

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

Suffolk County, ss

Docket No. SJC-09815

A. H.  
Petitioner-Appellant

v.

M. P.  
Respondent-Appellee

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ON APPEAL FROM A JUDGMENT OF  
THE MIDDLESEX PROBATE AND FAMILY COURT

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BRIEF OF AMICI CURIAE ON BEHALF OF  
FATHERS AND FAMILIES, INC.

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Adoption of Marlene,  
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E.N.O. v. L.M.M.,  
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Gestl v. Frederick,  
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In re Adoption of Kathy,  
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100 P.3d 546 (Colo. Ct. App. 2004)

In re Eamon,  
55 Mass. App. Ct. 1110, 772 N.E.2d 601 (Mass. App.  
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Laspina-Williams v. Laspina-Williams,  
46 Conn. Supp. 165; 742 A.2d 840 (Super. Ct. 1999)

Paternity of Cheryl,  
434 Mass. 23

T.F. v. B.L.,  
442 Mass. 522, 813 N.E.2d 1244, n.3

V.C. v. M.J.B.,  
163 N.J. 200, 748 A.2d 539 (2000)

## ARTICLES, BOOKS, JOURNALS, AND REPORTS

ALI Principles of the Law of Family Dissolution: Analysis and Recommendations (as adopted and promulgated May 16, 2000 (ALI 2002)

Association of Family and Conciliation Courts, Massachusetts Chapter, "Planning for Shared Parenting: A Guide for Parents Living Apart," (2004)

Katherine Bartlett, Rethinking Parenthood as an Exclusive Status: the Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 VA. L. Rev. 879, 902-911 (1984)

Robert Bauserman, Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review, Journal of Family Psychology, Vol. 16, 91-102 (2002)

R. H. Bloch, American Feminine Ideals in Transition: The Rise of the Moral Mother, 1785-1815, Feminist Studies, Vol. 4, 101-126 (1968)

John Demos, The Changing Faces of Fatherhood: A New Exploration in American Family History, in Father and Child: Developmental and Clinical Perspectives. Cath, Gurwitt, and Ross (Eds.), Little Brown and Company, 1982, pp.433-434

Ronald K. Henry, 'Primary Caretaker': Is It a Ruse?, Family Advocate, American Bar Association, Summer, 1994, p. 54.

Joan B. Kelly and Michael E. Lamb, Developmental Issues In Relocation Cases Involving Young Children: When, Whether and How?, Journal of Family Psychology, vol. 17, pp.193-205 (2003)

E. Mavis Heatherington and John Kelly, For Better or Worse: Divorce Reconsidered, W.W. Norton and Co. (2003)

Michael E. Lamb, Placing Children's Interests First: Developmentally Appropriate Parenting Plans, Virginia Journal of Social Policy and Law, Vol. 10, 98-119 (2002)

Robin Cheryl Miller, Child Custody and Visitation  
Rights Arising From Same-Sex Relationships, 80  
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U.S. Bureau of Labor Statistics, American Time Use  
Study (2005)

### IDENTITY OF AMICI CURIAE

Fathers & Families, Inc. (Fathers & Families) is the preeminent Massachusetts organization representing noncustodial parents and their children. Fathers & Families is a Massachusetts non-profit that advocates for the child's right to the love and care of both parents after divorce, with equal rights and responsibilities for both parents. Fathers & Families was established in 1998, and currently has approximately 2,200 members, most of whom are in Massachusetts.

Fathers & Families has engaged in lobbying (within the limits established by the Internal Revenue Service for 501(c)(3) organizations), public education, member services, and other activities designed to awaken the family courts to the need to allow children the involvement of both parents. Fathers & Families regards this as a national priority, because up to 50 percent of all American children are raised by only one parent at some point in their childhood. The adverse effects of single parenting have been amply and repeatedly documented. Of necessity, most such research has concerned heterosexual parents, and the absent parent has

usually been the father, but the conclusions almost certainly apply to same-sex unions. One of the earliest studies of single parenting was the famous 1965 report of the late Senator Daniel Moynahan in which he painstakingly documented the devastating effects of fatherlessness on the African-American community. Ironically, single parenting has only worsened in that community since 1965, while the rest of the nation has "caught up" with that community's 1965 statistics on single parenting. It is reasonable to believe that single parenting after the dissolution of same-sex relationships will be no more successful than single parenting after the dissolution of heterosexual unions.

