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The Family Caregiving Legal Research Project

By John E. Jordan

“Taking care of dependent or vulnerable adult family members, rather than contracting the work out to third parties outside of the family is the norm in many cultures.” So begins the study paper published in April 2010, by the British Columbia Law Institute, Canadian Centre for Elder Law. The paper found its genesis in the increasing incidence of unpaid caregiving by family members for aging parents, disabled children and relatives with mental health issues. The purpose of the Report is to examine how the laws of British Columbia, at present, meet the needs of working caregivers and goes on to look into ways that legislation could be revised to lend greater support for working caregivers.

Family caregivers provide an untold number and type of services such as emotional support, transportation, meals, medical care and homework specific to the disabled individual. All this is done while the caregiver must meet the demands of family, work and the community. Because family caregivers face substantial demands on their time, the Study noted the obvious result that attempts by the caregiver to balance paid work and unpaid caregiving is extremely challenging.

The Report went on to identify areas of work related challenges related to caregiving such as reduction in employment income and pensionable earnings, opportunities for advancement and resignation or termination. “The province has presented with the challenge of devoting more financial and manpower resources to institutional care giving. Despite this effort, care giving for the elderly and infirm falls mainly outside of government. The issue, then, we face, is how are the costs of such care giving to be apportioned among family, individuals, employers and the province. Women today, are, because of the demographics of our society, engaged in the work force to the same extent as men. It is, however, an incontrovertible fact that family care giving falls disproportionately on women. This gender inequality is hardly fair. The authors of the Study see the characteristics of today’s family as contributing to this gender inequality. Such factors include:

- (i) High divorce rates result in women providing more caregiving with less family support;
- (ii) Lower birth rates translates in to fewer caregivers;
- (iii) Younger generations delay having families until they are older because of economic issues resulting in women caregiving for parents and children at the same stage of life.

The legal regime which affects family caregivers is a patchwork of legislation found in human rights, health laws, employment and labour law and pension laws. There is no single law in British Columbia or Canada which concerns the family caregiver situation.

The author of the Study suggests four areas of law in which reform would prove beneficial:

A. Workplace Flexibility and Family Responsibilities Accommodation

There is currently no right for an employee to be given work flexibility to accommodate family caregiving obligations. Accommodation is usually left to the discretion of the employer. There

is a provision in the B. C. Human Rights Act that an employee may claim discrimination if a change is a term or condition of employment by the employer causes a “serious interference with a substantial or other family duty”.

A possible solution lies with changes to the Employment Standards Act similar to those enacted in the United Kingdom and New Zealand which give an employee the right to request variations in the location and hours of work, including changes to part-time status, if the employee needs these changes to undertake family caregiving services.

B. Pension Security

Private pension plans may contain provisions for security of earnings and pensions, but the Canada Pension Plan (“CPP”) does not. The CPP contains provisions only for the care of young children but for no other form of caregiving. In B. C., there is also no caregiver-specific pension to supplement income of older caregivers who have left work early and permanently to become full-time caregivers. As a result, such caregivers sacrifice future CPP benefits and, so, may end up below the poverty line in their retirement years.

The CPP could be amended to:

- (i) Include adding to the pension contribution of family caregivers who, because they have withdrawn from the workforce, have reduced contributions and therefore, retirement benefits; and
- (ii) Exclude the years the caregiver has been out of the workforce, similar to the CPP Child-Rearing Provision, in determining the CPP retirement benefit.

C. Employment Leave Provisions

The B. C. Employment Standards Act allows an employee five days unpaid leave to look after the needs of children and their immediate family members and eight weeks unpaid compassionate care leave to provide end-of-life care treatment to family members. This may also result in six weeks employment insurance benefits. However, there is no provision for other forms of family caregiving, such as for an aging parent.

The Study recommends extension of such benefits to include all kinds of family caregiving services so as, for example, to extend compassionate care leave under the Employment Standards Act to situations where a family member requires time off work to care for a family member who suffers from a serious health condition, whether or not death is likely.

Another approach suggested was to extend the duration of compassionate care leave under the Employment Standards Act to one year, to parallel the duration of the leave available for childbirth, subject to periodic information of the illness.

D. Income Replacement/Payment to Caregivers

Despite the number of fairly recent studies on the needs of caregivers, little in the way of financial resources exist in B.C. to support caregivers. Currently, family caregivers can take

advantage of tax credits that are available to taxpayers who reside with family members who are financially dependent on the taxpayer and who are mentally or physically disabled. However, such tax credits, including the Caregiver Tax Credit, benefit only higher income taxpayers. Also, eligibility is tied to financial dependence not the caregiver work actually done by the caregiver.

As far as direct payments to family caregivers in B.C. are concerned, such payments are made only in limited circumstances. The best that can be said is that through the Choice in Supports for Independent Living Programme, disabled people who are eligible can access certain money for their own care to be spent at their discretion. However, payments made directly to the caregivers themselves are, in reality, not available.

The Study concluded that both the Federal and British Columbia governments need to explore income replacement for low income family caregivers “either through attaching greater dollar value to a refundable caregiver tax credit or the creation of a direct caregiver allowance payable into the typical years of retirement and during the years of life course when a caregiving maintains paid employment”.

The Federal government could also create a tax credit that is accessible to low income caregivers, that provides, as its eligibility criterion, the provision of actual caregiving labour.

The Study concludes that substantial law reform measures are crucial to provide substantive support for family caregivers who are also in full or part-time employment. A related but important question to be determined is how the cost of home caregiving is going to be shared between families, employers, agencies and governments.

The BC Law Institute is interested in your views on this topic, especially if you are currently providing care to a family member or receiving care, please send any comments to familycare@bcli.org.

Anyone wishing to read a complete text of the Study can find the material online at www.bcli.org/ccel.

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