

Lawyering Up: The Effects of Legal Counsel on Outcomes of Custody Determinations

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Abstract

There is a common assumption that being represented by an attorney increases the likelihood of success in obtaining one's desired outcome. Proving this assumption empirically creates complex methodological concerns. Many existing studies only look at final outcomes in relation to the legal representation status of an individual parent, ignoring the issue of whether the parent achieved his or her initial custody request, as well as the possibility that the effect of legal representation may depend not just on whether one parent is represented, but also whether the other parent is represented as well. This study seeks to correct these deficiencies. After controlling for initial custody request and the legal representation status of both parents, the results of our study show that having an attorney can indeed increase the chances of a parent achieving his or her desired custody outcome, but only if that parent is represented and the other parent is unrepresented. These results can have a substantial impact on those advocating for the increased availability of free or low-cost legal services in child custody proceedings.

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Introduction

In light of the recent 50th anniversary of *Gideon v. Wainwright*,¹ there has been a renewed push within the Civil Gideon movement toward greater access to justice for indigent civil litigants.² Civil Gideon advocates claim that increasing access to counsel will lead to fairer outcomes and greater court efficiency, among other benefits of legal representation.³ Under existing law, indigent defendants can obtain appointed counsel for criminal offenses for which they face the possibility of imprisonment.⁴ But for the vast majority of rights in the civil sphere there is no guarantee of appointed counsel. And perhaps no right is more fundamental than the right to raise one's children.⁵ Indeed, it is not a stretch to suggest that many parents would rather face a short prison sentence than lose custody of their

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² See, e.g., John Pollock, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 HUM. RTS. MAG. (2013), available at https://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/its_all_about_justice.html. The Civil Gideon movement of course predates this anniversary; AMER. BAR ASSOC., RECOMMENDATION 112A AND REPORT 2-6 (Aug. 7-8, 2006), available at http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_112a.authcheckdam.pdf. In 2006, the American Bar Association passed a resolution urging that federal and state governments provide legal counsel at public expense in important civil matters, including child custody; *Id.* at 1. A similar statement of principles affirming the right to counsel for indigent clients was adopted a few years later, AMER. BAR ASSOC., ABA BASIC PRINCIPLES FOR A RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 1 (Aug. 9-10, 2010), available at http://www.americanbar.org/content/dam/aba/directories/policy/2010_am_105.authcheckdam.pdf.

³ See, e.g., Columbia Law School Human Rights Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases*, 64 SYRACUSE L. REV. 409, 412 (2014); see also Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998) (arguing that the Supreme Court should overturn *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18 (1981), and find a constitutional right to civil legal representation).

⁴ *Aregersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972); Jon Mosher, *Drawing the Line at Actual Imprisonment*, SIXTH AMENDMENT CENTER, (Jan. 31, 2013) <http://sixthamendment.org/the-right-to-counsel/history-of-the-right-to-counsel/drawing-the-line-at-actual-imprisonment/>.

⁵ *Troxel v. Granville*, 530 U.S. 57, 65 (2000). ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

child.

Of course, not all parents are able to afford attorneys despite their best efforts.⁶ And cost may not be the only barrier to representation. Some parents may be overconfident in their ability to represent themselves, fail to recognize the scope of the legal problem they face, believe that nothing can be done, or simply be distrustful of attorneys in general.⁷ At the same time, court systems spend significant effort to make courts accessible to unrepresented litigants, providing easy to fill out forms, holding instructional clinics, and fostering mediation programs, among other efforts.⁸ Even apart from these efforts, there is a reasonable belief that judges will not let their custody determinations be overly influenced by the presence of an attorney, and that on a matter as fundamental as child custody the judge will take extra care to look out for the interests of self-represented litigants.

Regardless of the intuitive appeal of having an attorney, determining the effectiveness of legal counsel requires looking at the case as a whole: from the initial custody requests of the parents all the way to the custody outcome ordered by the judge. While previous studies have examined either the desires of parties (as expressed in the initial custody requests) or representation, few have taken *both* the desires of the parties *and* representation into account. Of those studies that do exist, none have explored the full interaction of each party's representation.⁹ Moreover, the

⁶ LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, at 11 (2009). A study published in 2009 by the Legal Services Corporation found that while there were 312,046 family law cases closed nationally in 2008 (with the client receiving some form of free legal assistance ranging from full representation down to only advice and counsel) through its various state legal aid organizations, there were an estimated 391,000 applicants who were turned away during the same time period. *Id.* And this figure does not include the many thousands more who did not even apply for legal assistance. *Id.*

⁷ Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS, Winter 2016 at 63, 73 (citing Legal Servs. Corp., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, note 5, at C-1 (2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

⁸ Lynn Mather, *Changing Patterns of Legal Representation in Divorce: From Lawyers to Pro Se*, 30 J. OF L. & SOC. 137, 143 tbl. 1 (2003). One of the explanations for variable rates of representation (between 11% and 44% of litigants in one nationwide study) in divorce cases is the degree of self-help provided to pro-se litigants. *Id.* at 146.

⁹ There are four logical possibilities regarding parental representation: 1) no attorneys; 2) mother has an attorney and father does not; 3) father has an attorney and mother does not;

implicit assumption made by many studies is that each parent wants the maximum amount of custody possible, to the exclusion of the other parent. As our data shows, that assumption may be false. In addition, the extant literature is also dated, with data collections in the 1980's and 1990's.¹⁰ Parenting, including the legal and social expectations of fatherhood, has changed considerably in the years since.¹¹

This article fills the recent gap in evidence of the effect of legal representation by examining custody disputes resolved in 2011 and 2012 in Palmer, Alaska. Though the data is local to Alaska, the results suggest that custody outcomes are affected not so much by whether any given parent is represented, as it is by whether one side is represented while the other side is *not* represented. The article will first review existing studies on legal representation and custody outcomes. A brief overview of family law in Alaska will be presented to serve as a foundation for the research project, followed by a section discussing the research methodology. The bulk of the article will address the results of the research through analysis of the impact of legal representation on custody determinations, such as whether only one or both parents are represented and the relative success rates of parents achieving their initial custody requests. The article will conclude with a discussion of the implications of the findings on broader access to justice issues.

4) both parties have an attorney. Almost no studies explore the effects of each possibility on the outcome of custody determinations.

¹⁰ Although there have been studies on the effect of legal representation in other contexts more recently, with varying results. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010) (reviewing a variety of administrative benefits and housing, small claims and family law); Roselle L. Wissler, *Representation In Mediation: What We Know From Empirical Research*, 37 FORDHAM URB. L.J. 419 (2010) (family court mediation services); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L. J. 2118 (2011-2012) (finding that randomized offers and provision of high quality legal clinic services in unemployment benefits appeals had no significant effect on outcome); D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy, *The Limits Of Unbundled Legal Assistance: A Randomized Study In A Massachusetts District Court And Prospects For The Future*, 126 HARVARD L. REV. 901 (2013) (finding that in housing evictions, representation improves chances of retaining housing).

¹¹ See generally J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213 (2014) (discussing the historical evolution of child custody presumptions and modern custody models and presumptions).

I. Existing Studies on Legal Representation and Custody Awards

There have been relatively few studies on the effects of legal representation on custody determinations.¹² The most well-known study involves approximately 1,100 California families who filed for divorce in one of two counties in 1984 and 1985.¹³ Where both parents were represented, joint legal custody was awarded in 92% of cases, compared to only 51% of the time when neither party was represented.¹⁴ With regard to physical custody, the mother was awarded custody in 86% of cases when only the mother was represented, as compared to 49% of cases when only the father was represented.¹⁵ Fathers received custody in fewer than 10% of cases with the following circumstances: where there were no attorneys, where the mother was represented and the father was not, and where both parties were represented.¹⁶ When comparing requests made in initial pleadings to desires expressed in interviews with the parent, having an attorney made no difference for what the mother requested. But where the father was represented he was more likely to request the custody arrangement he actually wanted and was more likely to even make a custody request at all.¹⁷ The study did not examine whether legal representation played a role in the parent receiving what he or she requested in initial pleadings.

¹² See Russel Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 *FORDHAM URB. L.J.* 51-55 (2010) (providing an overview of studies on the effects of legal counsel in general in civil cases and a discussion of family law statistics. More recently, a review of existing empirical research on the effect of lawyer representation in civil disputes across a number of substantive areas suggests that representation generally benefits clients, although results are not so clear in some areas). See also Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 *PEPP. L. REV.* 881, 885, 888-89 (2016). Most of the studies Poppe and Rachlinski reviewed concentrated on case outcomes – the studies observed who was represented, who was not, and how each party fared in the case. *But see id.* at 888. Unfortunately, as the authors noted, such studies are difficult to interpret owing to the potential for endogeneity – it is difficult to isolate the relationship between attorney representation and case outcome from the relationship between other known and unknown variables and case outcome. There are a variety of studies looking at other factors determining custody outcome (such as income or education level or the impact of mediation) that will not be reviewed here.

