

CROSS-BORDER ISSUES FOR SNOWBIRDS AND ROAMING RETIREES

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TABLE OF CONTENTS

CROSS-BORDER ISSUES FOR SNOWBIRDS AND ROAMING RETIREES

A.	PLANNING FOR PERSONAL CARE AND PROPERTY IN THE EVENT OF INCAPACITY	2
1.	General Considerations.....	2
2.	The Power of Attorney to Administer or Alienate Property.....	2
3.	Power of Attorney for Personal Care.....	3
B.	ESTATE AND FINANCIAL PLANNING	6
1.	Will Planning	6
(a)	General Considerations.....	6
(b)	Residence and Domicile	6
(c)	Disputed Domicile	7
(d)	Financial Data	8
(e)	Multiple Wills.....	8
(f)	Ancillary Probate or Resealing.....	12
(g)	Timely Preparation and Execution.....	12
(h)	Special Will – Planning Concerns	13
i)	Principal Residence.....	13
ii)	Vacation Property	13
iii)	Subsequent Marriage(s)	15
iv)	<i>De Facto</i> Spouses	16
v)	Disabled Dependant.....	18
vi)	Choice of Executors and Trustees.....	19

vii)	Joint Ownership	20
C.	PORTABILITY OF PENSION BENEFITS.....	23
D.	HEALTH INSURANCE.....	24
1.	Provincial Health Insurance Plans	24
(a)	Eligibility	25
(b)	Prolonged Absence	25
(c)	Ineligibility	25
(d)	Health Care Services Insured.....	26
i)	Inside Canada.....	26
ii)	Outside Canada	26
2.	Supplementary Health Insurance	27
E.	CONCLUSION.....	28

CROSS-BORDER ISSUES FOR SNOWBIRDS AND ROAMING RETIREES

Older Canadians are on the move, travelling on the Trans-Canada Highway or interstate highways such as the popular I-95 to Florida or hopping on airplanes for exotic destinations. They are seeking a more relaxed pace of living in more benign climates. The driving force behind this migratory activity is probably best articulated in the words of a Quebec songwriter, Gilles Vigneault: “*mon pays ce n’est pas un pays, c’est l’hiver.*”¹ The prospect of dealing with the harsh Canadian winter by not dealing with it at all is enticing, but there may be a few surprises, and not all pleasant, for the unwary.

I will focus on the species of migratory creatures known as the “*aves nivales*”, more commonly called the “Snowbirds” who are travelling to the United States. I will also address, peripherally, older clients who may spend extensive time in other provinces or countries at various times of the year. For ease of reference, I will use the term “Snowbirds” for both categories. My purpose is to provide an overview of the issues facing the practitioner who has Snowbirds as clients. I will deal with selected cross-border issues (both international and inter-provincial) from the perspective of life planning for personal care and property, and traditional estate and financial planning, excluding, however, cross-border income and estate tax issues. I will not be providing exotic and rarefied information as disseminated in the pamphlet entitled *The Guide to Comfortable Tax Planning* mentioned in Sarah Caudwell’s intriguing novel *The Sirens Sang of Murder*², on such things as “*where to stay in Vaduz, eat in Gibraltar, or buy a novel in the British Virgin Islands, which flights to Luxembourg offer free champagne, what to see in Nassau, do in Vanatu, wear in Panama, drink in the Netherlands Antilles, and on no account do in the Turks and Caicos . . .*”³

A. **PLANNING FOR PERSONAL CARE AND PROPERTY IN THE EVENT OF INCAPACITY**

1. **General Considerations**

For Snowbirds, the preparation and execution of a power of attorney for the administration of property and personal care is an integral part of later life planning and an essential adjunct to estate planning. Disability planning, as it is sometimes called, should never take a back seat to estate or tax planning.

There is a wide range of alternate terms used: continuing or durable power of attorney, advance directive, health care directive or proxy, living will, representation agreement and, in Quebec, mandate in anticipation of incapacity.

The singular attraction of these legal instruments is the avoidance of the traumatic and costly proceedings of state-controlled regimes of protective supervision.

Given the significant variations in the laws of different jurisdictions as to the validity and effectiveness of these instruments, practitioners should ensure that they will be recognized and enforced in the jurisdiction where their Snowbird clients are vacationing or spending extended periods of time or at least inform their clients that they are not enforceable under the laws of that jurisdiction. Practitioners should advise Snowbirds not only about the domestic rules but about the choice of law rules and jurisdictional provisions.

