2. The following section provides a further breakdown of these groups by custody arrangement indicated in orders.

Chart 2
Legal representation in six superior courts, 2018-2019

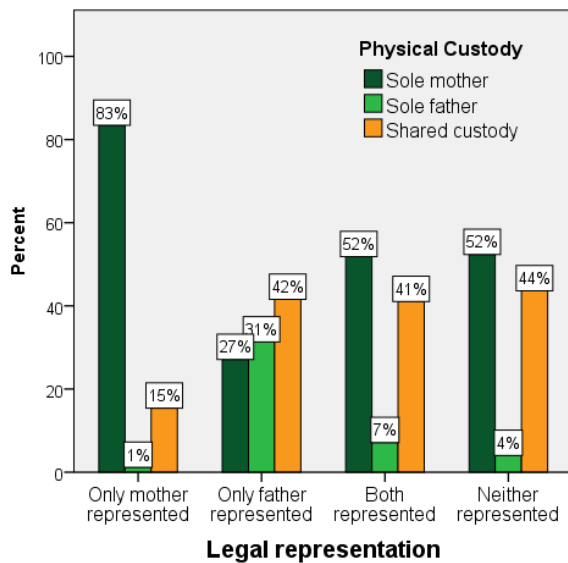


¹⁵ In ten cases dealing with custody and access issues it was not known whether a parent had legal representation. These unknowns were removed from the calculations.

Legal representation and custody arrangements

Additional analysis of the data was undertaken to understand the role of legal representation by parents’ gender in terms of how custody arrangements were awarded.¹⁶ Shared physical custody was awarded at a similar proportion when neither parent (44%), both parents (41%), or only the father (42%) had legal representation compared to when only the mother had a lawyer for her case (15%). When only the mother had a lawyer, sole maternal custody was much more likely than sole paternal custody (83% versus 1%). However, when only the father was represented, orders often indicated shared (42%) or sole paternal custody (31%).

Chart 3
Legal representation and physical custody in six superior courts, 2018-2019



Legal representation and legal custody arrangements

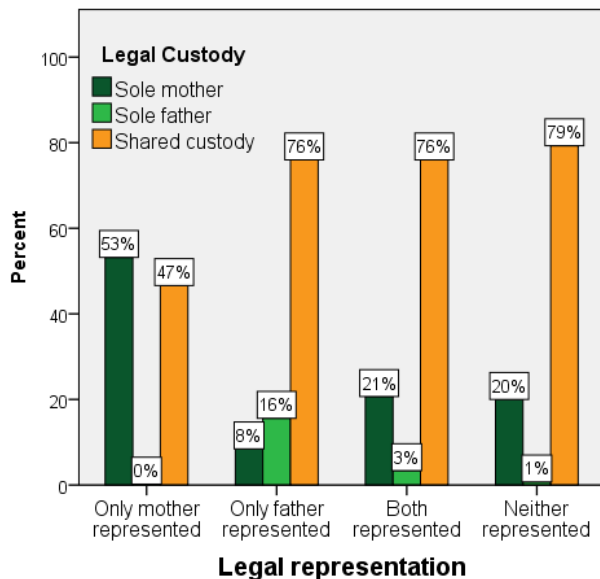
In terms of legal custody arrangements, joint legal custody was awarded at a similar proportion when neither parent (79%), both parents (76%), or only the father (76%) had legal representation, compared to when only the mother was represented (47%).

When only the mother was represented, sole maternal legal custody was much more likely than sole paternal legal custody (53% versus 0%). However, when only the father was represented, sole paternal legal custody was almost twice as likely as sole maternal custody (16% versus 8%). See Chart 4.

¹⁶ Includes all custody and access cases, including consent, contested and uncontested orders. Categories of “split custody”, “other”, and “not stated” represent a small proportion of orders and were removed from the calculations in this section.

Chart 4

Legal representation and legal custody in six superior courts, 2018-2019



CONCLUSION

This report includes SFC data from 2018 and 2019, providing insights into custody and access orders from six participating courts in Canada. The majority of custody and access orders were decided on consent, with contested cases making up only a very small percentage of the total orders. Shared and joint custody were more common in consent orders than in contested cases, while sole maternal custody was indicated more often in contested orders.

Joint custody was the most common legal custody arrangement identified in almost two thirds of orders, followed by sole maternal legal custody one quarter of the time. While over half of orders indicated that mothers had sole physical custody, almost one third indicated shared physical custody, an increase compared to previous analyses of SFC data. The largest proportion of sole custody access terms indicated reasonable/liberal access and/or were made on agreement by the parties, while a smaller percentage stipulated more restrictive access terms for the non-custodial parent.

In terms of legal representation in these custody and access cases, mothers had a lawyer representing them more often than fathers did, and in half of orders both parties had legal representation. When examining legal representation and gender of the parent, shared and joint custody were awarded at a similar relative proportion when both parents, neither parent, or only the father had legal representation. Sole maternal custody was more common when only the mother was represented, compared to the likelihood of sole paternal custody when only the father was represented.