

AGING AND THE LAW SERIES

What Every Professional Needs to Know

INTER-JURISDICTIONAL ISSUES

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Overview

- Each Canadian jurisdiction is bound by different provincial or territorial legislation in addition to federal law that affects older adults.



- Though federal legislation is applicable across the country, many issues that relate to aging are in the hands of the provinces : e.g. health care, property and civil rights, and advance care planning documents.

Overview

Canadians, especially older adults, are increasingly becoming “multi-jurisdictional” in the sense that they travel to different Canadian and international jurisdictions to visit family and to live for part of the year.



Overview

As a result, professionals need to be aware of inter-jurisdictional issues such as conflicting laws, different interpretations, and the consequences of their client's presence in different regions when drafting or advising.



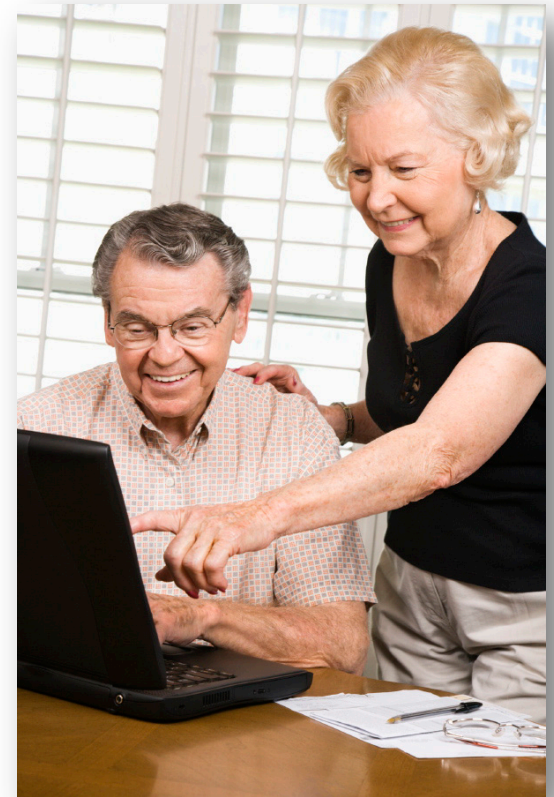
Snowbirds



Snowbirds

Who are snowbirds?

- Higher income and buying power
- Higher education
- Solid past employment
- Good health status
- Usually own 2 properties
- 80% of income is disposable



Snowbirds

Snowbirds have created organizations in Canada, which speaks to the magnitude of the movement and the organized nature of these travelers.



Snowbirds

Due to their buying power, snowbirds are more likely to make property purchases outside of their home jurisdiction.

This phenomenon results in a need for more legal services for snowbirds than the average older adult.



Laura Watts, Ed Boyer, and Caily Dipuma, "Advance Planning documents, Aging Snowbirds, and the Elder Law Lawyer."

Snowbirds

Impact of snowbirds for professionals

- Significant area of expansion for services
- Needed expertise
- Health care not always a primary concern (DRA-proof?)
- Planning can be complex
- Often assumed “no real differences” between law of jurisdictions

Advance Planning Documents (APDs)

- Advance planning documents are valuable tools that enable clients to have a degree of control over their affairs should they become incapable
- Each APD gives a specified individual (or more than one) the power to consent to decisions on the client's behalf.



Advance Planning Documents

Examples of advance planning documents (APDs) include:

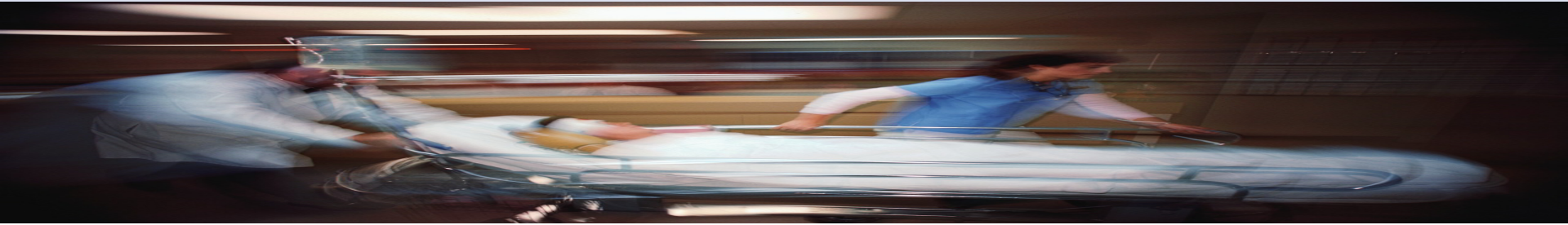
Advance
health plans

Powers
of attorney
(POA)

Health care
directives



Capacity



- A central issue with APDs across Canada is the definition of “capacity”.
- Only when the client becomes incapable do the documents come into effect.