2. **The Power of Attorney to Administer or Alienate Property**

A Snowbird may have executed a perfectly valid power of attorney in his or her jurisdiction of domicile for the administration of property. If the Snowbird owns real estate elsewhere, this power of attorney may not be recognized there if the law of the situs applies its own law to the formal or substantive validity of the power of attorney or to its effectiveness vis-à-vis third parties. Complex problems sometimes ensue because of the lack of uniformity and

consistency in the laws of the jurisdictions concerned. Even within a single jurisdiction, there is often a controversy as to the applicable law or laws. For example, in Quebec, it would be fair to say with some certainty that the right to name someone to act in the event of the incapacity of a person would be governed by the law of this person's domicile.⁴ The formal validity of the document is governed by the law of the place where it is made.⁵ Validity as a juridical act is governed by the designated law or the law with which the act has the closest connection.⁶

Conflicts often arise as to the performance of the power of attorney in the event of incapacity. For example, under Quebec law, homologation is necessary before the attorney may act⁷, which is not the case in most common law jurisdictions. The law applicable to the requirement for homologation could be the law governing the protective regime or domicile at the time of execution or the juridical act or perhaps by the law of the place where the attorney will act (i.e., the situs of the immovable or real property).⁸

The one inescapable conclusion is to ensure that the power of attorney conforms to the various laws potentially applicable. It may also be advisable to prepare a specific power for the situs jurisdiction. Otherwise, the practitioner and the Snowbird may become lost when engulfed and entangled in the realm of the conflict of laws so graphically described by Dean Prosser as follows:

“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”⁹

3. Power of Attorney for Personal Care

It is even more risky for a Snowbird to assume that a power of attorney for personal care executed in his or her home jurisdiction will be valid in another jurisdiction. Since Snowbirds are generally older persons who are more susceptible to chronic health disorders and problems caused by declining health, their personal care powers of attorney or living wills warrant more attention. If a medical emergency arises, the power of attorney or living will executed in the

jurisdiction of domicile may not be adequate to deal with the situation in the jurisdiction of sojourn, especially with respect to their wishes about “heroic measures”.

In 1952 the Welsh poet, Dylan Thomas, wrote the following lines after the death of his father:

*“Do not go gentle into that good night.
Old age should burn and rave at
the close of day.
Rage, rage against the dying of the light.”*

What would Thomas have written had he seen the respiratory and circulatory functions of his father artificially maintained by invasive medical techniques? Thomas might have urged that his father be allowed to pass gently into that good night. Transposed into a contemporary context, Thomas’ father would be advised to express his wishes in an advance directive. He, and others, might prefer to impose limits on the use of medical technology and recognize that death is simply the final stage of life. Thomas might today plead:¹⁰

*“Let him go gentle into that good night.
Old age should fade peacefully
at the close of day.
Accept and honour the dying of the light.”*

Legal questions regarding the medical prolongation of life occur in an environment considerably influenced by non-legal factors including startling advances in medical technology, an aging population and increasing costs and a shift to private sector sharing of medical care. Medical technology plays a greater role in death because most deaths occur in institutional settings – literally surrounded by life-prolonging equipment and health care providers who may be committed to the prolongation of life at any cost.¹¹

From the perspective of disability planning, it is important to enable clients to express their preferences regarding medical treatment with some assurance that they will be respected by the courts and health care providers. This concern is heightened when it comes to respecting the Snowbird’s wishes in another jurisdiction.

Clients may and should express their wishes in an advance directive. In all Canadian provinces and virtually all North American jurisdictions, a competent adult may execute a document which provides for the appointment of another person (a substitute or surrogate decision maker) to make health care decisions for the principal. If there is a reasonable possibility that the instrument might be used in another jurisdiction, similar conflicts of laws as expressed in the case of a power of attorney to administer property will arise, and the recommendations are the same as those stated earlier. For example, to the extent that an advance directive is recognized, a clear expression of intention is required by the law of some jurisdictions before the courts will allow a surrogate to refuse life-sustaining treatment for the patient.

Most Canadian provinces have no legislation giving an advance directive the force of law in the sense that health care professionals must follow them. An advance directive given directly by a person to any physician or hospital may not be valid in all jurisdictions. It is not valid in Quebec. The directive is merely an expression of the individual's wishes. It creates no legal obligation and no sanctions apply if it is not followed. In some American states, such as California, and in the province of Alberta¹², the directive has an obligatory character and health care professionals are bound by law to follow it (excluding instructions related to aided suicide, euthanasia or other instructions prohibited by law).

Currently, there is a debate being waged among legal practitioners on the issue of legislating enforceability. There are some, like the Elder Law Section of the Canadian Bar Association, who favour the Alberta model. Others believe there is sufficient protection and object to the law invading all aspects of life to try to eliminate all risks that are an inherent part of life and exercising excessive control over individuals.

