

**Misrepresentation of Gender Bias in the  
1989 Report of the Gender Bias  
Committee of the Massachusetts  
Supreme Judicial Court**

by

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## Misrepresentation in the Report of the Gender Bias Committee of the Massachusetts Supreme Judicial Court

A common misperception is that fathers are granted sole or joint physical custody 70% of the time when they request it. The Ann Landers column responded to one father, "you are wrong when you say fathers have difficulty gaining custody. Recent studies have found that fathers who fight for custody win sole or at least joint custody in 70 percent of the cases<sup>1</sup>." The statistic is regularly cited in newspapers all across the country, from Washington State<sup>2</sup> to Massachusetts<sup>3</sup>, and even up in Canada<sup>4</sup>. It has been cited by law professors at prestigious universities<sup>5</sup>. It is even cited in a manual for lawyers published by the National Center on Poverty Law<sup>6</sup>. It appears on numerous websites, including that of N.O.W<sup>7</sup>. This misleading statistic appears to be one of the standard arguments against joint custody.

This statistic would seem to imply that the reason fathers don't get custody is that they're not interested. In this paper, I will demonstrate that the statistic means nothing of the sort. I will further demonstrate that the very same data from which this 70% claim was derived also supports the following statement:

***The rate at which mothers' requests for sole custody were honored is 65% higher than the comparable rate for fathers' requests.***

There is a legitimate argument that in the prevailing legal climate, the deck is so stacked against fathers that the only ones who do seek sole custody are those who have extraordinarily good cases, and therefore constitute a self-selected non-representative sample. This would be subject matter for an entire study by itself, and is unfortunately beyond the scope of this paper. The focus of this paper is the Massachusetts Judiciary's use of statistics in a fashion consistent with Mark Twain's quip, "There are three kinds of lies: lies, damned lies, and statistics!"

Where exactly did the 70% factoid come from? In 1989, the Massachusetts Supreme Judicial Court's Gender Bias Committee (SJC-GBC), co-chaired by Justice Ruth Abrams of the Mass. SJC, released their report which included the statement, "Refuting complaints that the bias in favor of mothers was pervasive, we found that fathers who actively seek custody obtain either primary or joint physical custody over 70% of the time."<sup>8</sup> In support of this claim, they cite the Middlesex Divorce Research Group (MDRG) Relitigation Study<sup>9</sup>. Note that this study was particularly difficult to locate, since the SJC-GBC's report contained no information on where the study was published. However their omission proved beneficial in the long run, since in tracking down the MDRG study, I located and had the opportunity to speak with one of the study's authors.

In the MDRG study, the only data even remotely relevant to the SJC-GBC's claims is in a single table in the study, Table 4.4, "Legal Custody Arrangements Requested and Granted".<sup>10</sup> The study's author has told me that the data do not demonstrate the court's preference for one parent over the other in custody requests, and that the research was not designed to address the question of how frequently a parent's request was honored.<sup>11</sup> **So we start off with the author of the study essentially saying that the data cannot be used to support the SJC-GBC's claims.**

To understand the data, it is important to keep in mind the distinction between legal custody and physical custody. Unfortunately in direct contradiction to the SJC's claims that the statistic applies to physical custody, the Middlesex Divorce Relitigation Study gave full data on legal custody only, **not physical custody**.<sup>12</sup>

Based on a statement in a later paragraph of the study, physical custody can be inferred for some, but not all of the columns of data.<sup>13</sup> This is explained in greater detail below. Just to give you some idea of the complexity of getting useful information out of this report:

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1) The data compares the custody request at the time the divorce papers were filed with the custody granted by the court at the divorce. This is not terribly useful because the custody request may be modified after the initial filing. The table even has a column labeled "No request" which I initially thought sounded absurd. Could this possibly mean the divorcing parents were saying, "We don't care who gets custody"? In fact there is a sensible explanation. All it means is that no request was made at the time of the initial divorce filing. The request was made later.

If the goal is to determine whether custody decisions demonstrate court bias in favor of mothers or fathers, a more useful measure would be to compare the most recent custody request made prior to the granting of the divorce (i.e. the request the judge was actually considering rather than the first custody request made) vs. the custody granted by the court at the divorce. Unfortunately, I don't have access to that data. Nor do I know whether it even exists.

2) The data only deals with **legal** custody<sup>14</sup>, not **physical** custody as claimed by the SJC-GBC<sup>15</sup>. However two paragraphs after the table, the following sentence appears: "In all cases, if a parent was granted sole legal custody, that parent also received sole physical custody."<sup>16</sup> So we can infer physical custody from the "Mother Legal Custody Granted" and the "Father Legal Custody Granted" columns, but **not** from the "All Legal Custody Granted," "Joint Legal Custody Granted," nor "Other Legal Custody Granted" columns.