Ned Holstein, M.D., M.S. practices in the field of public health and preventive medicine, a field which includes the adverse effects of legal and cultural factors on health. Dr. Holstein is the author of a chapter entitled "Divorce and the Mental Health of Men" in a book currently in press with the American Psychiatric Association entitled The Mental Health of Men. He is a Clinical Assistant Professor at the Mount Sinai School of Medicine in New York City, where he was formerly a full-time researcher and

member of the faculty. His undergraduate education was at Harvard, and he also received a Master's degree in psychology from M.I.T. prior to attending medical school and graduating from Mount Sinai in 1971. Dr. Holstein is the founder of Fathers & Families, and currently serves as the Chair of the Board.

Daniel B. Hogan, J.D., Ph.D. holds both a law degree and a doctorate in psychology from Harvard. He is a member of the Massachusetts Bar Association and the Boston Bar Association. He is a fellow of the American Psychological Association, the Association for Psychological Science and the American Orthopsychiatric Association. His is the author of a four-volume series entitled "The Regulation of Psychotherapists: The Philosophy and Practice of Professional Regulation" that Contemporary Psychology has called "the most comprehensive and most stimulating publication on the matter." He has been the Guest Editor of a special double issue of Law and Human Behavior examining professional regulation and is the author of more than a dozen publications, including articles in the New York Times, the Harvard Journal on Legislation, and edited books. For many years, Dr. Hogan was consulting editor to Law and

Human Behavior and he is a past reviewer of books for Contemporary Psychology. He currently serves as Executive Director of Fathers & Families.

#### **STATEMENT OF INTEREST**

This appeal raises questions of great significance concerning the welfare of large numbers of children. The resolution of these questions is certain to affect the relationships of children to their same-sex caregivers, and is highly likely to affect custody and parenting time decisions concerning children of heterosexual parents as well.

The first question of specific interest to Fathers & Families is whether or not financial contributions to a family, or breadwinning, are to be considered a vital caretaking function on a par with direct caregiving activities such as changing diapers and preparing meals. In past centuries, the breadwinning role was exalted to an inordinate degree, with consequences for children that often were damaging. There is now a tendency to go too far in the other direction, denigrating breadwinning, also with adverse consequences for children. Children of both same-sex and heterosexual unions will benefit if the law recognizes breadwinning as a critical

caretaking function, on a par with other well-recognized caretaking tasks, and not held to be of inordinately greater or lesser value.

The second issue of great importance for children, and therefore to Fathers & Families, is whether the status of de facto parent will be determined by a bright-line mathematical accounting of which parental figure provides more hours of caretaking, what the Plaintiff-Appellant has termed a "quantitative analysis." Like the breadwinning issue, the resolution of this question will have important implications for custody and parenting time decisions in both same-sex and heterosexual unions. The so-called "primary caretaker standard" for determining custody in heterosexual families is an exact mirror image of the criterion requiring that the de facto parent "performs a share of caretaking functions at least as great as the legal parent." Reducing the de facto parent decision, or the custody decision, to a rigid arithmetical calculation is unworkable in practice. Moreover, it is detrimental to children, because it ignores their psychological reality as to whom their parents are and how they are attached to them. Distilled to its essence, the argument is that,

while a bright-line criterion based on an arithmetical calculation of caretaking hours may be a convenience to the courts, it does not serve the best interests of children. Children will be well served only when such bright-line tests for parenthood (or custody) are abandoned, and are replaced by an evaluation of the organic, living psychological reality of a child's attachment to parental figures (what the Plaintiff-Appellant has termed a "qualitative analysis").

#### **QUESTIONS PRESENTED**

1. Whether the judge erred in ruling that the plaintiff is not a "de facto parent," in particular by failing to take into account her critical caretaking role as the main breadwinner, and also by relying on an overly rigid, arithmetical determination of which adult performed the majority of caretaker functions, ignoring the abundant evidence that the child is strongly attached to both parental figures.

2. Whether children and society will benefit from a legal structure that demotes the value of breadwinning below other caretaking functions in deciding cases of de facto parenthood, and, by implication, custody among established parents; and a legal structure that relies on an excessively rigid,

arithmetical determination of de facto parenthood (or custodial parent).

