



Physical Custody of Children in the Province of Québec: a Quantitative Analysis of Court Records

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With the increasing number of divorces and separations, the question of the physical custody of children in a post-breakup context has become a major issue for legal and social worker professionals, as well as for parents and the groups that represent them. In the Province of Québec, both parents have legal custody. They likewise have, with respect to their children, a right and a duty regarding custody, supervision, and education. They must also nourish and provide care for their children. Even if physical custody is granted to one of the parents after the separation, each parent conserves the right to supervise their care and education¹. While it is important not to deny the importance of these principles, we must recognize that the debates about post-breakup parenting focus on the daily supervision of children and on the respective attributions of the mothers and fathers. Since the 90s, the sharing of the physical custody of children between the two parents has given rise to numerous discussions among specialists. The notion of the child's best interest, which constitutes, according to Québec's Civil Code, the most important criterion when making decisions about children's physical custody and access rights, has been clarified by the courts² but also widely discussed by psychologists and practitioners (for an international state of the art, see Nielsen, 2011). The present text does not take a direct part in this debate. Rather it draws a quantitative and objective portrait of children's physical custody as it currently occurs in the Province of Québec and asks the following questions. Is shared physical custody really

1 Articles 33, 600, 599, 605 of Civil Code of Québec. A judgement of the Appeal Court of Québec on April 6, 2009 by Judge Dalphond applied principles concerning the legal custody of separated parents and routine decisions (Family Law – 09746 2009 QCCA 623). He noted that legal custody belongs to both parents and that the fact that a judgment grants one parent the sole physical custody of a child does not grant that parent exclusive legal custody. In reality, decision-making responsibility concerning daily routine questions comes with the child, but the parent who has been granted child custody does not have exclusive authority for decisions concerning, for example, medical treatment, the choice of a school, or participation in a trip abroad. The other parent continues to have legal custody and, as such, has the right to participate in important decisions. Judge Dalphond also emphasized that the philosophy underlying the Civil Code is to encourage rather than discourage the participation of the non-custodial parent, since the latter (discouragement) might, in the long term, push this parent to lose interest in the child who, in turn, would lose a parental figure. [note written by the ministère de la Justice du Québec]

2 See in particular, Droit de la famille (family law) – 1456, 1991 CanLII 3133 (QC CA); Young c. Young, [1993] 4 R.C.S. 3; Droit de la famille – 2955, 1998 CanLII 12718 (QC CA); Droit de la famille – 073502, 2007 QCCS 6601.



becoming much more common, and if so, to what extent? And which parental and child characteristics explain a preference for one type of physical custody or another?

Different approaches to children's physical custody

Researchers can turn to several types of resources to answer these questions. Those who focus on the judicial dimension of physical custody decisions study the jurisprudence of these disputes or question judges who hear these cases. While this approach allows us to take an in-depth look at the arguments and ways of thinking employed by legal professionals, the approach is nonetheless limited regarding the range of situations it can consider: currently, and we will come back to this, only a minority of physical custody arrangements are decided by judges. Other researchers consequently favour data that documents real life situations, whether

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or not they were decided in court. In Canada, the National Longitudinal Survey of Children and Youth (NLSCY) has made it possible to study children's physical custody over several years.³ Based on data collected by the NLSCY between 1994 and 1999 from 758 families, Heather Juby, Céline Le Bourdais, and Nicole Marcil-Gratton (2005) suggested that shared physical custody

³ In Québec, the Québec Longitudinal Study of Child Development (QLSCD; in French, Étude longitudinale du développement des enfants du Québec, ÉLDEQ) also enables this type of study (see <http://www.jesuisjeserai.stat.gouv.qc.ca>).





occurs more frequently when it is not the result of a judicial decision. Nonetheless, these declarative data cannot document the decision-making process in matters of physical custody. Was it an agreement between the parents? Was the agreement reached with or without the help of lawyers and mediators? Did a judge reach this decision after persistent disagreements? To answer this type of question, legal sources would seem to be indispensable. Similar to the analysis conducted by Renée Joyal between 1995 and 1998 (Joyal, 2003), our analysis is based on the quantitative use of a judicial database.