*(*An exception: an enduring power of attorney, which continues to be in force after the client is considered incapable.)*

Capacity

CAPABLE	INCAPABLE
YOU DECIDE	SOMEONE ELSE DECIDES (YOUR SDM)

Laws & Materials

It is important to verify the following when advising on APDs :

- Name and citation of statutes
- Statutory methods for revocation
- Obligations to act (positive or neutral)
- If express out-of-jurisdiction recognition

Laura Watts, NAELA presentation, Hawaii

Example : Ontario

- In Ontario, APDs concerning property and personal care are governed by the Substitute Decisions Act, 1992.
- The Act recognizes inter-jurisdictional APDs at section 85(1), so long as they comply with the legislation of the jurisdiction of execution, of the grantor's then domicile, or of the grantor's (then) habitual residence.

Laura Watts, Ed Boyer, and Caily Dipuma, " Advance planning Documents, Aging Snowbirds, and the Elder Law Lawyer."

Inter-jurisdictional Problems



- Can be 'capable' in one jurisdiction but not in the other
- Rheostat v. binary notions depend on jurisdiction
- Defeats the intention of the grantor
- Often does not avoid court proceedings despite planning in advance with APDs

Inter-jurisdictional Problems



- Duties of attorney / proxy can vary
- Standard of care / liability varies
- Impinges on mobility rights

Inter-jurisdictional Problems



- Greater expense and complications
- Conflicts laws not usually helpful – not arms length
- Vulnerable to abuse and exploitation

Abuse & APDs



All advance planning documents carry the potential for abuse.

They are a grant of power over property or personal care decisions – this power can be manipulated.



Abuse & APDs

Abuse & APDs

- With multi-jurisdictional clients, the potential for abuse is elevated where the law governing APDs is not uniform.
- The duties of attorneys and the threshold for capacity vary across the country.
- This leaves open the possibility of uncertainty, which may be exploited by a savvy attorney.

Preventing Abuse

- Good drafting practices and thorough research as the drafter of an APD such as a power of attorney can help prevent abuse.
- Informing your client and his or her loved ones of the duties and requirements in the different jurisdictions will also help resolve potential confusion.



Best Practices : Advising Your Client

12 Tips for Good Practice :



Ask client if :

1. They own / rent / lease / hold timeshare property in another jurisdiction
2. Traveling? Where? Frequency? Duration?

12 Tips for Good Practice:



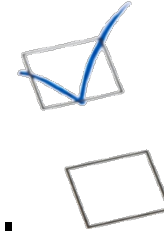
3. Move elsewhere if incapacitated?
4. Previously resided elsewhere? APDs done there?
5. If previous APDs elsewhere, what effect of new or additional APDs being drafted?

12 Tips for Good Practice :

6. Attorney or proxy named will really be willing to act, especially in more than one jurisdiction ☒
7. If they want APDs for each jurisdiction they regularly travel to ☐
8. Draft APDs specifically tailored – avoid boilerplate
9. Clarify “triggers” for Springing APDs – who determines and on what basis?



12 Tips for Good Practice:



10. Draft defensively – who is likely to challenge?
11. Consider implications of co-attorneys or co-proxies and the impact of jurisdictions
12. Advise re: choice of law rules and jurisdictional provisions which will affect the APD

Advising Attorneys / Proxies

- Advise re: scope of authority, obligations imposed in creating jurisdiction and other relevant jurisdictions
- Determine whether assets may be extra-jurisdictional
- Advise client as to other duties / liabilities / obligations in all jurisdictions relevant



Summary

Additional Resources

For information about how you can become a Certified Professional Consultant on Aging (CPCA) visit us at our website www.agefriendlybusiness.com

For information about the Canadian Centre for Elder Law visit us at our website www.bcli.org

THANK YOU!

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