### ARGUMENT

#### **I. The Trial Court Erred in Failing to Include A. H.'s Breadwinning Role as a Critical Caretaking Function.**

From the beginning of recorded history, couples with children have adopted a division of labor. One parent became the primary breadwinner, and the other parent became the primary direct caregiver to children. Usually the division of labor was not absolute. Roles overlapped to a greater or lesser degree, but the essential distinction remained. The question at hand is whether different values should be assigned to these critical, overlapping roles.

From the perspective of children, the family functions as a seamless unit that provides both their economic and caretaking needs. The seamlessness of the parental unit in the eyes of children has been confirmed by the research of the last twenty or thirty years. The proof is that infants form attachments to both parents at about the same age, around six to seven months, even though only one parent is typically the primary caretaker and the other may be absent from the home for long hours. See Joan B. Kelly and

Michael E. Lamb, Developmental Issues In Relocation Cases Involving Young Children: When, Whether and How?, Journal of Family Psychology, vol. 17, 193-205 (2003). Kelly and Lamb summarize a large body of research by stating, "Preference for primary caregivers diminishes with age and often disappears by eighteen months of age." See also Katherine Bartlett, Rethinking Parenthood as an Exclusive Status: the Need for Legal Alternatives When the Premise of the Nuclear Family has Failed, 70 VA. L. Rev. 879, 902-911 (1984).

Thus, regardless of how parents divide their labor, the child's reality is of a deep, equal and seamless attachment to both figures. The breadwinner, in the eyes of children, is neither overvalued nor undervalued, but simply valued.

When culture or the law has either overvalued or undervalued the breadwinner role, children and society have suffered. John Demos, the distinguished historian of the American family, has described how, in the nineteenth century, the role of breadwinner became excessively valued.

"The father who 'brought home' the bacon, no less than the mother who cooked it and put it on the table, was supplying the vital needs of his children. What he actually did in his shop or office was little known to other members of his

family; yet its product (income) was known, and was critical to their personal well-being. His ultimate 'success' would depend on his strength of mind and will, his endurance, his moral fortitude... As a result, his work seemed mysterious and wonderful, and his ability to negotiate the treacherous routes through 'the world' might be positively heroic."

"In short, a father's intrinsic connection to all that lay outside home gave him a special status within it. Whenever he returned to the 'sacred hearth,' he commanded attention, affection, respect, deference and devoted care... all this made his opinion especially worthy to be heard (and accepted), his orders to be followed."

John Demos, The Changing Faces of Fatherhood: A New Exploration in American Family History, in, Father and Child: Developmental and Clinical Perspectives. Cath, Gurwitt, and Ross (Eds.), Little Brown and Company, 1982, p.433-434.

Demos goes on to describe the disadvantages for children of the excessive idealization of the breadwinner role. In short, the overly idealized and exalted status of the breadwinner is the core of patriarchy. The disadvantages for children of patriarchal cultures have been well documented in modern commentary and analysis.

Just as the exaltation of the breadwinning role led to patriarchal dominance, this in turn led to devaluation of the contributions provided by non-

breadwinners, i.e., mothers. In other words, elevating one role over the other inevitably meant elevating *one parent* over the other. Not only were the mother's daily tasks of feeding and clothing children devalued, but *she* was devalued, to the detriment of children. Thus, her value as a teacher, guidance counselor, moral authority, disciplinarian, counselor and role-model were all similarly devalued. As a result, children were culturally conditioned to devalue the rich and varied tapestry of benefits that mothers could provide them. Feminist authorities in particular have recognized that devaluation of mothers' work led directly to devaluation of mothers, and all that they might provide children. See R. H. Bloch, American Feminine Ideals in Transition: the Rise of the Moral Mother, 1785-1815, *Feminist Studies*, Vol. 4, 101-126, 1968.

Today, the question is whether the law will swing to the opposite extreme and devalue the breadwinning role while excessively exalting the direct caregiving role. It is clear that ordinary people do not devalue breadwinning, either in the past, or today. One demonstration is that throughout human history, including the present, when economic demands have

conflicted with other family functions, the economic demands have won out. When economic circumstances in nineteenth century America required breadwinners to leave the family homestead for long hours each day in order to work in factories, they did so. When economic and legal circumstances required black South African miners to live in barracks while their families lived in distant "homelands," they did so. Today, when the breadwinner is offered a major promotion or other economic opportunity, families often move long distances, disrupting children's schooling, friendships and established patterns of life. In other cases, when single parents must work, latchkey children become the norm.

