

## SPOUSAL SUPPORT TAKES ON THE MOMMY TRACK: WHY THE ALI PROPOSAL IS GOOD FOR WORKING MOTHERS

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### I. INTRODUCTION

Buried within the nearly two hundred pages of the American Law Institute's chapter on compensatory spousal support payments is important information for working mothers: Section 5.06 provides a recovery for a working spouse who has been the primary caretaker of a child of the marriage. Many mothers cut back on their work schedules or make career sacrifices in order to devote time to child rearing. Women who balance the work-family conflict in this manner often find that they are on the "mommy track," a slower career path providing fewer opportunities for advancement and salary growth.<sup>1</sup> Even though fathers and children may benefit from these arrangements while a family is intact, it is women who have borne the entire cost of these decisions at divorce because the law has primarily treated the wife's career sacrifices as a "gift."

At divorce, many mothers and their children face a significant drop in their standard of living. Even working mothers experience financial loss at divorce. Although such women have remained in the labor force, they often experience a reduction to their earning capacity as a result of their greater investment in child rearing during marriage. But upon divorce, their employment status typically disqualifies them from receiving a need-based spousal support award. Consequently, any reduction to earning capacity has gone uncompensated.

Under the ALI draft, which reconceptualizes alimony as compensatory payments for losses arising from the marriage and its failure, a working mother's career loss would provide a ground for spousal support. According to the reporters, this proposal is premised on two principles: first, that caretaking is

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\* Assistant Professor of Law, University of Wisconsin. An earlier version of this commentary was presented at Divorce Reform 2000, a conference jointly sponsored by the Institute for Legal Studies, University of Wisconsin Law School, and Marquette University Law School, on October 28, 2000, and I thank Linda Balisle and Leonard Loeb, great lawyers, who did a fine job commenting on my presentation. Thanks also to Margo Melli, for sharing her time to help guide my formulation of the issues in this Commentary, and to Renee Haddad, for her invaluable research assistance. Special thanks to Jeff Brown for equally sharing our parenting responsibilities and always supporting my career aspirations.

1. Felice Schwartz first proposed the "mommy track" as an alternative career path for women who seek to balance family responsibilities and work demands rather than putting their careers first. See Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65. Schwartz's proposal was controversial and set off a debate that continues today.

the responsibility of both parents and, second, that the spouse who assumes a greater portion of caretaking during marriage should not bear the full cost of any resultant career damage. Adoption of Section 5.06 would have a broad impact on divorce law because most married mothers today work outside the home and most marriages end in divorce. The proposal also has implications beyond the compensation of women for their contributions during marriage. It challenges cultural and social norms in the United States that overlook the significant family responsibilities of workers and devalue child rearing. It reflects the view that caretaking is a joint parental responsibility and that the primary caretaker of children provides a social good worthy of compensation. In so doing, the proposal runs counter to societal assumptions that elevate market work over family work.

## II. THE ALI'S TREATMENT OF THE PRIMARY CARETAKER SPOUSE

Current rules governing alimony and spousal support are largely incoherent and lack a sustaining rationale. They have been the subjects of much scholarly criticism. The drafters of the *Principles of the Law of Family Dissolution* have sought to bring certainty and fairness to this area of the law by transforming alimony from a need-based into an entitlement-based regime and dramatically reducing judicial discretion through imposition of guidelines for determining spousal support payments. The ALI drafters identify several ways a spouse may become entitled to compensatory payments.<sup>2</sup> Spousal support is permitted for: 1) the loss in marital living standard in a marriage of significant duration;<sup>3</sup> 2) for the loss in earning capacity incurred by the primary caretaker of children;<sup>4</sup> 3) for the loss in earning capacity resulting from the care of a sick, elderly or disabled third parties (to whom the spouse(s) owe a moral obligation);<sup>5</sup> 4) to reimburse a spouse for contributions to the other spouse's education or training in short-term marriages;<sup>6</sup> and 5) to restore a spouse to their premarital living standard.<sup>7</sup> The reporters thus have attempted to formulate those instances when it is appropriate to compensate spouses for financial losses arising from divorce. The relevant question is whether the divorcing spouse is entitled to post-divorce support under one of the categories listed above rather than whether the spouse can demonstrate economic need to justify an award of alimony.

This Commentary focuses on Section 5.06 of the ALI draft, the most creative and innovative portion of the proposed law. Section 5.06 compensates a spouse whose earning capacity at divorce is less than it would have been had he or she not been the primary caretaker of the couple's children during the marriage. The caretaking spouse qualifies if certain criteria are satisfied. First, marital children must have lived in the claimant's household for the minimum period provided by the rule. Second, the claimant's earning capacity at divorce

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2. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 5 (Proposed Final Draft Part I, 1997) [hereinafter ALI PRINCIPLES 1997].