¹³ ELEANOR E. MACCOBY & ROBERT M. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 13 (1992).

¹⁴ *Id.* at 108, 300.

¹⁵ *Id.* at 109-10.

¹⁶ *Id.* at 110.

¹⁷ *Id.* at 111.

Another comprehensive study on the effects of legal representation on custody outcomes (among other things) was conducted in Maryland. An analysis of over 1,200 sampled cases filed in Maryland in Fiscal Year 1999 found a correlation between legal representation and awards of sole custody (which the study defines as both legal and physical custody);¹⁸ it is unclear from the study if legal representation is associated with other types of custody awards.¹⁹ The study also examined the parties' initial custody requests, showing that mothers were more likely than fathers to get their requested custody outcome, though this measure did not take into account the effect of legal representation.²⁰ Comparing cases with conflicting custody requests, decisions were heavily in favor of the mother.²¹ In sum, mothers were more than three times as likely to get sole custody as fathers

¹⁸ THE WOMEN'S LAW CTR. OF MD., INC., FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND 43, 45 (2006) [hereinafter FAMILIES IN TRANSITION]. Sole custody or primary physical custody was awarded to the mother in 62.5% of cases when both parties were represented and 66.6% when neither were represented, rising to 81.6% when only the mother was represented, and falling to 43.0% when only the father was represented. When only the mother was represented, the father was never awarded sole custody and awarded primary physical custody in only 2.0% of cases. When only the father was represented, he was awarded sole custody or primary physical custody in 31.7% of cases, split roughly evenly between them. *Id.* at 48 tbl. 16. This data includes both contested and uncontested cases. The study defined "sole custody" as the parent being awarded sole legal and primary physical custody.

¹⁹ *See id.* The authors either misreport their results for father representation in cases with joint legal but physical custody to the mother, or they inaccurately describe the results in the text. As reported in the table, cases where fathers are represented are 2.2 times more likely to result in joint legal but physical custody to the mother relative to cases where the father is not represented. This odds ratio is marked as significant at $p < 0.05$. Yet on page 43, they write that "representation does not correlate one way or the other" with cases other than where one parent has sole custody. The text also states that whether the requests were contested (where the mother and father differ in what they request) is the strongest indicator of whether or not joint legal but physical custody to the mother was ordered, despite the fact that *every* other significant variable's effect is of greater magnitude than that for contested custody requests (after inverting those that are less than one, as one would need to do to assess relative strength).

²⁰ *See id.* at 38. For example, mothers requesting sole custody were granted this request in 51.8% of cases, but fathers requesting sole custody were only granted it in 22.4% of cases. Similarly, mothers requesting joint legal and primary physical custody had their requests granted in 76.2% of cases, but fathers requesting joint legal and primary physical custody were only awarded this in 55.0% of cases.

²¹ *Id.* at 39 tbl. 11. When both parents in the same case requested sole custody, mothers were awarded sole custody in 17.9% of cases, fathers sole custody in 6.5% of cases, mothers primary physical custody (and joint legal custody) in 41.5% of cases, fathers primary physical custody in 4.9% of cases, and joint legal and physical custody awarded to both parents in 24.4% of cases.

in bivariate analyses. In multivariate analyses, after controlling for custody requests by both parents, the child's living arrangement, mother's income, father's income, and whether the custody request was contested, representation was a significant predictor for sole custody. Represented parties were about twice as likely to get sole custody relative to no representation. Unfortunately, this study did not model the interaction between legal representation of the mother and father. Omitting the interaction between the representation of the mother and father variables limits the usefulness of the results when assessing the effect of representation on outcomes.²² This study also does not report interactions between the two parents' custody requests.

A study of custody outcomes in a sample of Wisconsin cases from 1986 to 1994 found that shared custody and sole-father custody were more likely than sole-mother custody when only the father had legal representation, net of controls, in a multinomial logistic model.²³ While this study conducted multivariate analysis including employment, income, marital history, number, age, and gender of children, and which party filed as controls, initial custody requests of the parents were not included in the model. Since initial custody requests are likely related to custody outcomes *and* whether parties have counsel,²⁴ these results may be spurious.

Other studies provide narrower results. A study of cases in Washington State closed in 1987 showed that when both parties were represented, 91% elected shared legal custody in mandatory mediation proceedings, as compared to 70% when only one party was represented and 77% when neither party was represented.²⁵ The amount of visitation with

²² See, e.g., J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA (3d ed. 2014) (providing a detailed technical explanation. Briefly, without fully interacting the two representation indicators, the odds ratios for each of the two representation variables cannot describe circumstances where one party is represented and the other is not, at least not from the reported odds ratios alone. Instead, the reported odds ratios describe differences in the odds of each outcome occurring when the remainder of the variables are held at average values. The same criticism applies to custody requests by each parent: without modeling the interaction between mother's and father's custody requests and conducting post-estimation analyses, it is difficult to interpret the reported results in a meaningful way).

²³ Maria Cancian & Daniel R. Meyer, *Who Gets Custody?*, 35 DEMOGRAPHY 147, 152-53 (1998); but see Judith A. Seltzer, *Legal and Physical Custody Arrangements in Recent Divorces*, 71 SOC. SCI. QUART. 250, 261 tbl. 2 (1990) (reporting on an earlier Wisconsin study that did not find a strong correlation between legal representation and custody outcomes).

²⁴ See MACCOBY & MNOOKIN, *supra* note 13, at 111.

²⁵ Jane Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce*

the noncustodial parent also increased when both parties were represented.²⁶ A different study of Washington State cases found that legal representation of victims of intimate partner violence significantly increased the likelihood that visitation would be denied to, or restrictions placed on visitation with, the perpetrating parent.²⁷ A study of randomly selected custody cases in Nebraska closed between 2002 and 2012, showed that 88.3% of plaintiffs were represented by an attorney at the time of filing, and 84.6% were represented at the time a final order was issued. Defendants were represented by attorneys at 50.8% and 47.2% respectively.²⁸ No attempt was made to determine the effect of legal counsel on the outcome of the case.

While these studies provide helpful broad strokes about legal representation and custody outcomes, they do not address whether, and in what circumstances, having an attorney will impact the likelihood of achieving one's desired custody result. Our study is designed to tackle this inquiry. Before proceeding, we acknowledge that the effect of representation cannot be limited to observing whether legal representation is associated with a positive outcome for the attorney's client. There are procedural values to consider. The importance of a perception of procedural justice to a litigant's acceptance of an outcome is well established.²⁹

Custody Reform and the Role of Legal Professionals, 24 U. MICH. J.L. REFORM 65, 132 (1990). The article refers to legal custody as "shared decision making." *Id.* These percentages are out of 245 cases studied. *Id.*

²⁶ *Id.* at 133.

²⁷ MARY A. KERNIC, FINAL REPORT OF THE "IMPACT OF LEGAL REPRESENTATION ON CHILD CUSTODY DECISIONS AMONG FAMILIES WITH A HISTORY OF INTIMATE PARTNER VIOLENCE STUDY" ii-iii (2015). Legal aid attorneys were found to be more effective than private attorneys in such cases. *Id.*

²⁸ MICHAEL SAINI & DEBORA BROWNYARD, NEBRASKA OFFICE OF STATE COURT ADMINISTRATOR, NEBRASKA 2002-2012 CUSTODY COURT FILE RESEARCH STUDY 30-31 (2013).

²⁹ See JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 118 (1975) (establishing a link between disputant perceptions of fairness and the allocation or distribution of control over the adjudication process, so that "procedure that limits third-party control, thus allocating the preponderance of control to the disputants, constitutes a just process."). When Thibaut and Walker did their work, the dominant theory of distributive justice held that an unsuccessful litigant should be satisfied with the justice of his or her outcome was similar to those similarly situated, regardless of the procedure encountered; E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 3 (1988) (validating the early theories of Thibaut and Walker and advancing the concept of subjective procedural justice as the capacity of a process to "enhance the fairness judgments of those who encounter procedures"); see also *id.* at 11 for a finding that even litigants with poor outcomes will react more favorably if they perceive a procedure is fair.