An advance directive which is backed by legislation imposing a legal obligation for enforceability upon medical personnel in that jurisdiction may not be effective in imposing a similar obligation in another jurisdiction. It is suggested that, at least under Quebec conflict of laws, the validity of the instrument is governed by the law of the domicile of the party at the time he or she signs such a directive. However, vis-à-vis the health care professional, the law of the

place where the person is present would apply to determine whether, in an urgent situation (e.g., if the person is in a coma in Quebec and has executed a valid advance directive under the law of his domicile in Alberta), the health care professional would be bound by such a directive, whether pursuant to the emergency provision at article 3084 C.C.Q., or the public order provision at article 3081 C.C.Q.¹³ Nonetheless, Quebec health care professionals, in all likelihood, would abide by the instructions in the directive provided they were compatible with good care.

B. ESTATE AND FINANCIAL PLANNING

1. Will Planning

(a) General Considerations

More often than not, a Snowbird does have a will but it may well have been prepared while the client was younger. The risk is that the will is outdated and inadequately reflects the client's "Snowbird" status and some of the problems inherent in that newly acquired status. There may be significant inconsistencies or omissions as a consequence of differences in tax, property, family and succession laws in the jurisdiction where the client is now spending more time or has property. It is paramount to undertake a systematic review of the individual's situation.

(b) Residence and Domicile

The concepts of residence and domicile, and even citizenship and nationality, may have important implications for the Snowbird.

The number of days which an alien spends in the United States has significant income tax consequences as to whether one is a fiscal resident. The Department of Homeland Security now has the capability to track the number of days a person is present in the United States. It may be possible that the Department of Homeland Security would

share this information with the Internal Revenue Service. All foreign nationals should carefully keep track of the number of days that they are present in the United States each year and to seek advice to understand fully the United States residency tests.

The Snowbird's domicile may not be immediately evident, especially if he or she has lived in different jurisdictions or, as is frequent today, has one or more residences where he or she spends lengthy periods of time. While residence and domicile are different concepts, determination of domicile may be obscured by the multiplicity of residences. In the event of death, this determination may become critical given the impact which the rules of private international law may have on the settlement of the estate.

It is beyond the scope of this paper to discuss all the potential problems involved in an international estate, which usually, but not exclusively, is one in which there are assets located outside the home jurisdiction. There are a number of excellent articles and books written on the subject both from the common law and the civil law perspectives.¹⁴ For example, conflicts arise from differences in the requirements for formal validity of a will, forced heirship in some jurisdictions, discriminatory measures in favour of nationals (e.g., France and Holland) or in favour of heirs under the law of the situs (e.g., Belgium). Furthermore, contractual agreements entered into by the spouses concerning the division of property on marriage breakdown or death may be open to challenge to the extent that they deprive certain close family members of their compulsory shares of the estate. Conflicts may also result if different jurisdictions apply the principle of scission (that is, that movable property is governed by the law of the domicile and immovable property by the law of its situs) but apply the concept of domicile differently. A good example of such a problem is found in the American case of *Re Jane M. Renard*.¹⁵

(c) **Disputed Domicile**

The issue of disputed domicile sometimes arises in various contexts: for example, in the context of jurisdiction or the law applicable to the succession, or in a contest

between two or more taxing jurisdictions. A colleague in France related the following case of a disputed domicile. His client, a very wealthy lady who had been born in France, owned luxurious homes in Paris, Morocco, Capri and St. Moritz where she divided her time almost equally. When she died, four taxing jurisdictions vied for the right to tax her estate based on her domicile. The contestation was finally decided in favour of France since her nephew contended that her domicile had to be Paris since it was inconceivable that her domicile could be elsewhere given that her preferred wine was exclusively sold at a Parisian shop.

Domicile may be disputed where a relative or friend moves an elderly or otherwise disabled person to a new location and a new will is made there. If the testator did not have the mental capacity to change domicile, the proper jurisdiction to test the validity of the last will is not the place where it was made, but the place from which the person had been moved. Even if a will is admitted to original probate in one jurisdiction, that does not require the courts of another jurisdiction to give full faith and credit to that probate with regard to property located in the jurisdiction of domicile.

(d) Financial Data

There are Snowbirds today who have amassed considerable assets which are frequently scattered throughout various jurisdictions. A lawyer should be alert to examine the tax and successoral law implications that the multi-jurisdictional asset-base might provoke. This may necessitate consulting counsel in the jurisdiction where the assets are situated in order to ascertain the local requirements. Florida is a favoured jurisdiction for Snowbirds seeking refuge from winter. However, Florida does have strict rules in some areas which affect non-residents. This requires increased vigilance on the part of professional advisers with respect to the client's foreign assets.