With those caveats in mind, here is Table 4.4 from "A Comparison of Joint and Sole Legal Custody Arrangements":

Legal Custody Arrangements Requested and Granted

Legal Custody Requested	All N = 700 n (%)	Legal Custody Granted			
		Mother N = 441	Father N = 38	Joint N = 199	Other N = 22
Mother	515 (73.6)	380	8	109	18
Father	58 ( 8.3)	7	26	23	2
Joint	36 ( 5.1)	4	1	31	0
No request	91 (13.0)	50	3	36	2

The SJC's Gender Bias Committee reports, "In two-thirds of the cases in which fathers sought custody, they received primary physical custody (42% in which fathers were awarded sole legal and sole physical custody, plus 25% in which fathers were awarded joint legal and primary physical custody)."<sup>17</sup> Even if we give the SJC-GBC the benefit of the doubt and assume that they were unaware that the study's author says the data was not collected for the purpose of analyzing gender bias in custody awards, and is not appropriate data for that use, it's still instructive to look at how they manipulated the numbers to come up with the kind of result they did. They asked the question:

In what percent of cases in which the father requests custody is he granted any form of physical custody?

But they neglected to ask the same question with respect to mothers, i.e.:

In what percent of cases in which the mother requests custody is she granted any form of physical custody?

Comparing those two numbers would be the obvious place to start analyzing court bias.

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How can we calculate the comparable number for maternal custody awards? Unfortunately, from the data available, we can't. As explained above, maternal sole physical custody can be inferred from the maternal sole legal custody column, but no such inference can be made regarding joint physical custody. Lacking that, the following analysis is the best that can be done.

Here's the line from the above table dealing with fathers who requested sole legal custody:

Legal Custody Requested	All N = 700 n (%)	Mother N = 441	Father N = 38	Legal Custody Granted	
				Joint N = 199	Other N = 22
Father	58 ( 8.3)	7	26	23	2

They were granted sole legal custody (and by implication sole physical custody) 26/58 = 44.8%. The SJC's Gender Bias Committee claims 25% cases in which fathers were awarded joint legal and primary physical custody.<sup>18</sup> The 25% number cannot be derived from the table above. I have so far been unable to get the raw data. Nowhere in the SJC-GBC's report is there any indication that the MDRG study's authors made the raw data available to them. In any case, the 70% number can be derived by adding the aforementioned 44.8% + 25% = 69.8%. But the sample size is only 58 cases over the course of 6 years, or not quite 10 cases per year!

Here's the line from the above table dealing with mothers who requested sole legal custody:

Legal Custody Requested	All N = 700 n (%)	Mother N = 441	Father N = 38	Legal Custody Granted	
				Joint N = 199	Other N = 22
Mother	515 (73.6)	380	8	109	18

A comparable analysis of requests by mothers for sole legal custody yields the result that mothers who requested sole legal custody were granted sole legal custody (and by implication sole physical custody) 380/515 = 73.8% (vs. 44.8% for fathers). With respect to mothers who were awarded joint legal and primary physical custody, the above table tells us nothing, so the best that can be done is to calculate the range of possible values. To come up with a number to compare against the SJC-GBC's 70% figure, we'd have to know which parent was awarded primary physical custody for the 109 cases in which joint legal custody was awarded. This number could be anything from 0 to 109. Thus the bottom end of the range is the 73.8% we've already calculated. To calculate the top end of the range, we add 109/515 = 21.2% to the 73.8% yielding 95%. From this, the following statements can be made:

- The rate at which mother's requests for sole custody were granted is 65% higher than the rate at which father's requests for sole custody were granted.

$$(73.8\% \text{ for mothers} - 44.8\% \text{ for fathers}) / 44.8\% \text{ for fathers} = 64.7\%$$

- The rate at which primary physical custody was granted to mothers who sought sole custody is somewhere between (73.8% and 95%). The bottom end of that range is higher than the 69.8% rate for fathers!

Again, remember that we haven't dealt at all with requests for joint custody, custody requests which were filed later than the initial divorce filing, custody requests which were modified after the initial divorce filing, or the skewing effect of a self-selected sample of fathers willing to undertake a custody battle against overwhelming odds.

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Even now, sixteen years after the Mass. SJC published this statistic, it continues to influence public policy, as shown by the fact that the National Center on Poverty Law trains its lawyers to believe this statistic, and Legal Services of New Jersey bases its arguments against a presumption of joint custody on this statistic, as does George Washington University law professor Naomi Cahn.

In this paper, I have demonstrated how the Massachusetts Supreme Judicial Court's Gender Bias Committee constructed a true but highly misleading statistic whose sound-bite quality has quite predictably led the public to reach a grossly inaccurate conclusion, and to support legislation that exacerbates the problem rather than solving it.