Litigants may feel better about the process of resolving their custody dispute if they are represented by an attorney.³⁰ Moreover, litigants who believe they have been heard by the court are more likely to obey the law.³¹ Perhaps representation of the parent-litigants may affect the stability of custody determinations and, indirectly, the welfare of the children concerned. While these are valid considerations in the debate over whether to provide legal counsel in custody cases, they are not the focus of the present study, which is limited more to case outcomes.

II. Alaska Family Law Basics

Alaska is a “no fault” divorce state, and “fault” plays no legal role in determining custody.³² Alaska does not have a separate family court; all custody and divorce cases are adjudicated in Alaska Superior Court, the trial court level that also handles felonies, injunctive relief and civil disputes above \$100,000. In larger jurisdictions, some preliminary matters and mediation are handled by magistrates, but the assigned superior court judge must sign final orders in the case. There is an automatic right of appeal to the Alaska Supreme Court of any custody or divorce final order, as there is no intermediate appellate court for civil cases.³³

Like most other states, Alaska law distinguishes between legal custody and physical custody. Legal custody refers to the ability to make important life decisions about the child on matters such as education, medical treatment, religious upbringing, and social aspects of raising a child (e.g., extracurricular activities, summer camps, piercing ears).³⁴ Legal custody is an either/or situation – a parent either has legal custody of a child or he or she does not. The presumption under Alaska law is that parents should have joint legal custody of each child, absent a compelling reason to

³⁰ Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 889 (2016) (citing Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 495-96 (2010) (suggesting that lawyers may “explain the legal system, provide reasons for the outcome, and give [the litigant] greater assurance that the court hears the client’s story.”)).

³¹ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 62-63 (1990).

³² Velasquez v. Velasquez, 38 P.3d 1143, 1147 (Alaska 2002).

³³ ALASKA STAT. § 22.05.010 (2017).

³⁴ See *Glossary of Family Law Terms*, ALASKA CT. SYS. SELF-HELP CTR.: FAMILY LAW (Mar. 6, 2018), <http://courts.alaska.gov/shc/family/glossary.htm#legal> (definition of “Legal Custody”).

the contrary.³⁵ Physical custody is defined as how much time a child spends with a parent,³⁶ with the calculation being based on the percent of overnights spent with a parent throughout the calendar year.³⁷ Unlike legal custody, physical custody exists in a range – a child can spend anywhere from 0% to 100% of overnights with a parent. Alaska distinguishes between two main types of physical custody – primary physical custody and shared physical custody.³⁸ Under Alaska law, if both parents have physical custody of the child at least 30% of the time, then the parents have shared physical custody.³⁹ However, if one parent has physical custody more than 70% of the time, then that parent is said to have primary physical custody,⁴⁰ and the other parent has visitation rights (if any).⁴¹

The distinction between primary and shared physical custody is of consequence not only to the relationship between parents and children, but also when calculating child support. Alaska uses a percentage of income method for calculating child support, one of only ten states to take this approach.⁴² In primary physical custody situations, the income of the parent with primary physical custody is ignored and a fixed percentage of the

³⁵ ALASKA STAT. § 25.20.060(b) (2017) (“Neither parent . . . is entitled to preference in the awarding of custody.”); ALASKA STAT. § 25.20.060(c) (2017) (“The court may award shared custody to both parents if shared custody is determined by the court to be in the best interests of the child. An award of shared custody shall assure that the child has frequent and continuing contact with each parent to the maximum extent possible.”).

³⁶ ALASKA STAT. § 25.30.909(14) (2017) (defining “physical custody” as “the physical care and supervision of a child”).

³⁷ ALASKA R. CIV. PRO. 90.3 COMMENTARY V.A; *Farrell v. Farrell*, 819 P.2d 896, 901 (Alaska 1991).

³⁸ *See generally* ALASKA R. CIV. PRO. 90.3(f). Alaska also recognizes divided custody and hybrid custody, but both of those only arise in situations of multiple children and involve some combination of primary and physical custody. Divided custody exists where each parent has primary custody of at least one child, but the parents do not possess shared custody (as defined above) of any children. Hybrid custody exists where there is primary physical custody of at least one child and shared physical custody of at least one child. They are both quite uncommon.

³⁹ ALASKA R. CIV. PRO. 90.3(f)(1).

⁴⁰ ALASKA R. CIV. PRO. 90.3(f)(2).

⁴¹ ALASKA STAT. §§ 25.24.150(c), (g), (j) (2017). In situations where a court determines that a parent cannot safely care for a child, often because of a history of domestic violence or severe substance abuse, the court may prohibit visitation with the child or award only supervised visitation (requiring the presence of a third party to monitor the visitation). *Id.*

⁴² LAURA W. MORGAN, *CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION* §1.08 Table 1-3 (2d ed. 2012); *see also id.* at § 1.08[B]. Most states use an income shares approach, where percent of custody is often not a factor.

noncustodial parent's adjusted income determines the child support obligation.⁴³ In situations of shared physical custody, the income of both parents and the time spent with the child(ren) are taken into account when determining child support.⁴⁴ Thus, shared custody frequently has a dramatic effect on the amount of child support owed in Alaska. The distinction between primary and shared physical custody, therefore, provides a clear demarcation by which to differentiate awards of physical custody.⁴⁵

It is far more common for parents to be awarded joint legal custody without being awarded shared physical custody, than the other way around.⁴⁶ In Alaska, the court determines custody using a nine-factor test designed to determine the best interest of the child.⁴⁷ While in theory the best interests test gives a fair bit of discretion to judges,⁴⁸ in practice judges in Alaska are statutorily required to award 50/50 physical custody unless

⁴³ ALASKA R. CIV. PRO. 90.3(a)(2). For one child, the adjusted income is multiplied by 27%, with an additional 3% added for each additional child. *Id.*

⁴⁴ ALASKA R. CIV. PRO. 90.3(b)(1). The formula can be expressed as follows: $((I_F \times P_C \times T_M) - (I_M \times P_C \times T_F)) \times 1.5$, where P_C = Percentage multiplier for number of children, I_F = Adjusted income father, T_M = Time with mother, I_M = Adjusted income mother, and T_F = Time with father. If there is a wide enough disparity of incomes, a situation could arise where a parent with a greater percentage of time but also a greater income could be required to pay child support to a parent with a lesser percentage of time but also less income.

⁴⁵ MORGAN, *supra* note 43, at § 7.03[A]. To some extent, this demarcation may exist in other states as well, regardless of their method of child support calculation, provided that the state makes some adjustment to child support for shared custody. There are a variety of ways in which this adjustment can be made, though many states make shared physical custody a factor to be used in deviating from a child support award rather than employing a more objective formula based on percent of time. Because the present study focuses solely on Alaska, it is not necessary to compare these different accommodations for shared physical custody.

⁴⁶ MACOBY & MNOOKIN, *supra* note 13, at 108, 113. There are practical reasons why this is the case. For example, distance may prevent shared physical custody from being workable. Additionally, parents with limited ability to care for a child physically or financially may still possess the capacity to make legal decisions about the child. One study (previously discussed) found that joint legal custody was awarded 79% of the time, but joint physical custody awarded only 20% of the time.

⁴⁷ ALASKA STAT. § 25.24.150(c) (2017); *see also* ALASKA STAT. §§ 25.24.150(g)-(h) (2017). There is a separate statutory provision that creates a "domestic violence presumption" whereby if a court finds a history of domestic violence or one substantial act of domestic violence, the court cannot award either sole or joint legal custody or primary or shared physical custody to the parent who perpetrated the domestic violence.

⁴⁸ *See generally* Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83 (2011).

there is a convincing reason to depart from that presumption.⁴⁹ Alaska is one of sixteen states in which there is a presumption in favor of joint custody.⁵⁰ There is no “tender years” doctrine in Alaska,⁵¹ nor does the court look solely at caretaking practices prior to separation.⁵² These custody factors are meant to be gender neutral with regard to the parents, and operate under the presumption that even very young children should spend equal time with similarly situated parents wherever possible. All else being equal, the result of a custody determination should not depend upon whether a parent is represented or not. Representation, however, might enable parties to make legally-relevant arguments before the court that would otherwise have been poorly argued or omitted. Whether the statutorily mandated gender neutrality exists in practice and whether legal representation has a measurable impact on custody determinations are motivating research questions in the current study.