The database was put together by the ministère de la Justice du Québec (MJQ), under the responsibility of Marie-Hélène Filteau, an analyst in the orientation and policy department whom the department made available to us as part of a project supported by CURA – Parental separation, Stepfamily living.⁴ The database comprised 2,000 court orders for child support⁵ that were handed down in the Province of Québec in 2008. Random sampling among the 42 courthouses where the provincial superior court sits ensured the representativeness of the data over the whole province. The choice to study physical custody by examining judgments on alimony might seem surprising. In reality, it provides access to a large range of situations, from those where physical custody was decided by the court (at the same time as alimony) to those where the type of

physical custody was only compiled in order to calculate child support (see box below), without it ever having been discussed in court. In other words, this source allowed us to compare the different ways of determining physical custody based on the characteristics of the proceedings, parents, and children.

The Québec model for the determination of child support payments⁶

In compliance with the Québec Civil Code, the Québec model for determining child support (in effect as of May 1, 1997) considers the child's access to their two parents when calculating child support. Shared physical custody is a situation where each parent has at least 40% of the custody. When this is so, all of the custody is fully considered in the calculation of child support. When it is a question of sole physical custody and the non-custodial parent exercises a "prolonged" access right (representing between 20% and 40% of physical custody time), the support payment must be readjusted to acknowledge the costs incurred by the non-custodial parent when the children are with him (our translation).

Maternal custody is still more common but shared physical custody and paternal custody are clearly progressing

The database of court orders made in 2008 is all the more interesting in that it can be compared with a database of court orders put together ten years earlier by the ministère de la Justice du Québec (MJQ). After having set guidelines for child support, the MJQ established a first sample

4 We would like to thank Arnaud Sawadogo, a master's student in public affairs, for his contribution to the analysis of this database, as well as Dominic Drouin, a master's student in law, for his research in family jurisprudence. This research is part of a larger project devoted to family justice in Québec and France (www.ruptures.ulaval.ca).

5 Of the 2,000 court orders, 942 were related to the first proceedings following a break-up, and 1,058 to a review of a previous judgment. All of them were "substantive" orders, in other words, they were not interim orders or judgments.

6 Box written by ministère de la Justice du Québec (MJQ). See also: <http://www.justice.gouv.qc.ca/francais/publications/generale/modele.htm> (consulted October 10, 2013).



comprised of child support orders rendered in 1997 and 1998 (MJQ, 2000). The comparison between these two sources allowed us to measure the evolution in physical custody issues at a ten year interval (Table 1).

Table 1: Custody type in 1998 and 2008

Custody type	Orders, 1998	Orders, 2008
Mother	79%	60,5%
Shared	8,1%	19,7%
Sole physical custody granted to each parent	7,2%	5,3%
Father	5,4%	13,5%
Third person	0,2%	0,9%
Other	0,1%	0,1%
Total	100%	100%

Source : banque d'ordonnances de pension alimentaire sur le fond (database of substantive child support court orders), MJQ. N = 1,503 in 1997-1998; N = 2,000 in 2008.

The evolution of custody is noteworthy: while sole maternal custody was still the majority solution at six files out of ten in 2008, it was clearly less common than at the end of 1990s where it represented eight files out of ten. Shared physical custody – a situation in which each parent has physical custody of the child between 40% and 60% of the year – was practised by one family out of five in the sample, and even one in four if we include cases of sole physical custody granted to each parent (where not all brothers and sisters live with the same parent). Sole paternal custody is also steadily increasing, and now concerns almost one file in seven.

Physical custody disagreements are uncommon

We would be mistaken to limit ourselves to a supposed change in the judges' attitude in our attempts to explain this increase in shared

physical custody and sole paternal custody. Indeed, court files showed that there was only a small minority of the cases in which the judges had to resolve a custody conflict. In a large majority of the cases, the physical custody arrangement was arrived at without legal intervention, either because the parents explicitly agreed or only one parent made a request (Table 2).

Table 2: Physical custody: a mostly undiscussed issue

Physical custody requests	Percentage
No request*	22,2%
Request by one parent	44,9%
Same request by both parents	25,2%
Two different requests	7,7%
Total	100%

* These situations almost exclusively involved requests for an alimony review, since the custody arrangement set during the initial proceeding was not contested.

Source : banque d'ordonnances de pension alimentaire (database of child support court orders), MJQ, 2008. N=2000.