These examples illustrate the fact that ordinary people place breadwinning near the top of parental functions, not near the bottom. They recognize, as should this Court, that even the most perfect direct caretaker can do nothing unless someone is paying the bills. Moreover, as Ronald Henry, an Adviser to the ALI Principles, wrote, "It is obscene to say that spending [as a direct caregiver] is nurturing while earning is mere heartless cash... I don't know any parent who is incapable of spending, but many are

incapable of earning. Which is the better care giver?" Ronald K. Henry, 'Primary Caretaker': Is It a Ruse?, Family Advocate, American Bar Association, Summer, 1994, p. 54.

Ordinary people also understand that children need both parental figures, regardless of which one is primarily a breadwinner and which one a caretaker. In a non-binding ballot initiative in 2004, 86% of Massachusetts voters agreed that the best outcome of a custody determination is joint physical custody of children. The question was put before approximately 700,000 Massachusetts voters, approximately one-quarter of the electorate, with broad geographical, ethnic and socio-economic diversity. Approximately 600,000 of those voters recorded a vote on the question, of whom 86% endorsed joint physical custody<sup>1</sup>. Since nearly everyone recognizes that in most

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<sup>1</sup>The exact wording of the question was, "Shall the State Representative from this district be instructed to vote in favor of legislation requiring that in all separation and divorce proceedings involving minor children, the court shall uphold the fundamental rights of both parents to the shared physical and legal custody of their children and the children's right to maximize their time with each parent, so far as is practical, unless one parent is found unfit or the parents agree otherwise, subject to the requirements of existing child support and abuse prevention laws?"

relationships, there is a primary breadwinner and a primary caretaker of children, the voters were clearly endorsing breadwinning as a central caretaking function that is in no way inferior to other caretaking functions.

It is not useful to create a legal structure that places the value of breadwinning far lower than ordinary people do in their everyday lives. This is true whether the issue is determining who is a de facto parent, or who should have custody of children. When the law embraces values that are markedly different from those embraced by ordinary people, it creates only conflict and tumult.

When parental caretaking is defined so as to exclude breadwinning for the purposes of legal decision-making, or devalues breadwinning relative to other caretaking functions, not only will breadwinning be devalued, but the *breadwinner* will also be devalued, and all that he or she has to offer children. This is exactly what is at stake in the present case, in which the manifold parenting contributions that A. H. is eager and equipped to provide to O. H. P. may be denied to the child if breadwinning itself is devalued.

We do not argue that breadwinning alone is sufficient to create parental status (or to qualify a legally recognized parent for custody of a child). Breadwinning must be combined with interactions with the child that lead to attachment, in the specific, clinical meaning of the word as used by the GALs in this case. This is no different than the understanding that caretaking alone does not make one a parent. A robot or a chef can prepare meals, but this does not make them parents. But when either breadwinning or caretaking occurs in a setting in which attachment of the child to the adult occurs, then the adult has established a strong claim to be a de facto parent (or a custodial parent).

Accordingly, several out-of-state cases concerning the custody/visitation rights of a same-sex domestic partner of a legal mother have recognized breadwinning as an important parental function. Robin Cheryl Miller, Child Custody and Visitation Rights Arising From Same-Sex Relationships, 80 A.L.R.5th 1. Also, see Gestl v. Frederick, 133 Md. App. 216, 754 A.2d 1087 (Md. Ct. App. 2000) (finding that the same-sex former partner of a biological mother would have standing under the Uniform Child Custody Jurisdiction

Act to sue for custody where she alleged, inter alia, that she had provided significant monetary support for the child); V.C. v. M.J.B., 163 N.J. 200, 748 A.2d 539 (2000) (holding that the former same-sex domestic partner of a biological mother of twins qualified as a statutory "parent" where the former partner had assumed many of the day-to-day obligations of parenthood toward the twins, including financial support); Laspina-Williams v. Laspina-Williams, 46 Conn. Supp. 165; 742 A.2d 840 (Super. Ct. 1999) (holding that the allegations of the former same-sex partner of a child's biological mother that included the allegation she had contributed to the child's financial support were sufficient to confer standing to petition for visitation); In re E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004) (affirming a trial court order that awarded joint parental responsibilities and parenting time to former domestic partner of a child's adoptive mother after their relationship ended as former partner had acted as a psychological parent by, among other factors, providing financial support for the child).