III. Research Design and Data Collection

Studying the effect of legal counsel on divorce and custody cases is methodologically complex. For example, with protective order cases — a topic sometimes studied in relation to legal representation — there is essentially only one party at issue (the respondent) and a binary measurement of the protective order being either granted or denied.⁵³ Custody decisions are not so simple. First, there are two parents at issue as compared to just one respondent. And as discussed above, not only is there

⁴⁹ The same statutory requirements apply here as for legal custody. *See supra* note 35. Courts are required to make findings according to the nine-factor test listed in Alaska Statute §25.24.150(c) regardless of whether the court is awarding equal custody to both parents or giving one parent greater custody. This not only creates a record for appeal, it also provides parents who may not agree in their custody requests an understanding of the ruling. Explaining its reasoning and application of the nine-factor test is especially important when the court departs from the statutory presumption of equal custody by awarding sole legal and/or primary physical custody to one parent.

⁵⁰ *Family Law in the Fifty States 2014-2015*, 49 FAM. L.Q. 590, 593-97 (2016) (Chart 2 – Custody Criteria).

⁵¹ *Wetzler v. Wetzler*, 570 P.2d 741, 743 (Alaska 1977) (“Determination of the child’s best interests must turn on a balancing of the unique facts of each case rather than on outmoded presumptions.”); *Johnson v. Johnson*, 564 P.2d 71, 75 (Alaska 1977) (“We conclude that the doctrine of tender years is not an appropriate criterion for determination of the best interests of the child . . .”).

⁵² *See I.J.D. v. D.R.D.*, 961 P.2d 425, 430 (Alaska 1998) (rejecting a mother’s claim for primary physical custody “simply because of her status as primary caregiver”).

⁵³ *See, e.g., Amy Farmer and Jill Tiefenthaler, Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. EC. POL’Y 158 (2003).

a difference between legal and physical custody, but the award of physical and legal custody can differ from each other as well. Each parent can have either sole legal custody, joint legal custody, or no legal custody; *and* either primary physical custody, shared physical custody, or visitation (i.e., the other parent has primary physical custody). It is also possible that *neither* parent has legal or physical custody (e.g., custody is awarded to a grandparent). The result is 16 different possible outcomes, although some are rare in practice.⁵⁴

What the parties request and whether there is a conflict between the requests of the parties is also important. Consider, for example, a case with one child where both the father and mother request that the mother receive primary physical custody because the father has moved out of state. Unless the court finds that the mother is an unfit parent, she likely will receive primary physical custody regardless of whether either parent is represented. Perhaps these parents disagreed over legal custody or property division (in a divorce) and have retained attorneys to fight over these other issues.⁵⁵ Perhaps one or more of the parties retained counsel for no particular reason other than a belief that a lawyer is needed when one goes to court. Regardless, the context of the parties' desires in the case, and the presence or lack of conflict between the parties' desires, are key potential confounding variables in the relationship between representation and custody outcomes.⁵⁶

Multiple combinations of legal representation exist as well. It potentially matters not just if one parent in a dispute is represented, but also if the other parent is represented. If legal representation has any effect on outcomes, one might reasonably expect that when the mother is represented,

⁵⁴ It would be exceedingly rare, for example, for one parent to have sole legal custody and visitation-only physical custody.

⁵⁵ Future researchers may want to consider including property division in their analyses. We have not done so here. While the outcomes of legal and physical custody are multitudinous, they do have the advantage of being finite and unambiguous. Property division can have numerous complications surrounding what property is to be divided (marital v. non-marital property) and has a nearly infinite number of outcomes that render measurement challenging.

⁵⁶ WILLIAM R. SHADISH ET AL., EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR GENERALIZED CAUSAL INFERENCE, 7 (2002). "Confounding" a relationship carries the same meaning as "spurious" or "endogeneity" or "omitted variable bias," depending largely in which social science discipline the researcher has been trained. The concern is that an unmeasured variable omitted from the analysis is correlated with both the outcome and a predictor, which can create the appearance of a relationship when none exists.

whether the father is represented could affect the custody outcome.⁵⁷ Another way to think about this is that if attorneys affect the outcome of a case, then that effect should be stronger if only one party was represented. The effects of the attorneys in cases where both parties are represented could also cancel each other out. In statistical terms, there could be both main effects and interaction effects of representation.

After taking these concerns into account, determining the effect of legal representation requires, at minimum, measuring (1) the initial custody requests of both parties; (2) whether each party was represented; and (3) custody outcomes. Not only has no previous study in Alaska measured the effect of legal representation on the outcomes of domestic relations cases, no study in any other jurisdiction has incorporated the interaction effect between all three of these factors.⁵⁸

For this study, we chose to analyze case files for contested divorce and custody decisions in the Superior Court in Palmer, Alaska for which the final custody order was issued in 2011 or 2012. We define “contested cases” as those for which a complaint and an answer were filed, even if custody was eventually resolved through some form of settlement without a trial. No attempt was made to distinguish between cases that were settled and those with a trial because the fact of settlement would not always be apparent in the written case file. However, it was possible to determine the initial custody requests of each parent by reading the complaint and answer

⁵⁷ FAMILIES IN TRANSITION, *supra* note 18, at 47-48. This assumption is borne out to some extent in the Maryland study, which provides percentages of representation under each of the four different possible representation scenarios. For example, if both parties are represented, the most likely outcome is joint legal custody and primary physical custody to the mother; *Id.* at 48 tbl. 18. This is also the most likely result where only the father is represented, though at a lesser rate. But if either only the mother is represented or neither party is represented, the most likely result is that the mother will receive both sole legal and primary physical custody. However, because the Maryland study does not relate the custody outcomes to the initial requests of the respective parents, it is a less persuasive analysis than it otherwise might be.

⁵⁸ Barbara Armstrong, *Unmet Legal Needs in the U.S. and Alaska*, 27 ALASKA JUST. F., Summer 2010 at 11, available at https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/27/2summer2010/a_unmet.cshtml. A study of legal representation in family law cases in Anchorage in 2009 showed that for divorces with children, neither party was represented by counsel in 32.2% of the cases and only one party was represented in 27.4%. For custody cases, the lack of representation is even greater, with 55.2% of cases involving two unrepresented cases and another 26.7% having only one party represented. This study did not report any attempt to analyze the outcomes of the custody determinations.

in contested cases.⁵⁹

Uncontested cases and defaults were excluded from the study; examination was limited to cases where two parties participated in the proceedings. In uncontested cases (a dissolution or uncontested custody complaint), both parents agree on custody prior to filing and express their agreement in the initial filings. Consequently, there would not be a separate expression of initial custody requests. Moreover, if the parties agree on custody, then the impact of attorneys on the outcome is likely minimal.⁶⁰ Default cases, where the defendant did not make an appearance in the case and the plaintiff was granted the custody arrangement requested in the complaint, were excluded because these cases are often qualitatively different from cases where both parties participate in the proceedings.⁶¹

Casefile reviews were conducted at the Palmer, Alaska Superior Court during the summer and fall of 2015. The area served by the Palmer Superior Court is the Matanuska-Susitna Borough.⁶² Palmer was an ideal site for three reasons. First, we wanted to avoid sampling cases. Sampling can introduce bias, particularly when the number of observations (cases) is small and population characteristics are unknown.⁶³ The Palmer Court's caseload is relatively small, meaning that we could incorporate all contested divorce/custody proceedings into our study and not have to rely upon a limited sample.⁶⁴ Second, the Clerk of Court in Palmer was supportive of

⁵⁹ Occasionally the answer was missing (possibly because it was given orally at a hearing). These cases were excluded from the analysis.

⁶⁰ Uncontested cases may (or may not) involve an attorney, but sometimes both parents would be consulting the same attorney to draft the appropriate paperwork, making it impossible to measure the effect of the attorney on the outcome of the case relative to each parent. Conceivably, there may be instances where the parents consult separate attorneys prior to filing a complaint to reach a non-judicial resolution, but this would be impossible to determine from the pleadings themselves.

⁶¹ Anecdotally, we often found default judgments against incarcerated parents — but documentation of the incarceration status of parents was not consistent enough to provide a reliable and valid measure. Under what circumstances default judgments occur is an interesting question that is ultimately outside the scope of the current study.

⁶² According to the U.S. Census Bureau, the 5-year (2011-2015) American Community Survey population estimate for the Matanuska Susitna Borough is 96,178. An Alaskan *borough* is a unit of government roughly analogous to a *county* in other states. The City of Palmer (pop. 6,449) is approximately 50 miles from Anchorage, Alaska.

⁶³ Typically, a variety of errors introduced by sampling can be corrected by weighting observations until the weighted sample matches known population parameters. Here, we have too little information on the population of divorce cases to weight observations effectively.