In the sample, the most common situation (45% of files) was where only one parent made a custody request, followed by that in which both parents made the same demand (25% of files). The cases in which the two parents put forward different requests only represented 7.7% of the total. This observation is not new: the 800 files from the two judicial districts analysed by Renée Joyal more than 10 years before our analysis already suggested that judges were only likely to arbitrate physical custody disputes in 15% of the cases (Joyal, 2003: 271). A comparison that suggests that custody conflicts, which were already in the minority in the 1990s, were even rarer in the 2000s. The development of family mediation, the costs and waiting times for access to the courts, as well as the different options available to the parents during the procedure are all hypotheses to consider if we are to understand



this phenomenon which, furthermore, is not restricted to the Province of Québec (Bessière, Biland, Fillod-Chabaud, 2013).

To have custody, you have to ask for it

It would thus be inappropriate in our analysis of how children's physical custody is determined to only examine cases where there was disagreement. Instead, it would be more fitting to study how fathers and mothers express – or not – their preferences. On this note, there were sizable differences between the men and women. In short, during the legal proceedings, the mothers put more effort than the fathers into obtaining the physical custody of their children. When only one of the two parents made a physical custody request, it was more often the mother (69% of files). Overall, in more than one file out of two, the father did not request to have physical custody of his children, as compared to one file out of three where the mother refrained from doing so. When the mother made a request and the father made none, sole maternal custody represented the large majority (81.5% of these files).⁷ Conversely, shared physical custody was the most common solution when there was either a double request or agreement between the two parents. In these files, shared physical custody and sole physical custody granted to each parent almost reached, when combined, the same proportion as sole maternal custody. Together, the two represented 41% of the files with a double request or agreement between the two parents, whereas sole maternal custody only reached 47%. When the parents disagreed and asked for sole physical custody, sole paternal custody and shared physical custody were likewise more common

⁷ The situations in which court orders for maternal custody were the most common were, as might be expected, those in which the two parents agreed to grant the mother sole physical custody (99% of the sole maternal custody orders in these cases).



than on average, representing respectively 6 and 7 of the 23 files where the father requested sole physical custody and where the mother made another request. Indeed, the greater prevalence of maternal custody ensued above all from the fathers' lower involvement in obtaining physical custody, even though they asked for it more often than in the past.



Shared physical custody is more common when the parents are well-off

The gender-based differences also combined with differences in social position and, more precisely, in income.⁸ It was in low-income families that single or no requests were the most common (81% of the files in the lowest income quartile⁹ as compared to 65% on average). Conversely, agreement about physical custody was more common when the parental income was higher (45% in the richest quartile as opposed to 28% on average). The correlation between income and physical custody requests was particularly strong among the men: 70% of the poorest fathers¹⁰ made no physical custody request as opposed to 41% of the richest fathers; 5% of the poorest fathers asked for shared physical custody as opposed to 23% of the richest fathers. Consequently, the increase in paternal income was associated with a considerable decrease in maternal custody (-27 points between the first and fourth quartile), with shared physical custody increasing to a similar extent.

The influence of income was quite statistically robust. Analyzing the determinants of physical

8 This analysis of income looked at 1,682 files out of 2,000, since the income of one of the two parents was not provided in the other 318 files.

9 Parents whose total income (of both the mother and father) represented the poorest quartile of the sample of 1682 files.

10 The lowest income quartile for the sample of 1,807 files mentioning the fathers' income.

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custody through logistic regression confirmed that there was an independent effect of income on physical custody: when all the other variables influencing physical custody were controlled for,¹¹ shared physical custody was more likely to increase as the parents' income increased and in comparison to sole maternal custody. These results agree with previous results drawn from Québec, American, and French data (Juby, Le Bourdais and Marcil-Gratton, 2005; Donnelly and Finkelhor, 1993; Guillonneau and Moreau, 2013). They suggest that the present-day encouragement to share parenting responsibilities has not been equally incorporated by the different social classes, particularly with respect to the costs associated with shared physical custody (large enough residence to lodge children, equipment, etc.).

