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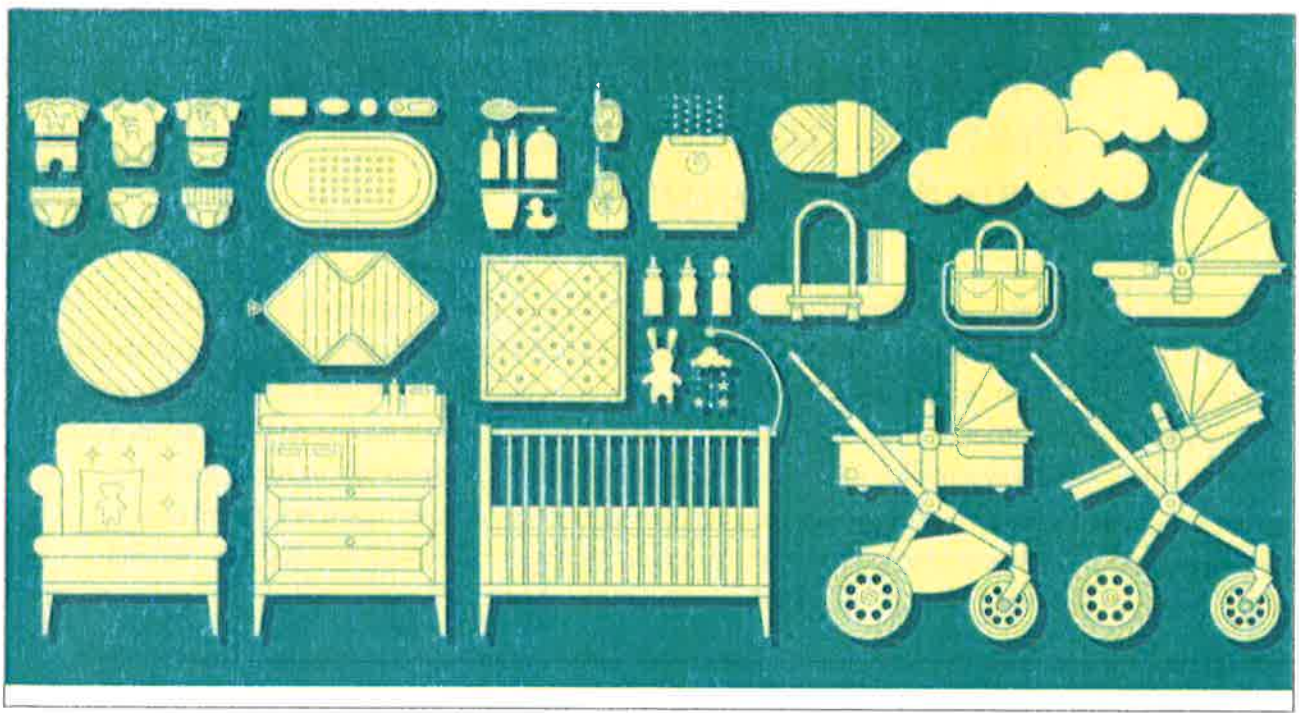
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PARENTAL LEAVE: MORE AND BETTER CHOICES FOR EVERYONE

April 27, 2017 | Rachel Migicovsky

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When Jeff Feiner was an associate at a Bay Street law firm in Toronto, he took three parental leaves: "I always knew that having children was going to have an impact on my career because I knew that I wanted to spend as much time with my children as possible." Feiner took full use of the parental leaves offered by his firm so that he could spend time at home after each of his three children were born.

"There will never be gender equality in the workplace unless and until there is gender equality domestically. There should not be a default assumption that the mother is the primary caregiver."

Feiner makes it clear that it was important to both him and to his wife, then an associate at another Bay Street firm, that both of them spend time with their children and show them that both parents are responsible for caregiving. Still, it wasn't easy; they were contending with the reality that many women in private practice face: they find it more difficult to advance after they return from leave, and are leaving private practice at higher rates than men. Now a partner at Corman Feiner LLP, Feiner says "There will never be gender equality in the workplace unless and until there is gender equality domestically. There should not be a default assumption that the mother is the primary caregiver." Although men taking parental leave will not change those assumptions overnight, it's a start.

Through supportive policies, law firms can accommodate men and women who want to take time off, come back, and still succeed at work.

THE LAW ON PREGNANCY AND PARENTAL LEAVE

PREGNANCY VS. PARENTAL LEAVE

The *Employment Standards Act* sets out employee entitlements to time off work because of a pregnancy. It applies only to “employees”—partners in law firms are not covered.

Pregnant employees who have been employed for at least 13 weeks at their place of work are entitled to 17 weeks of unpaid “pregnancy leave”.

“Parental leave”, on the other hand, is for all parents. Parental leave is separate from pregnancy leave. A parent who has taken a full 17-week pregnancy leave is also entitled to 35 weeks of parental leave. A parent who has not taken a pregnancy leave is entitled to 37 weeks of parental leave. This means that both parents can take the time off if they want to.

EMPLOYMENT INSURANCE BENEFITS

Employee benefits during a pregnancy or parental leave are governed by the *Employment Insurance Act*. Currently, an employee is entitled to 17 weeks of employment insurance benefits due to pregnancy, and 35 for caring for a new born child, or a child who has been adopted. There is a one week waiting period before an employee can receive these benefits.

The new Liberal budget tabled on March 23, 2017 is set to change all this. The new rules will allow parents to choose between the current 12 months of parental leave benefits at 55% of their weekly average earnings (up to a set maximum) or 18 months at 33%.