⁶⁴ ALASKA COURT SYSTEM, ALASKA COURT SYSTEM ANN. REP. FY 2012, at 95 (2013),

the project and able to satisfy our public records requests. Finally, the distribution of cases among the four judges in the Palmer Superior Court also made it easy to examine the possibility of judge effects.⁶⁵

The Alaska Court System makes a bulk data extract available quarterly. The bulk data extract does not, however, contain all data fields relevant to our study. We queried the bulk data extract released in December 2014 for “Custody – Superior Court”, “Divorce with Children – Superior Court”, and “Legal Separation with Children” cases that were disputed by the parties and were disposed of in the Palmer court in 2011 and 2012. The query yielded 375 disputed cases for the two years. The Palmer Clerk of Court provided public records for each of these cases. Each paper casefile on record with the court was reviewed and coded by research assistants who were trained how to read the relevant filings.

Data was collected on the initial custody requests of the parents in the complaint and answer, the ages of the parties, the number and age(s) of the children, whether the parents were married and the date of marriage, whether either parent was represented by an attorney, who was awarded legal custody, the type of physical custody awarded, the income of each parent,⁶⁶ whether visitation was supervised, whether there was a finding of domestic violence or substance abuse against either parent in the final order, the date the case was filed and the date of the final custody order,⁶⁷ and the name of the judge that issued the final custody order.⁶⁸ Legal representation was determined as of the date the final order was issued.⁶⁹

available at <https://public.courts.alaska.gov/web/admin/docs/fy12.pdf>. According to the Alaska Court System Annual Report for fiscal year 2012, there were 304 contested divorce cases and 130 custody or child support cases filed in Palmer Superior Court.

⁶⁵ All Palmer Superior Court judges handle domestic relations cases. In some other courts throughout Alaska (e.g., Anchorage) judges have a more specialized workload.

⁶⁶ This figure was self-reported by the parties on child support filings and is of unknown accuracy.

⁶⁷ This is not necessarily the date the case was closed, as there could be property division or other issues that remained after the custody determination.

⁶⁸ Custody cases are assigned to one judge for their duration, though certain preliminary orders might be issued by other judges under certain (but rare) circumstances. Our data showed no significant difference in custody outcomes for the four Palmer judges, even considering that two were male and two were female.

⁶⁹ See Banks Miller et al., *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC'Y REV. 209 (2015). Data regarding demographics of representation and quality of representation were not available. At least one study has shown that experience and education of the legal representative may have an impact; *But see* Rebecca Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOC. REV., Oct.

Our data source had limitations. Some case files were simply not available for review by the research team. Cases undergoing appellate review or a motion to modify custody at the time the file was requested were not available to code because the paper casefile was not in the clerk's office. It is unknown the extent to which these cases differed from the cases for which we could collect data. This, incidentally, is one reason the cases requested were from 2011 and 2012 despite collecting data in 2015 — the Clerk of Court suggested the lag between disposition and data collection to make it less likely that we would request cases with ongoing proceedings. Other files were confidential. Parties can request that their file be kept confidential, most often when there are safety concerns associated with the file being publicly available.⁷⁰ Confidential files were not made available to the research team. To the extent that these unavailable files involved substantiated domestic violence or child abuse, this may result in underreporting of that category in the data analysis. We were also limited to the information documented in the casefile.⁷¹ Additionally, the relatively small sample made it impossible to control for success rates by attorney.⁷² We therefore present our models as exploratory and suggestive of future research.

2015 at 909. However, another suggests substantive knowledge is not particularly important; rather lawyers' impact is greatest when they assist their clients in navigating relatively simple (to lawyers) procedures and where their relational expertise helps courts follow the courts' own rules; *see also* John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 *LAW & SOC'Y REV.* 751 (1998). Given the recognized divergence in income, education, and social status or class between lawyers who practice law directed to personal services (such as family law) and lawyers who practice corporate or institutional law, and the small market, a wide range of practitioner backgrounds seems unlikely.

⁷⁰ Anecdotally, one of the authors knows from his law practice that cases are more likely to be confidential when there is a protective order in place and the location of the victim of domestic violence or child abuse needs to be kept from the perpetrator.

⁷¹ There are many variables of potential interest that were not available in the casefiles that served as our data source and are unlikely to be available in any retrospective analysis of secondary data. For example, race of parties, race of children, education of parties, experience of counsel and other quality-of-counsel measures, and satisfaction with case outcomes were not available.

⁷² Small samples and rare combinations are particularly vexing to model using the regression techniques used here. The regression techniques we use require variation on the dependent variable for each combination of independent variables.

IV. Analysis

A. Descriptive Statistics and Analysis Strategy

We requested the full record for 375 cases. Ninety-six (96) cases were dropped from our analyses due to being resolved through a default judgment. Additional cases were dropped where 1) the full case file was unavailable for any reason; 2) the initial custody request from either party was unclear or not present in the file; 3) either party requested a divided or hybrid custody arrangement; or 4) either party requested a third party such as a grandparent be awarded custody.⁷³ We were left with 206 cases for analysis.

Table 1 shows descriptive statistics for cases included in this study. The primary variable of interest, whether each party has an attorney, was measured as a four-point scale (no attorneys, only mother has an attorney, only father has an attorney, both have attorneys). Legal representation was strongly bimodal. In general, either *neither* parents hired attorneys (42.2%) or *both* parents did (34.6%). Where one party had an attorney and the other one did not, fathers were more likely (13.6%) than mothers (9.2%) to be represented. Compared to fathers, mothers were significantly younger and had a lower median income. Cases in our sample typically had one child (58.3%) who was 8.6 years old on average, and the parents were typically married (59.0%).

One of the difficulties in analyzing child custody cases is the multitude of possible outcomes. We analyze two broad categories of dependent variables: 1) custody outcomes; and 2) success of each party in obtaining the custody requested in their initial filings. For custody outcomes, we have combined legal and physical custody. As explained above, these are not identical under Alaska law, but they do trend together in our data. Moreover, judges of course must address both in the same case. Separating out physical from legal custody might yield misleading results in the data analysis by suggesting different success rates, when in practice it is the entire custody request that is at issue in any given case.

⁷³ The first two categories were dropped because it would have been impossible to do an analysis on them. The second two categories were dropped due to the ambiguous nature of these arrangements. However, when an award of divided or hybrid custody or award to a third party was made contrary to a parent's request, then that was coded as a failure of the parent to obtain their desired custody result.

Table 1. Descriptives for Independent Variables

Attorney hired (% of cases)	
None	42.2
Mother only	9.2
Father only	13.6
Both	34.6
Age (mean)	
Mother	33.6
Father	37.1
Income (median annual)	
Mother	\$19,129
Father	\$38,752
Number of children (% of cases)	
1	58.3
2	26.7
3	11.7
4 or 5	3.4
Age of youngest child (mean)	
	8.6
Number of children (% of cases)	
	59.0%

Note: Income was missing for one or more parties in 64 cases. Median incomes are reported only for cases where income was present for both parties ($n=142$).

Frequencies for this combined custody outcome are shown in Table 2. Joint legal and shared physical custody is the most common outcome, ordered in about 30.1% of cases. Joint legal/mother primary physical and mother sole legal/mother primary physical are tied for the second-most common outcome with 22.8% of cases. Fathers are far less likely than mothers to get sole legal or primary physical custody, and when they do, they are more than twice as likely to get both sole legal and primary physical custody. Just 4.9% of custody outcomes were joint legal/father primary physical, and close to 12.6% were father sole legal/father primary physical.

Table 2. Custody Outcomes, Palmer (Alaska) Superior Court 2011-2012

Legal/Physical	Frequency	Percent
Joint/Shared	62	30.1
Joint/Mother	47	22.8

Mother/Mother	47	22.8
Joint/Father	10	4.9
Father/Father	26	12.6
Other	14	6.8
Total	206	100.0

Note: Other includes divided or hybrid custody awards and custody awarded to a third party.

Previous studies have generally focused on custody outcomes like those described above. There is, however, another dependent variable of interest: Was each party successful in achieving their goals? Prior studies frequently assume that parents seek to maximize custody of their children — that each parent seeks sole legal and primary physical custody. In our data, this was not universally true, especially for fathers. Table 3 shows initial custody requests and success rates by party. On average, mothers requested a higher level of custody than fathers. Mothers were far more likely (68.9% of cases) to request sole legal and primary physical custody than fathers (31.6% of cases). Fathers were nearly twice as likely to request joint legal/shared physical custody (51.5% of cases) compared to sole legal/primary physical custody (31.6% of cases).