More shared physical custody and paternal custody with children over six years old and from bigger families

The children's characteristics were another set of determinants that also counted. For example, maternal custody decreased as the children grew older. The older the oldest child was, the less the children lived exclusively with their mother (80% for those under 6 years old, 51% for those from 12 to 18) and the more they were in shared physical custody or in sole physical custody granted to each parent (from 16% to 30%) or living with the father (3% to 19%). In families composed of several children, sole physical custody with the mother was likewise less frequent; either all the children alternated between their parents' homes (shared physical custody) or some of the children lived with their father and the others with their mother (sole physical custody granted to each

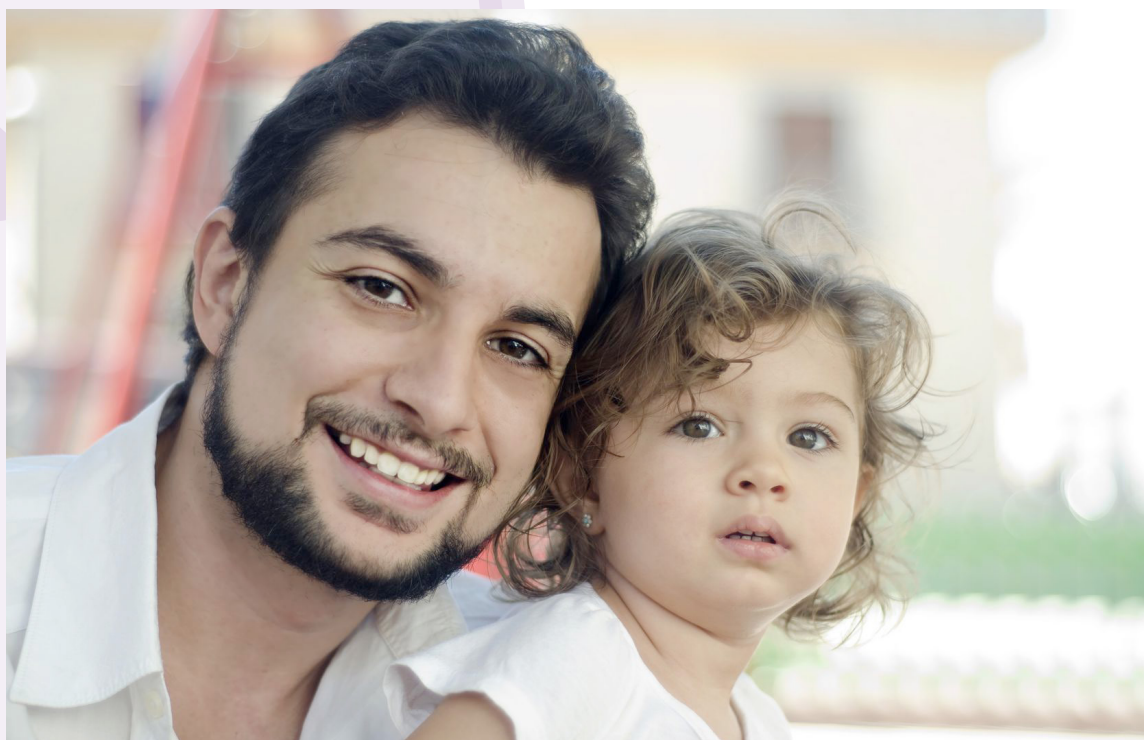
11 In the model summarized here, we considered the following variables: matrimonial status, number of children, age of the oldest, type of judgment (initial or under review and, consequently, contested or not), represented by a lawyer, request or not by each parent for custody, parental income, and difference in income between the two parents.



parent). Together, these two types of physical custody reached 32% in files involving sibships of at least three children as opposed to 16% in files with a single child.

This qualitative analysis of how the physical custody of children was determined in separations that went to court confirms an idea that is now commonly held in the Province of Québec: shared physical custody has definitely advanced since the late 1990s; what is less discussed however is that sole paternal custody has also advanced. We must not however see this evolution as a dramatic change in children's physical custody, since sole maternal custody is still the main choice, in particular because several fathers do not ask for physical custody. Nonetheless, those who do so are more numerous than in the past, a tendency which deserves to be documented in future studies, as do the social differences in the choice of parenting roles. In this regard, a

more precise examination of women's situations would be necessary, as other studies have shown that women's participation in the labour market, in well-qualified and full-time jobs, is a factor that favours shared physical custody (Juby, Le Bourdais and Marcil-Gratton, 2005; Bessière, Biland and Fillod-Chabaud, 2013). According to these same studies moreover, the sharing of child rearing between the father and mother before the separation is a significant predictor of children's physical custody after the separation. Furthermore, disparity in child-rearing does not disappear with shared physical custody: in France, women continue to be responsible for the greater part of the children's educational, hygiene, and medical needs and often pay for the associated costs (Cadolle, 2011). Accordingly, the care taking role in a post-breakup context reveals pertinent aspects of the remodelling of class and gender relationships but also of persistent structural inequalities.



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