(e) Multiple Wills

It is advisable in some situations to consider the possibility of multiple or situs wills if the Snowbird has assets in different jurisdictions. Some caution must be taken

when embarking upon the course of multiple wills. The peculiarities of the various rules governing foreign assets must be taken into consideration. If each jurisdiction in which a deceased person has assets were to govern the assets situated in that jurisdiction according to its succession, tax and family laws, the estate could be subject to a dizzying combination of local laws. Furthermore, the lawyer must ensure when suggesting multiple wills that proper advice is obtained about how the foreign jurisdiction will deal with the assets situated there. It is foolhardy to presume that the situs jurisdiction will apply the same rules as in the domiciliary jurisdiction regarding formal validity or the authority of a non-resident executor. For example, a holograph will written by a Quebec resident in conformity with the laws of Quebec is not valid in Florida. The law of Florida requires a holograph will by a non-resident to be witnessed by two persons. Hence any real estate in Florida owned by the Quebec resident will devolve in accordance with the intestacy rules of Florida and a Florida resident will have to be appointed as the personal representative.

While most jurisdictions have adopted a liberal stance concerning formal validity, blithely assuming that a will drafted in conformity with the law of the domicile will suffice in a foreign jurisdiction is folly. The decision rendered in *Feltrinelli v. Barzini*¹⁶ by the Quebec Superior Court also illustrates this point from a reverse perspective. It was held that the will executed in the presence of witnesses (formerly sometimes called an English form will) by a person of Italian nationality in Quebec was valid only with respect to immovable property situated in Quebec. Since the law of the testatrix's nationality and domicile did not recognize this form of will, the succession to her movable property was governed by the rules of intestacy. Therefore, it is advisable to have the will prepared or, as a minimum precautionary measure, reviewed by local counsel.

Alternatively, an international will could be used. Basically, this is a will made in compliance with the *International Wills Convention*¹⁷ which was intended to provide a will that would be recognized internationally with certain formalities common to all jurisdictions which had adopted the Convention. The formalities are largely similar to

those required for a witness will, with some modifications. The main advantage of the international will is that it virtually eliminates the conflict of laws problem relating to the determination of formal validity under foreign law. In Canada, the *Convention* has been adopted by Ontario, Newfoundland, Manitoba, Alberta, Saskatchewan, New Brunswick, Nova Scotia and Prince Edward Island. For use outside of Canada, it is advisable for a practitioner to confirm whether the *Convention* is in force in the relevant jurisdiction where it is to be used.

More sophisticated planning for probate purposes may require reliance on more than one will. For example, Ontario residents frequently have one will (the “Primary Will”) for assets that require probate and another (the “Secondary Will”) for those assets that do not.¹⁸ This is an ideal planning tool where an individual owns shares of private companies with significant value.

A provision of the *Estates Act* of Ontario permits a grant of probate for part of the deceased’s property.¹⁹ This provision can be relied upon to allow an individual with property located in different jurisdictions to execute multiple or situs wills to deal with the property located in these different jurisdictions with separate wills (for example one will would deal with Ontario situs assets and another will with all property other than the Ontario situs assets). Ontario probate fees would then be assessed solely on the property dealt with in the Ontario will. Property in the other jurisdictions dealt with in the other situs wills is not included in the valuation of Ontario assets and is thus excluded from the assessment of Ontario probate fees. The use of multiple wills to reduce probate fees was validated in *Granovsky Estate v. Ontario*²⁰, a lower level court decision. There are some commentators who originally believed that the Ontario government believed that *Granovsky* was not the appropriate case to appeal so the multiple will method may still be susceptible to attack in the future, although it is unlikely, especially in light of the fact that the probate forms have been amended to contemplate multiple wills.

Relying on this provision arguably allows some latitude for planning to eliminate probate fees even on assets located in Ontario. For example, from time to time, Quebec

retirees relocate in Ontario to be closer to family. In these situations, there is a planning technique which may be implemented with considerable savings in probate fees. In a typical situation, the Snowbird's assets may consist of bank accounts, securities or bonds which are held in Ontario but the Snowbird still owns country property or a bank account or both in Quebec. It would be advantageous to probate the Snowbird's will in Quebec since there are no probate fees in Quebec. The Quebec Superior Court will have jurisdictional competence if the deceased was domiciled or died or had assets in the province.²¹ The Quebec probate judgment may then be used to effect the transfer of the Ontario assets to the executors provided that this is acceptable to the institutions holding these assets. Of course, if the deceased owned land in Ontario registered in the Land Titles system, probate in Ontario will be required (unless the total value of the estate is less than \$50,000.00 and the consent of the Ontario registrar is obtained). However, it seems that more requests are being made to register property in the land titles system without letters probate. Perhaps a more generous policy will develop, but it is not seen as likely. If land is held in the *Registry Act* system, and probate is not otherwise required, the will of the deceased may be registered rather than a certificate of probate to effect the transfer.²²