Overall average success rates for mothers (38.4%) and fathers (35.0%) were not significantly different despite substantial differences in what the parties initially requested. Of note, mothers and fathers shared virtually the same success rate when requesting sole legal and primary physical custody for themselves. Table 3 also shows that mothers who requested joint legal/shared physical custody were far more likely to be successful (69.6%) than mothers who requested sole legal/primary physical custody (31.0%). But whereas fathers requesting joint legal and primary physical custody had a very low success rate (4.3%), mothers requesting joint legal and primary physical custody were successful over half of the time (51.4%).

Table 3. Initial Custody Requests and Success Rates by Party

Initial Custody Requested Legal/Physical	Mothers		
	Initial Request (<i>f</i>)	Percent Request	Success Rate (%)
Joint/Shared	23	11.2	69.6
Joint/Mother	35	17.0	51.4
Mother/Mother	142	68.9	31.0
Joint/Father	2	1.0	50.0
Father/Father	0	0.0	—
Other	4	1.9	0.0
Total	206		38.4
Initial Custody Requested Legal/Physical	Fathers		
	Initial Request (<i>f</i>)	Percent Request	Success Rate (%)
Joint/Shared	106	51.5	41.5
Joint/Mother	7	3.4	42.9
Mother/Mother	4	1.9	100.0
Joint/Father	23	11.2	4.3
Father/Father	65	31.6	30.8
Other	1	0.5	0.0
Total	206		35.0

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

In addition to looking at success rates of initial custody requests, it is also worth comparing initial filings between the two parents in the same case, since agreement on custody requests is a likely predictor of success. We found few cases with full agreement on both legal and physical custody in our sample of contested cases. Parties agreed on both legal and physical custody in 10.2% of cases. Parents were more likely to agree on legal custody (25.7%) than on physical custody (14.1%).

Our data also suggest no statistically significant connection between

legal representation and initial custody requests. Parties were more likely to be represented in divorce cases (about half of the time) than in unmarried custody actions (where mothers and fathers are each represented only about one third of the time), but there are no statistically significant differences in legal or physical custody outcomes by marital status.⁷⁴ Further exploratory bivariate analyses showed no statistically significant differences in initial requests for legal custody by legal representation status for mothers or fathers. There were also no statistically significant differences in initial requests for physical custody by legal representation status for mothers or fathers.

We seek to test the independent effects of representation and initial custody requests on custody outcomes and whether the final custody order matches what each party asked for. Our hypotheses are straightforward:

H1: Legal representation of a parent is positively associated with greater custody for that parent, after controlling for opposing parent representation and initial custody requests.

H2: Legal representation of the opposing parent is associated with lesser custody for the first parent, after controlling for the first parent's legal representation and initial custody requests.

H3: Legal representation is positively associated with a parent's success in obtaining a custody outcome that matches that parent's initial request, after controlling for legal representation and initial custody requests of both parties.

H4: Legal representation of the opposing parent is negatively associated with the first parent's success in obtaining a custody outcome that matches that parent's initial request, after controlling for legal representation and initial custody requests of both parties.

H5. Initial custody requests are associated with the success of parents. Parents who request sole legal/primary physical custody for themselves are less likely to be successful, while parents who request joint legal/shared physical custody are

⁷⁴ This result nears the traditional threshold but is heavily influenced by six cases where physical custody was awarded to neither parent (all of these parents were married). Chi-square tests of legal custody outcome by marriage status and physical custody outcome by marriage were both $p > .05$.

more likely to be successful regardless of legal representation of the parties.⁷⁵

Combined, H1 and H2 test custody outcomes and suggest that the greatest amount of custody is awarded where one party is represented and the opposing party is not represented. H3 and H4 (combined) test the impact of legal representation on each party obtaining their desired outcome, as measured by their initial custody request. H5 tests the impact of initial custody requests on the likelihood of parties obtaining their initial custody request. Because mothers are far more likely to request sole legal/primary physical custody than fathers (see Table 3), H5 tests whether this difference in initial requests impacts the ability of parties to be successful in obtaining what was initially requested.

Our hypotheses require multivariate techniques. At a minimum, our hypotheses require simultaneously controlling for legal representation and initial custody requests. Multivariate models are presented after bivariate analyses. We test H1 and H2 using multinomial logistic regression, and H3 through H5 using logistic regression. Both methods allow us to predict the probability of each outcome by representation while controlling for initial custody requests.⁷⁶

B. Bivariate Analysis

Bivariate analysis of legal representation and custody outcomes suggests a moderate relationship between the two, as shown in Table 4. Examining the cross-tabulation, there are few substantive differences in outcomes for cases with no attorneys and cases where both parties have attorneys. In cases where mothers are represented and fathers are not, mothers are more likely to receive sole legal and primary physical custody. In cases where fathers are represented and mothers are not, the most common outcome is joint legal and shared physical custody.

⁷⁵ Because of the relatively small number of cases, we are not examining situations where one parent requests that the other parent receive legal and/or physical custody.

⁷⁶ Details of our models are available in the Appendix. For a more general discussion of multinomial logistic and logistic regression, see J. SCOTT LONG & JEREMY FRIESE, *REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA* (3d ed. 2014).

Table 4. Custody Ordered by the Court, by Legal Representation of Parties

Custody Ordered: Legal/Physical	Legal Representation				Total
	None	Mother Only	Father Only	Both	
Joint/Shared	23	4	13	22	62
Joint/Mother	22	4	5	16	47
Mother/Mother	22	9	1	15	47
Joint/Father	5	—	—	5	10
Father/Father	10	1	8	7	26
Other	5	1	1	7	14
Total	87	19	28	72	206

$\chi^2 = 25.524, df = 15, p = .043, \text{Cramer's } V = .203$

Note: Other includes divided or hybrid custody awards and custody awarded to a third party.

Bivariate analysis of whether each party gets the custody arrangement they initially requested is shown in Table 5, and generally shows similar results. There are no statistically significant differences in mean success rates for mothers or fathers when neither, or both, have legal representation (each is approximately 33%). Mothers who are represented are significantly more likely to be successful than fathers who are not represented (73.7% vs. 21.1%). Fathers who are represented are also significantly more likely to obtain the custody arrangement they initially requested when mothers are not represented (53.6% vs. 28.6%).

Table 5. 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 request. Success is not mutually exclusive; both parties can be successful in their requests and both parties could also fail.

Table 6 shows the success rate by custody requested. Mothers were most successful when they requested joint/shared custody (69.6% success)

and were least successful when they requested mother/mother custody (31.0%). Fathers were most successful when they requested joint/shared custody (41.5%) and least successful when requesting joint/father custody (4.3%).⁷⁷

The importance of measuring legal representation as a four-point scale (none, mother only, father only, both) is clear in these bivariate analyses, as is the importance of the custody requested. From a theoretical standpoint, the need to measure legal representation of each parent in relationship to the other parent should be obvious. If legal representation has any impact on outcomes (see H1 and H2), we would expect it to be greatest when one parent is represented *and the other is not*. Empirically, in other analyses (not shown) we found no bivariate relationship between legal representation and custody orders when we measured representation of each parent as two separate dichotomous measures (one yes/no measure for each parent). In other words, the effect of legal representation for one party is only revealed when compared to the representation status of the other parent. Measurement and model specification is therefore crucial when analyzing the impact of legal representation.

Table 6. Success Rate (%) by Custody Requested and Party

Custody Requested:	Mother	Father
Legal/Physical		
Joint/Shared	69.6	41.5
Joint/Mother	51.4	—
Mother/Mother	31.0	—
Joint/Father	—	4.3
Father/Father	—	30.8
Other	—	—

Note: Success is defined as an outcome that matches the request. Success is not mutually exclusive; both parties can be successful in their requests and both could also fail. Success rates are not shown where fewer than 10 cases exist. “Other” includes divided or hybrid custody awards and custody awarded to a third party.

⁷⁷ These comparisons exclude instances where fewer than 10 cases exist, as does Table 6. For example, there were only four cases where the father requested mother/mother custody.

In summary, our bivariate analyses show that what matters is not whether any one parent has legal representation independent of the other parent. Instead, what matters is the joint distribution of legal representation of both parents. Consistent with H1 and H2, when one parent was represented and the other parent was not, the represented parent held an advantage in obtaining a higher level of custody. That advantage was expressed differently for mothers and fathers. For mothers, this meant a higher likelihood of sole legal and primary physical custody being awarded, relative to other outcomes. For fathers, this meant a higher likelihood of joint legal and shared physical custody, as compared to the mother obtaining sole legal and primary physical custody. Consistent with H3 and H4, success rates appear to be associated with representation of the parties, at least at the bivariate level, before controlling for initial requests. Consistent with H5, each parent's success rate is associated with initial requests. Based on these bivariate analyses, we have good reason to continue with multivariate analyses that will allow for simultaneous estimation of the effect of legal representation and initial custody requests.