THE BENEFITS OF PARENTAL LEAVE FOR BOTH PARENTS

Canadian women take on almost double the hours of unpaid domestic and caregiving work as do Canadian men, and earn only 72% of what men earn for similar paid work. When both parents take parental leave, it sends a message: childrearing is a shared responsibility. Taking time off work entailed career sacrifices for both Matthew Furrow, a lawyer at Goddard Gamage Stephens, and his wife, a doctor: “we agreed pretty early on that a 50-50 split of parental leave for the first year of our son's life was the fairest way to handle things”. In the case of heterosexual couples, when both parents take parental leaves, this teaches children that men can stay at home, women can be the primary worker, and that neither activity is inherently gendered.

THE ADVANTAGES OF HAVING A PARENTAL LEAVE POLICY

In 2009, the Law Society of Upper Canada’s Justicia Project prepared the Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Associates. It recommended that firms adopt policies for pregnancy and parental leave. Among other reasons, policies mean transparency: the same rules apply to everyone. Policies also show that the firm is committed to inclusiveness and to creating a culture that is supportive of new parents.

When deciding to take a parental leave, lawyers say having a written policy makes a difference. Nadia Champion, a partner at Polley Faith LLP, says that a written policy helps remove stigma for parents who take

leave: "they know what they are getting while they're off, and know that when they come back, they will be welcomed."

The stress of having to negotiate a policy with one's partners/employers makes for an unequal and potentially unfair imbalance of power.

Written policies benefit men, too. Fredrick Schumann has taken one parental leave, while working as an associate at Stockwoods LLP. He says clear, gender-neutral language in his firm's parental leave policy was a signal that it was acceptable for men and women to take parental leave.

Stephen Kurelek, a lawyer with the Department of Justice in Ottawa took two parental leaves, the first while he was in private practice, and the second after he joined the Department of Justice. He describes the problem of not having a written policy as follows: "The private law firm I was with did not even have a parental leave policy at the time—such leave had to be worked out between the associates and the partners on an ad hoc basis." For a soon-to-be or new parent, not knowing whether or on what terms leave is permitted is an additional stress, at one of life's most stressful times. Furthermore, the stress of having to negotiate a policy with one's partners/employers makes for an unequal and potentially unfair imbalance of power.

WHAT ARE FIRMS DOING?

It is not known how many firms are implementing parental leave policies. In 2014, Justicia surveyed the 57 law firms participating in its project in Ontario to find out. Less than half of those firms responded—12 small and medium-sized firms (fewer than 100 lawyers) and 13 large firms (over 100 hundred lawyers).

It is difficult to draw any significant conclusions from the data available, due to the small sample size, and the significant variations among the policies of the responding firms. For example, of the small and mid-sized firms, four had ad hoc pregnancy policies and three had parental leave policies consistent with the *Employment Standards Act*. There was variation among all other firms and policies. Eleven of 13 large firms provided 100% top-up for 15 weeks of pregnancy leave, and five firms had parental leave policies that were consistent with the *Employment Standards Act*.

CREATIVE SOLUTIONS

Some firms have decided that working towards gender equality requires an active commitment on their part, requiring policies that reflect this commitment. Campion says: "Leave policies are quickly becoming an important indicator of whether the firm in question is progressive or still living in the dark ages."

To that end, Campion's firm, Polley Faith LLP, has just rolled out a new pregnancy and parental leave policy. The preamble to that policy explicitly recognizes the importance of leave: "The firm appreciates and understands the importance of pregnancy leave and parental leave in the lives of its employees and their families and, through this policy, encourages all members to take full advantage of the pregnancy and parental leave benefits available according to provincial legislation and through the firm."

The policy goes beyond the "standard" 17 week top-up: the firm will pay any associate the top-up amount for an additional month for every year the associate has been employed at the firm, up to a maximum of four months. This means that a fifth-year associate who takes a pregnancy leave can expect to receive 100% of her salary, provided the associate returns to work at the firm for one year.

GETTING IT RIGHT

The decision to take a parental leave is not the only issue new parents face in balancing family and career. Talking about his and his wife's approach to balancing parenthood and a busy legal career, Awanish Sinha, a partner at McCarthy Tetrault LLP, says: "We make it up every day. I wish we could say we were sophisticated enough to have a long-term plan, but mostly we have a deal, we share goals, and we have the sheer force of will." But part of that plan involved Mr. Sinha taking a parental leave.

These long-term, career-fulfilling goals must be shared and supported by the firms at which we work. If all of us, as lawyers, agree that we value having our families, whatever form they take, alongside our careers, we must ensure that our collective policies (as firms, as partnerships, as associations) reflect that value. There is much to be said about actually stating it, out loud, on paper, and in policies that benefit all members of the firm. If firms acknowledge the benefits of parental leave for everyone and ensure that they have fair and equal policies in place, their associates, partners, and staff will be more loyal and productive. If men and women together demand that policies reflect their lives—including shared parental goals and the "force of will" to do things together—the legal workplace will be a more welcoming and sustainable place for everyone.

Rachel Migicovsky and Ottawa lawyer Juliet Knapton co-chaired an OBA Panel where Jeff Feiner, Fredrick Schumann, Stephen Kurelek and Awanish Sinha discussed their experiences taking parental leave, coming back to work, and supporting their partners during their time away from work. Sabrina Bandali of Bennett Jones LLP moderated that discussion. Learn more about this issue and earn CPD credits by downloading the archived video and materials.

ABOUT THE AUTHOR

Rachel Migicovsky is a litigation lawyer at Shibley Righton LLP. Her main area of practice is professional negligence. She attended Osgoode Hall from 2009 – 2012 was called to the bar in 2013. Rachel serves on the executive committees of the Ontario Bar Association's Civil Litigation Section and Women Lawyers Forum.

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