An interesting judgment was rendered this year by the Supreme Court of British Columbia in *Re: The Estate of Bessie Bloom*²³. It would have been a good example of how the interplay between jurisdictional competence can affect probate applications and materially affect the amount of probate fees that may be assessed had its effectiveness not be eclipsed by a recent amendment to the British Columbia *Probate Fee Act*. Bessie Bloom died in British Columbia, owning stocks, bonds and debentures. The securities had been purchased for her committee account by the Bank of Nova Scotia Trust Company in Toronto, Ontario, which purchase was effected through the book entry system maintained by the Canadian Depository for Securities Limited located in Toronto, Ontario. Her securities were in non-certificated form and held through the now common indirect multi-tiered holding system. The issue was whether the securities should be considered to be situated in British Columbia and, accordingly, whether probate fees should be assessed. The court held that the situs of the securities was Toronto. Toronto

was the location of the financial investment intermediary on whose books the interest of the deceased was recorded and where her personal representative would have to go to effect the transmission. Therefore, no probate fees could be assessed by British Columbia with respect to the securities.

(f) Ancillary Probate or Resealing

In the absence of a domicile dispute, the probate judgment rendered by the court of domicile should be fully recognized in other jurisdictions and should be entitled to comity in other countries. Nevertheless, it may be necessary to have a separate procedure such as ancillary probate or resealing or letters of administration to transfer property situated in another jurisdiction.²⁴

(g) Timely Preparation and Execution

In preparing wills for Snowbirds, it is of the utmost importance that all hypotheses be canvassed because there is more likelihood that such clients may become ill, incapable or that death will occur unexpectedly while they are away from home. As a general rule, will-planning for them must have a wider ambit. It is ill-advised to assume that the will can be changed when personal circumstances or the law changes, because an older person may have become incapable or ill and, therefore, unable to remedy the problem by preparing a new will.

It is also the responsibility of a lawyer, (and, in Quebec, this also applies to a notary), to attend to the preparation and execution of a will on a timely basis. The timing factor assumes more critical proportions when it is the will of an older client.

This is particularly important if you consider that of the ten commandments governing will drafting, the most significant in the case of Snowbirds is that the will may only be requested if the client has one foot on the airplane.

(h) **Special Will – Planning Concerns**

i) Principal Residence

Under the *Income Tax Act*, an exemption is provided for a principal residence so that it is exempt from capital gains and may pass to any beneficiary without attracting tax.²⁵ The principal residence exemption is also available for trusts. In the case of Snowbirds, if the principal residence is to be held in a spousal trust, care should be taken in drafting the terms of the trust in order to anticipate changes in circumstances. The trustees should be given wide powers to sell or lease the residence if the surviving spouse no longer wishes or is able to live there. The terms of the trust should allow the trustees to purchase or lease another residence in the same or another jurisdiction, as for example, in Florida or Arizona or, alternatively to apply the sale proceeds or rental income to pay for the care and maintenance of the surviving spouse in a nursing facility.

On a practical note, Snowbirds should arrange to have someone attend at their principal residence on a regular basis while they are away to check mail and to ensure compliance with insurance requirements.

ii) Vacation Property

Vacation property situated in other jurisdictions, especially in the United States, may introduce the further complexities of conflict of laws and tax and, in particular, estate tax. It is beyond the scope of this paper to provide a detailed analysis of these rules. Suffice it to say that since several older clients do own vacation property in the United States, a fundamental acquaintance with the basic features of its estate tax is essential for the lawyer advising Snowbirds.

Another source of headache for Snowbirds who own winter retreats in Florida is the Florida homestead exemption. Those clients who are contemplating

a purchase may well cringe when they realize what the impact of this exemption may be, especially in the light of rising housing prices.

All out-of-state property owners suffer when Florida house prices rise, but Canadians are especially vulnerable because of our lower currency. In fact, many Canadians have been forced to sell because they simply cannot afford the ever-increasing tax burden.

Meantime, Florida domiciliaries who live in their principal residences have had their tax increases capped at three per cent annually despite the surge in property values. Back in the early 1990s, Floridians approved an amendment to the state constitution known as the Save Our Homes program. This program creates a homestead exemption for principal residences which places a limitation of three per cent on annual assessment increases on homestead exempt properties.

The effect of the homestead exemption is to shield resident property owners from most of the impact of rising property valuations, leaving non-resident owners to assume the full burden. In the process, the skyrocketing taxes paid by non-permanent residents produce windfall revenue for the relevant taxing authorities.