C. Does the Presence of Attorneys Change Custody Outcomes After Controlling for Initial Custody Requests?

We estimated a multinomial logistic regression model of custody outcomes. For this analysis, it was necessary to combine joint legal custody/primary father physical custody and other custody arrangements (such as divided or hybrid custody or where custody is awarded to a third party) due to the relatively rare occurrence of the former in our data.⁷⁸ Legal representation (none, mother-only, father-only, both) and whether the outcome was requested in the initial custody filings were independent variables in the models. This allows us to describe the change in predicted probabilities for the different outcomes by representation while adjusting for the desires of the parties.⁷⁹

Table 7 shows the predicted probability of obtaining each outcome

⁷⁸ We recognize that substantively joint/father custody is very different from these other custody arrangements. However, we lacked statistical power to model these two outcomes separately, leaving us with two options: 1) combine the two outcomes; or 2) drop the cases from analysis. We chose the former.

⁷⁹ See LONG & FREESE, *supra* note 76, at 162. All other variables (mother's age, father's age, number of children, age of youngest child, mother's income, and father's income) were not significant and were dropped from our models. Technical notes and coefficients are available in the Appendix. As a general matter, reporting of predicted probabilities (and statistical significance of change thereof) is more useful than reporting coefficients or odds ratios given the nonlinear nature of logistic regression models.

by representation of the parties controlling for whether the initial custody requests by each parent matched the outcome. The probability of a joint legal/shared physical custody outcome when no parties were represented was 0.26, or about one-quarter of cases, independent of the initial custody requests. When only mothers were represented, the probability of joint legal/shared physical custody was 0.21. The difference between the probability of joint legal/shared physical custody when no party is represented (0.26) and when only mothers are represented (0.21) is 0.05, and is not statistically significant at $p < .10$. When only fathers were represented, the probability of a joint/shared custody outcome was 0.46, a difference of 0.20 from when no party is represented. This difference is significant at the $p < .10$ level. Examination of Table 7 reveals that, after controlling for initial custody request by the parents, situations in which only the father is represented yielded a statistically significant increase in the probability of joint legal/shared physical custody and decrease in the probability of mother sole legal/mother primary physical custody. This is the only category of legal representation that yielded statistically significant results as compared to neither parent having legal representation.

Table 7. Predicted Probabilities of Custody Outcomes by Representation, Controlling for Initial Custody Requests

Outcome	Representation				Overall Probability of Outcome
	None	Mother Only	Father Only	Both	
Joint/Shared	0.26	0.21	0.46†	0.31	0.30
Joint/Mother	0.25	0.21	0.18	0.22	0.23
Mother/Mother	0.25	0.47	0.04*	0.21	0.23
Father/Father	0.12	0.05	0.29	0.10	0.13
Other	0.12	0.05	0.04	0.17	0.12

Note: Based on multinomial logistic model of outcomes; model controls for initial custody requests of parents. Parent's income, age, number of children, and children's age were not significant and were dropped from the model.

† Difference between neither party having an attorney significant at $p < .10$

* Difference between neither party having an attorney significant at $p < .05$

H1 (legal representation of a party is association with greater custody) and H2 (legal representation of opponent is associated with lesser custody) are therefore partially confirmed. The results of our multinomial

logistic regression of custody outcomes suggest that attorneys matter *only* for fathers, and *only* when mothers are not represented. We urge caution in interpretation of these results. Our data lacks the degrees of freedom needed to fully interact all combinations of custody requests in the model, and some combinations of cases are quite rare in our data. For example, cases where only the mother is represented *and* where the mother failed to obtain the desired custody arrangement occur just five times in our data. This explains why there is no statistically significant difference in the probability of a mother legal or mother primary physical outcome between cases with no attorneys (0.25) and cases where only the mother is represented (0.47). We lack sufficient statistical power to detect a difference between these probabilities despite a large substantive difference (0.22). Additional analyses (not shown) suggested that the model of custody outcomes was also sensitive to both model specification and measurement of the variables in the model.⁸⁰ One finding was consistent regardless of modeling approach used: We found no statistically significant differences in custody outcomes between cases where there were no attorneys and cases where both parties were represented. We have high confidence in that finding, given the findings in the next section.

D. Are Represented Parties More Likely to Succeed After Controlling for Their Initial Request?

Our examination of initial custody requests (Table 3) makes clear that maximum custody (sole legal/primary physical) is not necessarily the outcome each party desires. Mothers are particularly likely to request mother/mother custody, while fathers are more likely to request joint/shared custody. We use logistic regression to model success separately for mothers and fathers. Representation and whether each party asked for sole legal/primary physical custody were the independent variables.

Table 8 shows predicted probabilities of success after controlling for initial custody requests. Note that these two success measures are not necessarily mutually exclusive — both parents (or neither) could be successful in any given case. In these models, initial custody requests were entered as two dichotomous measures (did the mother request sole legal / primary physical custody? and did the father request sole legal / primary physical custody?). We find that mothers are statistically significantly more likely to be successful in obtaining their initial custody request when only

⁸⁰ Sensitivity to model specification (i.e., the substantive results change depending on what variables are included in the model) could persist with larger sample sizes if certain combinations remained rare in the larger sample.

they are represented (0.74) than when no party is represented (0.38), only the father is represented (0.27), or when both parents are represented (0.33). Similarly, the difference in a father's success in obtaining his initial custody request is significant when comparing situations where only fathers are represented (0.54) to when no parents are represented (0.32).

Table 8. Success Rates by Representation, Controlling for Initial Custody Requests

	Representation				Overall Probability of Success
	None	Mother Only	Father Only	Both	
Mother Success	0.38	0.74**	0.27	0.33	0.38
Father Success	0.32	0.21	0.54*	0.35	0.35

Note: Based on logistic models of successfully obtaining custody contained in initial filings of each party; model controls for initial requests of parties. Party's income, age, number of children, and children's age were not significant and were dropped from the model.

* Difference between neither party having an attorney significant at $p < .05$

** Difference between neither party having an attorney significant at $p < .01$

E. Summary

Prior studies provide data separately on the effect of legal representation and on initial custody requests, but not on the interaction between the two. Through our five hypotheses, we have sought to test this interaction. We found qualified support for H1 (legal representation is positively associated with greater custody for that parent) and H2 (legal representation of the opposing parent associated with lesser custody for the first parent). In our models of custody outcomes, legal representation mattered — but only for fathers, and only when mothers were not represented. We found support for H3 (legal representation of a parent is positively associated with achieving a parent's initial custody requests) and H4 (legal representation of the *opposing* parent is negatively associated with achieving a parent's initial custody requests), but only when the other party was not represented. This held for both mothers and fathers. We also found support for H5 (parents requesting sole legal/primary physical custody are less likely to be successful than parents requesting joint legal/shared physical custody). The type of initial custody requests is associated with success rates.

Our findings suggest there is value in separating custody outcomes

from the success of each party when analyzing the importance of legal representation. This should be a methodological concern for future studies. Careful consideration should be given to what, exactly, is being measured. Analysts should not assume that maximal custody is the desired outcome by the parties. Our analysis found large differences in initial custody requests between mothers and fathers, with mothers requesting sole legal/primary physical custody far more often than fathers.⁸¹

Substantively, we consistently find no difference between cases without attorneys and cases where both parties have legal representation. This holds both for custody outcomes and for the probability of each party's success in obtaining what the party requested initially. This finding is by far the most robust across alternative modeling strategies, model specifications, and methods of measurement. Our other findings regarding representation are more tentative. We found that joint legal/shared physical custody outcomes are more likely when only fathers are represented, and that father sole legal/father primary physical outcomes are also more likely when only fathers are represented. We found no difference between cases with no attorneys and where only mothers are represented in terms of outcomes, but the non-significant difference is likely due to a lack of statistical power. This is furthered by our logistic models of success: mothers are more successful in getting the custody arrangement in their initial request when only mothers are represented.⁸²

Conclusion and Implications for Access to Justice

There are a few main lessons that can be taken from our analysis. The first is that legal representation does matter if a parent wants to achieve his or her desired custody outcome and that desired outcome differs from what the other parent is requesting. But legal representation only matters if one parent is represented and the other is not. This effect is confirmed for fathers and suggested for mothers, though not confirmed because of limitations with the data. When both parents are represented, the effect of legal representation cancels out. Neither parent need necessarily hire an attorney, but if one parent hires an attorney then the other parent is better

⁸¹ We suggest measuring both custody outcomes and success in obtaining what was initially asked for to allow explicit modeling of each rather than relying on assumptions. We also suggest future researchers more directly measure desires of the parties in prospective studies. It is possible that parties to a custody dispute include *what they think they can get* in their initial custody requests, not *what they want*.