Massachusetts case law also identifies the provision of financial support as a critical

caretaking function. In finding that E.N.O. was a de facto parent, this Court noted approvingly that E.N.O. "assumed most of the financial responsibility for the family." E.N.O. v. L.M.M., 429 Mass. at 831 (1999). See also T.F. v. B.L., 442 Mass. 522, 813 N.E.2d 1244, n.3 (affirming the importance of financial responsibility for a child even in the absence of a genetic link to the child).

In other cases, Massachusetts courts have found that the provision of financial support is such an important parental duty that it survives various extraordinary circumstances. In Paternity of Cheryl, 434 Mass. 23, this Court refused to terminate child support for a child born out of wedlock in spite of conclusive DNA evidence that the legal father was not the biological father, in part on the grounds that "continuity of support, both emotional *and financial*, are essential to a child's welfare." (emphasis added, citations omitted) Lamenting that "No judgment can force him [the father] to continue to nurture his relationship with Cheryl...", this Court nevertheless found that providing financial support by itself helps forge a bond between adult and child worthy of protection: "Relieving him of child support

obligations might itself unravel the parental ties, as the payment of child support 'is a strand tightly interwoven with other forms of connection between father and child,' (from Bowen v. Gilliard, 483 U.S. 587, 617, 1986, Brennan, J., dissenting) and often forms a critical bond between them." Cheryl thus stands for the proposition that sustained financial support of a child by itself "often forms a crucial bond" between a parent and child, a bond that, once established, should not be severed even when the adult is not the biological parent of the child.

In the case at bar and in Cheryl, we have two parental figures, neither of whom is biologically related to the child. It cannot be that the importance of financial support trumps biology in Cheryl, but that biology trumps the importance of financial support in the present case.

See also Adoption of Marlene, 434 Mass. 494, in which this court found that the duty to support a child is so important that it survives a grant of voluntary consent for adoption.

In other cases, Massachusetts courts have found that the provision of financial support is so important that its absence is grounds for limiting or

terminating parental rights. See Adoption of Kirin, 50 Mass. App. Ct. 1110, 739 N.E. 2d 717 (Mass App. Ct., 2000) (waiving need for biological father's consent for adoption of children in part because he "only occasionally provided incidental financial" support.) See also In re Adoption of Kathy, 63 Mass. App. Ct. 1109, 825 N.E.2d 114 (Mass. App. Ct., 2005) (waiving father's right to contest adoption of his children in part because his financial support was "irregular.") In re Eamon, 55 Mass. App. Ct. 1110, 772 N.E.2d 601 (Mass. App. Ct., 2002) (finding that father was unfit where he did not assume any parental role, one of which was financial.)

In summary, many courts consider the provision of financial support so important that this parental obligation survives extraordinary circumstances. Conversely, the failure to provide financial support is frequently used as a reason to limit or deny parental rights. For these reasons, the provision of financial support for a child must also be considered an important factor in establishing or maintaining parental rights.

We now turn to the proper interpretation of this Court's criterion that a de facto parent "performs a

share of caretaking functions at least as great as the legal parent." E.N.O. v. L.M.M., 429 Mass. 824 (1999). Whether or not breadwinning is considered a "caretaking function," it is still necessary to determine if the best interests of children require a strict, arithmetical computation of the number of hours each putative parent (or custodian) has spent in caretaking functions, as defined. We argue here that such an approach is 1) unworkable and 2) at variance with the psychological world of children, and thus not in their best interests.

To strictly quantify caretaking activities, one must first define them. One example of such an effort is found in the ALI Principles of the Law of Family Dissolution: Analysis and Recommendations (as adopted and promulgated May 16, 2000 (ALI 2002) (hereinafter "ALI Principles"). The ALI Principles are prominent among those who have pressed for a "primary caretaker standard" in custody determinations, as well as in the definition of a de facto parent.