3. *Id.* § 5.05.

4. *Id.* § 5.06.

5. *Id.* § 5.12.

6. *Id.* § 5.15.

7. *Id.* § 5.16.

must be substantially less than that of the other spouse. When these criteria are met, the rule presumes that the claimant provided a disproportionate share of the childcare during the marriage. The other spouse may rebut this presumption by presenting evidence that the claimant did not in fact provide a disproportionate share during marriage of the care of the marital children. The other spouse may not, however, rebut the presumption that childcare responsibilities adversely impacted the claimant's earning capacity. The ALI drafters point to the difficulty of making individualized determinations of career damage as a justification for prohibiting a rebuttal of this inference.

The value of a spousal support award available under Section 5.06 is determined by reference to a standard formula. The amount of the award would be calculated by multiplying the difference between the post-divorce incomes of the spouses by a "childcare durational factor." The ALI drafters leave it to the implementing jurisdiction to specify what the childcare durational factor will be, but point out that it should increase with the duration of the time period during which the claimant was the primary caretaker. Under section 5.06, the duration of an award is determined by multiplying the childcare period by a specified factor established by the state legislature.<sup>8</sup> The ALI drafters assume that as the childcare period increases, so does the impact on the primary caretaker's earning capacity. The net effect of the proposal is to create a uniform statewide rule that would yield more consistency and reliability in determining spousal support awards.

### III. THE ECONOMIC DEPENDENCE OF WORKING MOTHERS AND THEIR VULNERABILITY AT DIVORCE

Alimony has never been a sure thing. Yet, the former wives most likely to get a post-divorce award have been women who fit the patriarchal homemaker model. The alimony cases have a familiar ring to them—the wife selflessly devoted decades of her life to her husband and children and she is left at divorce with grown-up children, minimal job skills and a paltry earning capacity. Her spouse, on the other hand, has heavily invested in his career and can walk away from the marriage with his enhanced earning capacity intact. These wives deserve and get awards and the cases providing generous awards to homemakers in long-term marriages commonly stress their sacrifice in financial independence arising from focusing on homemaking tasks. The law here is well-settled and uncontroversial.

The traditional rule of alimony—providing need-based awards after dissolution of a long-term marriage in which one spouse was a homemaker—does not fit most divorcing couples today. Work and family patterns have changed dramatically over the past thirty years. While the traditional family model persists in society, only ten percent of married couples adopt the Ozzie and Harriet pattern over the long term. The vast majority of married couples do not divide their labor according to the strict gender-based male breadwinner/female

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8. ALI PRINCIPLES 1997, *supra* note 2, § 5.07.

homemaker model. Indeed, most married couples with children are dual-career couples.<sup>9</sup>

Part of the growing concern over balancing work and family responsibilities is fueled by the growth of dual-earner couples with children. Over the past twenty-five years, there has been a dramatic increase in the number of married mothers who are in the labor force. Today two-thirds of all married mothers work outside the home. Yet, studies show that it is mothers and not fathers who perform most of the caretaking and housework.<sup>10</sup> Because few traditional full-time jobs provide the autonomy and flexibility to allow workers to balance work and family effectively, many mothers turn to alternatives such as flextime, job sharing, self-employment, part-year positions and temporary work. Mothers also manage the work-family conflict by taking breaks from market work or reducing the number of hours they work. For example, within married couples, over 40 percent of mothers with children under the age of three are not in the labor force and about a third of those that do work outside the home are engaged in part-time employment.<sup>11</sup> Part-time employment among fathers, on the other hand, is very rare.<sup>12</sup> The caretaking provided on the homefront by working mothers has an adverse impact on their earning capacity, whether the woman temporarily withdraws from the labor force, works part-time or works full-time. Career disruptions such as these place many mothers on the lower wage “mommy track”<sup>13</sup> and contributes to the wage gap between working mothers and all others in the labor force. The ALI draft recounts similar studies showing that “their disproportionate responsibility for care of children is by far the most important single factor explaining the difference in the earnings of men and women, swamping all other possible factors including discrimination by employers”.<sup>14</sup>

The wage differential between fathers and mothers transforms upon divorce into an even more dramatic disparity between their post-divorce incomes. Researchers consistently have documented a sharp fall in mothers’ economic position and a rise in fathers’ after divorce.<sup>15</sup> Modern day alimony rules (re-

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9. DEPARTMENT OF LABOR, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 1999, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY tbl.1 (2000), available at <http://stats.bls.gov/news.release/famee.nr0.htm> (“In 1999, both parents were employed in 64.1% of married-couple families with children under 18, while the father, but not the mother, was employed in 29.1% of these families.”).