⁸² Compared to logistic regression, multinomial logistic regression requires more cases to find a statistically significant difference between two predicted probabilities.

off hiring an attorney as well to protect his or her custody interests.

The implications of this from an access to justice perspective are complicated. The initial inclination of those advocating for legal representation in custody cases is to value the presence of an attorney regardless of the interaction effects with whether the other parent is also represented. However, if the expected custody results are essentially the same – at least from the perspective of achieving one’s initial custody requests – in situations where both parents are represented as where neither parent is represented, then Civil Gideon advocates may need to refocus their efforts or change the arguments they are making. To be sure, there could be other benefits to legal representation in custody cases than the outcome, such as perceptions of fairness by the litigants or compliance with custody orders.⁸³ Nonetheless, our results suggest that perhaps the best way to ensure fairness in the custody process is to promote means for an unrepresented parent to be provided with legal representation if the other parent hires an attorney.

There are a few possible ways to accomplish this. Legal aid or pro bono representation could be promoted in these situations.⁸⁴ Bar associations could encourage the use of unbundled legal services for those who are only able to afford limited legal representation.⁸⁵ Judges could be more willing to order the parent with greater resources to pay for an attorney for the other parent.⁸⁶ All of these could help counteract the advantages of single-parent representation.

Another lesson from our analysis is that despite law suggesting

⁸³ See, e.g., Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice*, 40 FAM CT. REV. 36, 37 (2002).

⁸⁴ Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 41 FORDHAM URB. L.J. 1227, 1249 (2014).

⁸⁵ See generally Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY’S J. LEGAL MAL. & ETHICS 166 (2012) (discussing that this solution, though not without its challenges in the custody context and full representation throughout the proceeding, would almost certainly be better than for only limited motions or hearings).

⁸⁶ *Flores v. Flores*, 598 P.2d 893 (Alaska 1979); *In the Matter of Alaska Network on Domestic Violence and Sexual Assault*, 264 P.3d 835 (Alaska 2011). Alaska has rather unique precedent whereby if one parent is represented by the Alaska Legal Services Corporation (subsequently extended as well to the Alaska Network on Domestic Violence and Sexual Assault) and the other parent is financially eligible for representation by the Alaska Legal Services Corporation but cannot be represented for conflict reasons, the court will appoint an attorney for the other parent at public expense. No other state appears to have followed this lead.

equal time with both parents is the desired outcome, initial custody requests are not for equal time — and mothers on the whole ask for a greater percentage of custody than fathers. However, mothers have a much lower success rate in requesting *and obtaining* sole legal and primary physical custody (31.0%) than in requesting and obtaining either joint legal/primary physical (51.4%) or joint legal/shared physical (69.6%) custody.⁸⁷ This suggests that even though mothers are awarded both sole legal and primary physical at higher rates than fathers, mothers are requesting sole legal and primary physical custody at a high rate relative to their likelihood of success. This may in part be a strategic decision in their initial requests, but it may also signal custody expectations on the part of the mother that are not in line with the reality of what courts are likely to order. Family law advocates may need to be mindful of counseling mothers (and to some extent fathers) of likely custody outcomes to mitigate potential widespread dissatisfaction with the legal system.

The final conclusion to draw from the case study combines the first two – if one parent disagrees on custody with the other parent and wants to achieve his or her desired custody result, then that parent had better hire an attorney and hope that the other one does not. In many ways, this is the reverse of the stated desires of the Civil Gideon movement. Having both parents represented will reduce the chances of either parent obtaining their desired initial custody request, at least as compared to a single parent being the only represented party. Whether this is ultimately better for the child(ren) involved cannot be determined from the present study, but there is some literature suggesting children are best served when custody disputes are resolved with the assistance of attorneys.⁸⁸ From each parent's perspective, though, unequal representation is by far the better scenario . . . as long as the other parent is the one who is unrepresented.

This study and these conclusions ultimately reveal a fundamental tension about legal representation. There is a basic belief that judges should make the same custody determinations regardless of whether a parent is represented by legal counsel or not. At the same time, there is the intuition — particularly among attorneys and their clients — that legal representation matters, and that parents need to hire an attorney to obtain their desired

⁸⁷ See Table 3.

⁸⁸ See, e.g., Amy Koel et al., *A Comparison of Joint and Sole Legal Custody Agreements*, in *IMPACT OF DIVORCE, SINGLE PARENTING AND STEP-PARENTING ON CHILDREN*, (E. Mavis Hetherington & Josephine D. Arasteh eds., 1988) (suggesting that well-written, complete custody and support agreements could contribute to stability in post-divorce families by reducing interparental conflict and relitigation of disputes).

custody result. As the results of this study demonstrate, legal representation only matters where only one parent is represented and the other is not. This creates somewhat of a prisoner's dilemma for the parents. The most cost-effective route may often be for neither to hire an attorney. But if one parent hires an attorney, then it behooves the other parent to do so as well to protect their custody interests and cancel out the effect of legal representation of the other parent, even if all this does is cost both parents a significant amount of money and return the likely custody result to a similar outcome as if neither parent were represented.

Methodological Appendix

The custody outcome is not ordered and has more than two possible outcomes. Multinomial logistic regression is an obvious choice for our custody outcome. The interpretation of such models is complex. Briefly, multinomial logistic models simultaneously estimate $J - 1$ equations, where J is the number of possible outcomes. One of the outcomes is set as a base outcome, to which other outcomes are compared. Logistic regression is the obvious choice for our binary measures of success in obtaining the custody requested in initial filings. Below, we report coefficients and other statistics for our multinomial regression and both logistic regressions, but in general interpretation of nonlinear models should not be attempted from regression coefficients alone.⁸⁹ As computing power has increased and rendered the once-tedious task of calculating predicted probabilities trivial, the preferred interpretation method is to interpret such models based on predicted values of the outcomes, as we have done in the text.

Table 1 App. 1A. Multinomial Logistic Coefficients

	Custody Outcome			
	Joint / Mother	Mother / Mother	Father / Father	Other
Representation				
Mother Only	0.05 [-1.87, 1.97]	0.03 [-1.85, 1.91]	-0.28 [-2.75, 2.18]	0.35 [-2.33, 3.04]
Father Only	-1.07 [-2.47, 0.34]	-3.13* [-5.55, -0.71]	0.47 [-0.76, 1.69]	-1.58 [-3.88, 0.71]
Both	-0.05 [-1.11, 1.02]	-0.23 [-1.49, 1.02]	-0.44 [-1.61, 0.72]	0.51 [-0.70, 1.72]
Mother's Initial Request Matches Outcome	0.59 [-0.51, 1.69]	3.81*** [2.30, 5.32]	-15.8 [-1705.50, 1673.89]	-2.06 [-4.30, 0.18]

⁸⁹ J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA (3rd ed. 2014).

Father's Initial Request Matches Outcome	-3.60*** [-4.91, -2.29]	-3.30*** [-4.72, -1.87]	0.35 [-0.77, 1.48]	-3.42*** [-5.02, -1.82]
Constant	0.89* [0.08, 1.70]	-1.25 [-2.61, 0.10]	-0.79 [-1.90, 0.32]	0.43 [-0.49, 1.35]
N	206			
pseudo R-sq	0.337			
BIC	550.49			
Log likelihood, null model	-318.76			
Log likelihood, full model	-211.31			

Joint / shared is reference outcome

95% confidence intervals in brackets

* p < 0.05, ** p < 0.01, ***p < 0.001

Table 1 App. 1B. Logistic Regression Models of Each Party's Success

	Mother's success	Father's success
Representation		
Mother only	1.53** [0.37, 2.69]	-0.64 [-1.84, 0.56]
Father only	-0.42 [-1.42, 0.58]	0.93* [0.03, 1.83]
Both	-0.2 [-0.88, 0.49]	0.13 [-0.54, 0.79]
Mother requested mother / mother	-0.91** [-1.56, -0.26]	-0.35 [-0.98, 0.29]
Father requested father / father	-0.93* [-1.65, -0.22]	-0.37 [-1.04, 0.30]
Constant	0.38 [-0.26, 1.02]	-0.4 [-1.04, 0.23]
N	206	206
pseudo R-sq	0.108	0.034
BIC	276.64	289.61
Log likelihood, null model	-137.14	-133.31
Log likelihood, full model	-122.34	-128.82

95% confidence intervals in brackets

* p < 0.05, ** p < 0.01, ***p < 0.001