This system can create huge tax differentials between adjacent or neighbouring properties based on the owner's place of residence. Critics of the plan contend that this is not only unfair but also economically unsound.

However, no politician is likely to take up the cause of non-resident owners. The reason is very simple: non-residents do not vote. Florida residents are quite content to let the outsiders shoulder virtually all of the financial load. It is a classic case of eating your cake and having it too: they enjoy the profits inherent in rising property without having to pay the price.

Snowbirds thinking of buying a Florida residence need to be aware of the effect of the homestead exemption. One step to consider, contrary to the usual practice in property-hunting, is to seek an area where prices are stable or even falling. If keeping annual carrying costs under control are of concern, Snowbirds should avoid areas where prices are rising sharply or appear poised to move up.

iii) Subsequent Marriage(s)

One of the distressing realities of our times is the increasing rate of divorce among older clients both in long-term marriages as well as in second and third marriages. Add to this recent phenomenon the expanding horizon on December-December or May-December marriages plus longevity plus children from multiple marriages and a recipe for potential domestic conflict frequently surfaces. This late-life marital activity has spawned a plethora of complex issues for a segment of the population with considerable assets and family commitments rooted in the previous marriage.

Consider the following situation. A female Snowbird spent extended periods of time in an exotic location where she met and married her second husband. Upon her return to Quebec, she arranged for her new husband to join her and embarked upon some estate planning. Her goal was to ensure that the children of her first marriage would be the sole beneficiaries of her estate. She was advised that even though she made them the sole heirs under her will, her husband could have certain claims against her estate by virtue of their matrimonial regime and the family patrimony rules. Perturbed by this revelation, she then asked the surprising question whether her new husband's other wives could also have any claims against her estate. Apparently, the exotic location permitted polygamy. Since she was domiciled in Quebec at the time of her marriage, the marriage was invalid under the laws of her domicile which does not recognize polygamy. With this bizarre turn of events, the spectre of claims under the matrimonial regime and family patrimony vanished along with her marriage.

iv) *De Facto* Spouses

A notable reflection of the diversification of our society is the unprecedented rise in co-habitation. Since co-habitation has virtually assumed the status of an institution of the law, it is no longer a status reserved solely for young and opposite-sex couples, but is embraced by the middle-aged and the elderly as well as by same-sex couples. Increasingly, older persons are finding that cohabitation is a convenient alternative to another marriage. Snowbirds who choose to mate in southern climes as opposed to nesting in traditional northern locales may find that informal nest-sharing may be convenient, but it comes with a potential cost of which many are unaware.

Given the discrepancies and variations in the application of the laws which may apply to *de facto* or common law spouses on the death of one of them, it is essential that each party has a will to supplement the lacunae and to ensure that the survivor receives the benefits intended by the deceased. In the majority of Canadian provinces, if a *de facto* spouse dies intestate, he or she will have no entitlement to the estate as an intestate heir.

The perils of a *de facto* spouse dying intestate are exacerbated in Quebec if the spouses own property jointly, especially the family home or even prime vacation property such as a condominium in Mont Tremblant. Since there is no form of undivided co-ownership in Quebec which confers a right of survivorship as is the case with the common law's joint tenancy concept, the surviving spouse may be shocked to learn that he or she will be sharing ownership of the home with the deceased's intestate heirs, who may be brothers or sisters or nieces or nephews. In the case of an older person, this may be particularly devastating financially since he or she may be faced with the prospect of being uprooted by having to sell the home or buying the other half, neither choice being particularly palatable at that stage of life. Furthermore, in Quebec, this spouse has no status to claim *post mortem* alimentary support and has no rights in the family patrimony.

In some other provinces, there is recognition of a *de facto* spouse's claim for support.

Extensive changes in non-traditional family law involving cohabitating partners are occurring at an increasingly fast pace worldwide. British Columbia has enacted legislation to put common law spouses on the same footing as legal spouses in many areas of the law including wills, estates and inheritance matters.²⁶

The *Civil Code of Québec* was amended in 2002 to recognize a new type of conjugality, the civil union, which may be contracted by two same- or different-sex persons.²⁷ A civil union is regarded as being the same as a traditional marriage conferring identical rights and obligations on the parties, except that the civil union may be dissolved by a simple agreement made before a notary. Snowbirds united civilly in Quebec who have their residence elsewhere should be aware about the uncertain effects which this institution may have beyond the borders of Quebec. Since the substantial validity of the civil union is governed by the law of the place of solemnization, it will be without effect in a jurisdiction that does not recognize this institution.²⁸

No other Canadian jurisdiction has proposed or enacted legislation as sweeping in impact as in Alberta's *Adult Interdependent Relationships Act*.²⁹ The legislation allows for recognition of claims based on economic interdependent relationships by common-law and same-sex partners, siblings, friends, children and other persons against another person or against a deceased person's estate.