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### Endnotes:

<sup>1</sup> Landers, Ann, "Divorced dads speak up; they have rights, too," (Ann Landers' nationally syndicated column, 1/20/1997), <http://www.s-t.com/daily/01-97/01-20-97/zzzadlan.htm>, "... you are wrong when you say fathers have difficulty gaining custody. Recent studies have found that fathers who fight for custody win sole or at least joint custody in 70 percent of the cases."

<sup>2</sup> Cafazzo, Debbie, "Tug of War," (The Tacoma Washington News Tribune, 11/11/2002, p. D.01), <http://www.tribnet.com>, "But a 1989 study of the Massachusetts court system found that when fathers actually sought custody, they received it about 70 percent of the time. Most of the time, the study said, they didn't ask."

<sup>3</sup> Kraft, Stephanie, "Why Does He Do That?," (Valley Advocate of Easthampton Mass, 2/6/2003), <http://www.valleyadvocate.com/gbase/News/content.html?oid=oid:1562>, "His point is bolstered by a Massachusetts Supreme Judicial Court study showing that when fathers, including abusive fathers, fight for custody of their children in Massachusetts, they win more than three times as often as mothers."

<sup>4</sup> Landsberg, Michele, "Children of divorce need our protection," (Toronto Star, 7/28/2003), [http://www.thestar.ca/NASApp/cs/ContentServer?pagename=thestar/Layout/Article\\_Type1&c=Article&cid=1059257408551&call\\_page=TS](http://www.thestar.ca/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1059257408551&call_page=TS), "In an official report of the Massachusetts Supreme Judicial Court in 1990, the researchers admitted that they began by sharing this perception about court bias in favour of women. They found the opposite to be true. (New England Law Review, Spring, 1990). Most women have physical custody of their children post-divorce - not because of bias, but through mutual parental agreement. When men do actually fight through the courts to get custody, they are awarded sole or joint custody more than 70 per cent of the time."

<sup>5</sup> Boston, Gabriella, "Custody's high stakes," (The Washington Times, July 10, 2005), <http://www.washingtontimes.com/familytimes/20050709-104258-3244r.htm>, "Naomi Cahn, a law professor at George Washington University, says the 85 percent statistic is misleading. 'In most of those cases, the divorce is settled out of court and the father is not seeking custody,' Ms. Cahn says. 'But in the cases that fathers contest, they actually win either joint or sole custody in about 70 percent of cases.'"

<sup>6</sup> Goldhill, Nancy, "Perils of Joint Custody," (National Center on Poverty Law, Poverty Law Manual for the New Lawyer, reprint of article from Legal Services of New Jersey Report, July-Aug. 2000), <http://www.povertylaw.org/legalresearch/manual/Joint%20custody.pdf>, "When fathers contest custody, however, studies consistently document that they win at least half of the time. ... a Massachusetts study found this to be so in 70 percent of cases."

<sup>7</sup> "N.O.W. Action Alert on Fathers' Rights," (N.O.W. website, 1996), <http://www.now.org/organization/conference/1996/resoluti.html?NS-search-set=/32a83/aaaa0050Ia8310c&NS-doc-offset=0&#alert>, "WHEREAS many judges and attorneys are still biased against women and fathers are awarded custody 70% of the time when they seek it"

<sup>8</sup> Abrams & Greaney, Gender Bias Study of The Supreme Judicial Court, Justice Ruth I. Abrams, Supreme Judicial Court, co-chair, and Chief Justice John M. Greaney, Appeals Court, co-chair, (Massachusetts Supreme Judicial Court, 1989)

<sup>9</sup> Koel, et al, Middlesex Divorce Research Group (Amy Koel, Susan C. Clark, W.P.C. Phear, and Barbara B. Hauser), "Impact of Divorce, Single Parenting, and Step-parenting On Children," Chapter 4, "A Comparison of Joint and Sole Legal Custody Arrangements," (Lawrence Erlbaum Associates, Inc., 1988, Hetherington & Arasteh, editors)

<sup>10</sup> Ibid., p. 78, Table 4.4

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<sup>11</sup> Personal communication with Amy Koel, Ph.D., May, 1995.

<sup>12</sup> *Ibid.*, p. 78, Table 4.4

<sup>13</sup> *Ibid.*, p. 79

<sup>14</sup> *Ibid.*, p. 78, Table 4.4

<sup>15</sup> Abrams & Greaney, *op. cit.*, p. 62, "In two-thirds of the cases in which fathers sought custody, they received primary physical custody"

<sup>16</sup> Koel, *op. cit.*, p. 79

<sup>17</sup> Abrams & Greaney, *op. cit.*, p. 62

<sup>18</sup> *Ibid.*, p. 62