The more that parental roles overlap, as in the case at bar, the more difficult it becomes to apply a strict arithmetical approach to the caretaker tasks defined by the ALI Principles or other similar

schemes. For instance, which parent is the caretaker while a child is in school or daycare, or engaged in sports, school band, or other recreational activities? Which parent is the caretaker when both work and the child is in the care of a nanny? The ALI Principles attempt to deal with this by defining caretakers as those who "supervise the interaction and care provided by others." Is this a realistic definition of a caretaker when the school or nanny acts autonomously 95% of the time? Do all the hours in the care of the school or nanny accrue to the putative caretaking parent, or only the 5% of the time when consultation is needed? The teacher or nanny would qualify as a de facto parent, except that the ALI principles mandate that caretaking must be undertaken "for reasons primarily other than financial compensation." But which putative parent accrues "credit" for the hours the child spends in the care of unpaid volunteers, such as aunts and uncles, grandparents, mentors, and older siblings? Which putative parent accrues "credit" for the after-school hours during which a child is a "latchkey child?" Which putative parent accrues "credit" during the hours a child sleeps? If, as in the present case, a breadwinner customarily

attends to a child when he awakens at night, does she get "credit" for only the time the child is awake, or for all the nighttime hours? Suppose a primary caretaker rings up many hours, but ignores the child, such that she watches television for hours on end. And suppose the breadwinning parent is actively and enthusiastically involved with the child when he or she returns from work, engaging with the child, challenging her intellect, helping her with homework and acting as her confidante. Does the primary caretaker get "credit" for all those hours the child watches television alone, and is the primary breadwinner "credited" only for the small number of hours of interaction, even though they are psychologically much more important for the child?

Sometimes parental figures provide only 50% of caretaking hours because the child spends the rest of the time with teachers, nannies, teams, coaches, mentors, or daycare providers. In such a case, does this mean that one parental figure will be excluded from the status of de facto parenthood (or custodial parent) because she provides, for instance, only 23% of the total caretaking hours, while the other parent provides 27%? (Note that in dual earner households,

the Bureau of Labor Statistics finds that mothers average only 44 minutes per day in childcare, whereas fathers average only 23 minutes. U.S. Bureau of Labor Statistics, American Time Use Study, 2005)

How is it that, according to the ALI principles, "arranging for recreation," "arranging for the child's education," "communicating with teacher and counselors," "arranging for healthcare providers," "arranging alternative care by a family member... including investigation of alternatives, communications with providers," are all considered caretaking functions that qualify one to be a de facto parent (or a primary caretaker), even though these tasks are performed at a distance from the child and do not involve interaction with the child? How is it that these activities qualify one to be a de facto parent (or a primary caregiver), while "participating in decision-making regarding the child's welfare" does not so qualify one? How is it that shopping for food and clothing qualifies one as a de facto parent (or a primary caretaker), but providing for other physical needs such as shelter, either by paying for a home, or by "maintaining or improving the family residence," or building a crib does not? How is it that "being

attentive to the child's personal hygiene needs" qualifies one to be a de facto parent (or a primary caretaker), but hygienic "housecleaning" does not? The internal contradictions and the unworkability of the ALI Principles' definition of a de facto parent (or of a primary caretaker) render them inadequate for the purposes of this case, and many others.

Even in cases in which there is a stark division of labor with little overlap of roles, the ALI Principles may not be useful because the breadwinner may, in fact, be the better parent, or may be sacrificing in order to allow the stay-at-home parent to be free of the rigors of paid employment and to enjoy the comforts of home and the companionship of children. Neither the child nor the breadwinner profits by the latter subsequently being excluded from de facto parenthood (or custodial parent status) because of a voluntary sacrifice. And when, as in most cases today, both parental figures are employed to one degree or another, and roles overlap considerably, the difficulties described above in applying the ALI Principles by a strict arithmetical accounting of hours become insuperable.

Even if strict quantitative methods were both workable and internally consistent, which they are not, a rigid, arithmetical approach to determining parental status is not in the best interest of children. Psychological reality for children is not formed by an internal accounting of hours. It is formed as the result of parental interactions of many sorts which cumulatively lead to an observable state known as "attachment." As documented above, attachment forms at about six to seven months of age, and it forms with both parental figures, even when one is primarily an out-of-home breadwinner. While the attachment may for a while be stronger to the direct caregiver, any differences in strength of attachment fade away and are usually gone by eighteen months of age. When a child's contact with an attachment figure is seriously diminished or terminated, the developmental consequences for a child can be serious and long-lasting. All of this is documented in ample research of the past twenty to thirty years. It is both observable, and to a certain extent, measurable. If the goal of E.N.O. is to protect established parent-child relationships, these realities must be the starting point. They call for what the Plaintiff-

Appellant has called a "qualitative analysis" rather than a rigid, quantitative one. This is the only way in which the best interests of children can be achieved.