Several Canadian provinces, namely Quebec, Ontario and British Columbia, and one territory, Yukon, now recognize same-sex marriages. Some states of the United States are beginning to recognize gay rights but recognition of same-sex marriage is still denied in most states by *Defense of Marriage Acts*. No United States court has recognized same-sex partners as married, but the

Massachusetts Supreme Judicial Court has held that same-sex couples should be allowed to marry.³⁰ Given the unsettled state of the law and the lack of uniformity in recognizing same-sex marriages, the potential for conflict and controversy is considerable. For example, same-sex couples who married in Canada have sued in California and Hawaii to have their marriages recognized by these states where they reside. Therefore, if Snowbirds find themselves in a comparable situation, they should be aware that their marriage may not be recognized in the jurisdiction where they relocate. There is an argument that, even though same sex marriages could be celebrated in Quebec, Ontario, British Columbia and the Yukon, they should not be valid if either or both of the parties are domiciled at the time of their marriage in a jurisdiction prohibiting same sex marriages.

v) Disabled Dependent

Older clients who have a disabled dependent are confronted with the dilemma of making fair and adequate provision for the care and maintenance of this person and, at the same time, not compromising any government social benefits after they die. The most frequently-encountered situation involves older parents with a disabled adult child. Confounding this dilemma is the sharp distinction made in the applicable legislation between the obligations of parents during their lifetime and their obligation to leave property on their death.³¹

A popular planning device in the case of a disabled adult is to use a discretionary trust. The trust is established to provide support for the disabled beneficiary for his or her lifetime and, upon his or her death, to distribute the trust property to others. The trustee has full discretion regarding income and capital distribution to the disabled beneficiary, with instructions that such discretion be exercised in a manner which will maximize any sources of government funding for support of that beneficiary. If this person is receiving any kind of government

assistance such as welfare, it will not be lost or reduced in most provinces since he or she has no right to income but merely has an expectancy.

Alberta is an exception. Changes made to the *Assured Income for the Severely Handicapped Act* government program (“AISH”) have made discretionary trusts less attractive in Alberta.³² The amendments introduced an asset test under which a person is eligible to receive AISH benefits only if the value of all assets does not exceed a stipulated amount. In addition, the Director of the AISH program has the authority to deem a person to be entitled to receive all or any part of the capital or income produced by any trust, including a discretionary trust, of which the person, the person’s spouse or any dependent child of the person is a beneficiary.³³

It is, therefore, important to consult applicable law in the particular jurisdiction where the disabled beneficiary resides with respect to its efficacy. The trustee should also keep abreast of the jurisdiction's rules on social assistance and monitor the asset-based programs on a regular basis in order to ensure compliance with the benchmarks.

Snowbirds who are acting as court-appointed representatives of incapable adults (for example, as committee, curator or tutor) should also be aware that if the protected adult is accompanying them for prolonged stays at their vacation home in another jurisdiction, their court appointment may not necessarily be recognized. It may be advisable to verify with local counsel if they would have the required standing to gain access to medical records or consult with physicians on behalf of the incapable adult.

vi) Choice of Executors and Trustees

An important consideration in the choice of executors and trustees is the issue of residence. In some jurisdictions, a non-resident may be foreclosed from

acting or may be required to obtain an administration bond. Non-resident trustees may cause a trust to become resident of the jurisdiction in which the trustee resides for income tax purposes.

vii) Joint Ownership

In common law jurisdictions where Snowbirds stay for extended periods, a frequently-used will substitute for the transfer of property on death is joint ownership. Some forms of joint ownership, but not all, allow jointly-held assets to pass outside of the estate, thus not attracting probate fees whenever such fees are assessed. If property is owned jointly, and not as tenants in common, with rights of survivorship³⁴ or in a tenancy by the entirety, the will or, in the absence of a will, the rules on intestacy, will have no effect on the distribution of the property on the death of one of the owners. The property will pass automatically to the surviving joint owner or, in the case of a tenancy by the entirety, to the surviving spouse.

While holding real estate, securities, bonds and bank accounts in joint ownership may appear to be a panacea to avoid probate fees and to facilitate the distribution on death, there are some potential problems. There are many instances where a reckless rush into joint tenancy without proper advice may trigger unexpected and negative tax consequences. If the joint owners are spouses, there will be no tax consequences when one spouse dies and the property passes to the survivor. If the joint owners are not spouses, there may be a deemed disposition which may trigger tax consequences. Therefore, caution should be exercised before transferring assets into joint ownership with a non-spouse solely for the purpose of avoiding probate fees.