10. See ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 22-32 (1989)(coining phrase ‘Second Shift Mom’ for proposition that, in two-job marriages, wives continue to do bulk of household work and chores).

11. DEPARTMENT OF LABOR, *supra* note 9, at tbl. 6, available at <http://stats.bls.gov/news.release/famee.t06.htm> (showing employment status of mothers with own children under 3 years old by single year of age of youngest child, and marital status, using 1998-99 annual averages).

12. *Id.* at tbl. 5 (showing that 96.8% of working fathers with children under six years of age are engaged in full-time employment).

13. For example, part-time workers “average fifty-eight cents on each dollar earned by full-time workers per hour worked . . . and frequently are cut off from career advancement.” Joan Williams, *Afterword: Exploring the Economic Meanings of Gender*, 49 AM. U. L. REV. 987, 992-93 (2000).

14. ALI PRINCIPLES 1997, *supra* note 2, § 5.06 cmt. d, reporter’s note at 336 (citing VICTOR FUCHS, WOMEN’S QUEST FOR ECONOMIC EQUALITY (1988)).

15. Although researchers have reached differing conclusions about the degree of the disparity, their studies consistently show that there is a significant gender gap in the financial consequences of

flecting the social reality that most women are in the labor force) have adapted to provide payments designed to “rehabilitate” ex-wives to economic self-sufficiency rather than to address the economic marginalization of working mothers. Temporary maintenance awards have become the norm in family law. These awards are designed to provide transitional support for women who lack the skills or work experience needed to pursue market work. Like alimony, maintenance awards have generally been need-based.

Need-based alimony rules have not provided working moms with a reliable source of post-divorce support. The ALI draft points out that need-based standards overlook income disparities between divorcing spouses and provide examples of court decisions rejecting claims for alimony by spouses who are capable of self-support. The *Louise v. Louise*<sup>16</sup> case, cited in the draft, provides a clear example. After twenty-three years of marriage, the couple divorced. Although they were both schoolteachers, the husband earned considerably more than the wife because she had taken a ten-year break from teaching to raise their children. At the time of their divorce, the husband earned \$40,000 and the wife earned \$28,000. The court acknowledged that the wife suffered a loss to her earning capacity because of her temporary withdrawal from the labor force. It stated that the spouses’ “salaries would have been approximately the same” if the wife had pursued her career throughout the marriage as the husband had.<sup>17</sup> Despite the wife’s career damage, the court reversed a trial court maintenance award finding that maintenance was unwarranted because the wife could get on quite well on her income.

#### IV. CONCLUSION

The ALI’s proposal on compensatory spousal payments promises the equitable reallocation of financial loss at divorce, but it actually does much more than that. Section 5.06 recasts caretaking of children and financial support of the family as the joint responsibilities of the husband and wife. It recognizes that although spouses have a joint responsibility for each of these duties, many married couples divide the duties in a traditional way even today—with the wife fulfilling most of the care of their children while the husband fulfills most of their joint responsibility for the family’s financial support. The drafters are careful not to prefer one family form over another, but instead recognize that a parent who assumes the responsibilities of primary caretaker of the children often limits her market labor during this period, and this limitation typically results in a residual loss of earning capacity that continues beyond the caretaking period.

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divorce. See, e.g., Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528 (1996) (finding a twenty-seven percent decline in wives’ post-divorce standard of living, and a ten percent increase in husbands’ living standards); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988) (at divorce, wives experienced a thirty-three percent decline in their living standard). See also, Joan Williams, *Gender Wars: Selfless Woman in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1603-04 n. 252 (1991) (“The Census Bureau followed 20,000 households for 32 months and reported a 37% income drop for mothers which, when adjusted for the drop in family size, reflects a 26% loss overall.”).

16. 549 N.Y.S.2d 238 (App. Div. 1989).

17. *Id.* at 239.

The proposal ensures that at divorce, the primary caretaker will not bear the entire cost of this division of labor.

The spousal support provisions of the ALI draft can have tremendous significance for the working mothers who stand to benefit economically from the proposal. They would reduce the extent to which primary caretaker parents, still predominately women, have been required by alimony law to bear a disproportionate amount of the marriage-caused economic hardships at divorce. However, beyond these individual benefits, the proposal has the capacity to exert important social effects as well. The ALI proposal implicitly recognizes that child rearing has long been women's work, and as such is devalued in American society. The ALI drafters contend that *both* parents have a "special responsibility" and a "legal obligation" to provide care for their children and that parents ought to share any financial loss to earning capacity that caretaking creates.<sup>18</sup> The ALI drafters take on the work/family conflict in the form of the mommy track and their spousal support provisions serve as a challenge to the marginalization of caregiving.

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18. ALI PRINCIPLES 1997, *supra* note 2, § 5.06 cmt. c, reporter's note at 332.