**II. Neither children nor society will benefit from a legal structure that demotes the value of breadwinning below other caretaking functions, or one that relies on an excessively rigid, arithmetical determination of de facto parenthood (or custodial parent status).**

As discussed earlier, when breadwinning is devalued, so is the breadwinner. Devaluing the breadwinner so that she or he does not qualify as a de facto parent (or custodial parent) means that children will be denied the benefit of the broad panoply of talents and virtues that she or he may bring to the upbringing of a child. The breadwinner may be the best role model for disciplined and upright moral behavior, but this will not matter if she or he is devalued by the courts because of her or his breadwinning role. He or she may be the superior parent in helping the child with homework. He or she may be the best motivator of the child. He or she may offer a rich ethnic heritage that differs from the other parent. He or she may eventually be able to gain admittance for the child into a lucrative trade union. He or she may be the organizing influence in a

household that is otherwise chaotic. He or she may be the parent who is not suffering from depression or chronic anxiety, parental conditions that may have harmful influences on the child. A child loses out when a breadwinner is legally devalued merely because he or she is a breadwinner.

Society will not benefit from a legal structure that causes a breadwinner to be disqualified from de facto parenthood (or from physical custody of a child). Unfortunately, such a structure already exists in practice in custody determinations, and the results for children and society have been regrettable. Even though the ALI's "primary caretaker standard" has not been widely adopted as a legal standard, it is a de facto standard in many custody determinations. The result has been widespread single parenthood, with the custodial parent almost always having been the non-primary breadwinner.

The research demonstrating the adverse social effects of sole custody to primary caretakers has of necessity concerned heterosexual parents, with mothers usually the primary caretakers. But it is almost certain that the same conclusions will apply to same-sex unions. Michael Lamb, until recently the Head of

the Section on Social and Emotional Development of the National Institute of Child Health and Human Development of the National Institutes of Health, has written of custody evaluators and judges that "... these professionals emphasize the importance of strengthening the relationship between young children and their primary caretaker (typically their mothers), frequently at the expense of the relationships between the children and their father... Such arrangements were often represented by professionals as being 'in the best interests' of the children due to the mistaken belief that young children had only one significant attachment that needed protection."

(Michael E. Lamb, Placing Children's Interests First: Developmental Appropriate Parenting Plans, Virginia School of Social Policy and Law, Vol. 10, 2002, at p. 108) He went on to summarize a large mass of research stating that, "Most importantly, research indicates that children benefit from supportive relationships with both of their parents, whether or not those parents live together... Brief dinners and occasional weekend visits do not provide a broad or extensive enough basis for such relationships to be fostered, whereas daytime and nighttime activities during both

weekdays and weekends are important for children of all ages." (Id, at p.118) Lamb also states, "The failure of policy and decision-makers to take advantage of a burgeoning and increasingly sophisticated understanding of child development is unfortunate and may threaten the quality of social policy." (Id, at p.98)

A distinguished Massachusetts panel recently stated similar conclusions. The Chief Justice of the Massachusetts Probate and Family Courts, Sean M. Dunphy, initiated the work of a special Massachusetts committee established to recommend parenting schedules after divorce. The committee was chaired by the Hon. Arline S. Rotman, a retired judge of the Massachusetts Probate and Family Courts, and consisted of a sitting family court judge, two eminent members of the Massachusetts domestic relations bar, and four recognized experts in the psychology of children after divorce. It was, therefore, a collaborative effort of the legal and mental health communities of Massachusetts. The result was a document entitled "Planning for Shared Parenting. A Guide for Parents Living Apart." (Available from the Massachusetts Chapter of the Association of Family and Conciliation

Courts, 2004) The Introduction states, "This guide combines recent developmental research about children and the impact of divorce on their lives..."

Recognizing the research evidence demonstrating the centrality of both parents after divorce, the committee stated as its first conclusion, "We now know that: children do best when both parents have a stable and meaningful involvement in their children's lives."

A meta-analysis recently demonstrated similar conclusions. A meta-analysis is a statistical technique developed in recent years that allows one to combine the data from numerous separate studies that examine the same issue, thus increasing the statistical power of the analysis. Thus, when a meta-analysis leads to a particular conclusion, that conclusion is supported by the combination of all the research studies that have been combined into the meta-analysis. Based on 33 underlying research studies, the 2002 meta-analysis of Robert Bauserman compared child adjustment in joint physical or joint legal custody with sole custody settings. It included comparisons with intact families where possible. It concluded that "Children in joint physical or legal custody were better adjusted than children in sole-

custody settings, but no different from those in intact families." (Robert Bauserman, Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review, Journal of Family Psychology, Vol. 16, 91-102, 2002.)

The publications by Lamb, the Massachusetts distinguished panel and Bauserman each stated conclusions that were based on the review of a large body of research. The vast majority of families that were studied were ones in which there was a primary breadwinner and a primary caretaker, with varying degrees of overlap of roles, since that is what one encounters in America today. Thus, this body of research supports the assertion that children do better after family dissolution when both parental figures to whom the child is attached retain an active parenting role, even though in most cases, one of the parents is primarily a breadwinner.

By contrast, the failures of single parenting are by now well known. This is not the fault of single parents, who try valiantly to do well by their children. Despite their best efforts, numerous studies demonstrate that on average, seriously negative outcomes for children increase two- to

threefold in single-parent families compared to intact families. (E. Mavis Heatherington, for instance, summing up a lifetime of research, in E. Mavis Heatherington and John Kelly, For Better or Worse: Divorce Reconsidered, W.W. Norton and Co., 2003) In contrast, Bauserman's meta-analysis of 33 underlying studies showed that children's outcomes in joint-custody arrangements were statistically just as good as those in intact families. Ronald Henry, an Adviser to the ALI Principles, makes the case succinctly. While his language addresses heterosexual family dissolution, it is directly applicable to same-sex situations. "No one will argue that America suffers from an excess of good parenting. Why, then, do we focus on finding ways to place children in single-parent custody? The focus, instead, should be on developing a structure that demilitarizes divorce, that gets past winner-loser dichotomies, and that encourages the maximum continued involvement of both parents." Ronald K. Henry, *Id*, at p. 56.

It is also true that there will be negative consequences for children and society if decisions about who is a de facto parent (and who a custodial parent) are made by a simplistic counting of

caretaking hours, with breadwinning hours eliminated from the count. Under such a system, there is a danger that couples who harbor doubts about the long-term strength of their unions will engage in a "race to the bottom" financially. Each party will compete to be the caretaker, while giving short shrift to breadwinning, with possibly disastrous consequences for the family. There is already a belief in some quarters that some parents, faced with an imminent dissolution of their family, deliberately minimize their income in order to minimize child support. If this is true, and if one then adds the incentive of being declared the de facto parent (or the custodial parent), any such tendency will be increased.

Moreover, the continuing efforts of women to achieve parity in the workplace will be seriously undermined if there is a sense that doing so may cost them their children in a subsequent legal action.

In summary, the only approach that will serve children, families and society well is to neither overvalue nor devalue breadwinning, but to include it as a factor of equal importance among the other caretaking functions of parenthood. A breadwinner with whom a child has formed a parent-like attachment,

and who satisfies certain other reasonable criteria as may be established, should have an equal claim to the status of de facto parent (or custodial parent), not just in deference to the virtue of the breadwinning parent, but in light of the needs of children. Finally, no evaluation of caretaking functions can proceed upon the basis of a rigid, simplistic adding up of hours, but must instead be grounded in a modern understanding of child psychology, in which the attachment process is paramount.

**CONCLUSION**

For all of the forgoing reasons, this Court is urged to vacate the Trial Court Judgment of July 3, 2006 and remand the case for further proceedings.

Respectfully submitted,  
Amici Curiae:

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**CERTIFICATE OF SERVICE**

I certify under penalties of perjury that I sent 2 copies of this brief to counsel of record: Elizabeth A. Zeldin, Lynch, Brewer, Hoffman & Fink, LLP, 101 Federal Street, 22<sup>nd</sup> Floor, Boston, MA 02110 and John Foskett, Deutsch, Williams, Brooks, DeRensis & Holland, P.C., 99 Summer Street, Boston, MA 02110.

October 4, 2006

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