Often a Snowbird decides to open a joint bank account for the sake of convenience with children, grandchildren, other relatives or a friend. This practice has great potential for conflict. Even though the intention of the parties

may simply be to authorize the relative or friend to sign cheques on the Snowbird's account, this arrangement could be better accomplished by giving the relative or friend a power of attorney on the bank's usual form. If the funds have been provided by the Snowbird and this has not been properly documented, on the death of the Snowbird, the ownership of the account may be claimed by the surviving joint account holder thus unwittingly depriving the estate of these funds which the deceased had intended to be governed by his or her will. In some jurisdictions, legislation exists which provides a presumption of resulting trust between spouses when property is jointly held. In all other cases, the legal situation is uncertain and ripe for litigation.

Another source of unexpected problems in the case of joint bank accounts may arise from the fact that many older women use their husband's family name and initials. Take the example of a couple of Snowbirds who have a joint account with right of survivorship in Florida held in the name of Mr. and Mrs. R.M. Roy: Mrs. Roy dies; Mr. Roy remarries; Mr. Roy dies and leaves his estate to the children of his first marriage; the second Mrs. R.M. Roy continues to use the condominium and account after her husband's death; when the second Mrs. Roy dies, the account may not necessarily be part of her estate. To prevent any dispute as to the rightful owner, the proper name of the holder should be on the account.

In Quebec, the concept of joint ownership with right of survivorship does not exist. When a co-owner of property situated in Quebec dies, the deceased's undivided interest in the property will not pass to the surviving co-owner; his or her undivided interest will form part of his or her estate and devolve accordingly. Surprisingly, many spouses in Quebec who have a joint bank account mistakenly believe that on the death of one of them the account will automatically be transferred to the survivor. Joint accounts are "frozen" in Quebec. This can engender liquidity problems for the surviving spouse even if he or she is the sole heir. Until the bank obtains all the proper documentation to effect the transfer, the surviving spouse has no access to the account. A will which is not in notarial form

must be submitted to the court for probate which delays the transfer of the account to the surviving spouse.

If a Snowbird domiciled in Quebec dies with property owned in joint ownership outside of Quebec, the manner in which this property will devolve varies depending on whether it is immovable (real) or movable (personal) property.

If a Snowbird domiciled in Quebec held immovable property in Florida in joint tenancy with a right of survivorship, it will pass automatically to the surviving joint owner because immovable property is governed by the law where it is situated. However, movable property is governed by the law of the domicile. Therefore, if a couple domiciled in Quebec has a joint bank account with a right of survivorship in Florida and one of the spouses dies, the surviving spouse will only be entitled to all the funds in the account if he or she also is entitled under the terms of the deceased's will or, in the absence of a will, in the proportion dictated by the rules governing legal devolution in the *Civil Code of Québec*. In the case of *Drolet v. Trust Général du Canada*,³⁵ the Quebec Court of Appeal held that the surviving co-owner of a joint bank account in Florida was not entitled to the funds. While the surviving joint owner was entitled as regards the bank and pursuant to the terms of the contract with the Florida bank to withdraw the deposited funds, the law of the domicile of the deceased prevailed to determine who owned the funds. The court characterized the issue as one of succession and not property law and held that the heir of the deceased was the owner of the funds under the terms of his will.

The issue of immovables came before the Quebec Superior Court in *Moisan v. Morency*.³⁶ The court had to determine whether an undivided one-half interest in a Florida condominium acquired by a husband and wife in the form of joint ownership known as tenancy by the entireties was vested in the surviving wife on the death of her husband or in the husband's heirs named in his will. The

court applied the law of Florida by characterizing the automatic vesting on death as a succession issue which was governed, in this case, by the law of the situs of the immovable being the law of Florida.

Since a significant number of Snowbirds have property and bank accounts in other jurisdictions, they should be advised about the advantages and disadvantages of joint ownership, both from the perspective of the law of their domicile and of local law and how to plan accordingly.³⁷

C. PORTABILITY OF PENSION AND INSURANCE BENEFITS

Snowbirds spending their retirement abroad need not necessarily worry about receiving their Old Age Security and Canada or Quebec Pension Plan benefits. If a person has lived in Canada for at least 20 years after reaching age 18, he or she may collect the Old Age Security pension outside Canada. To qualify for the Canada or Quebec Pension Plan retirement pension, a person must have made at least one valid contribution to the Plan and will be eligible to receive a monthly retirement pension at any time after his or her 60th birthday. The amount of the benefit depends on how long and how much the person has contributed to the Plan. If a person has contributed to the Canada or Quebec Pension Plan for a certain number of years (between three and ten, depending on the type of benefit and age of the contributor), he or she may qualify for a disability pension and the members of his or her family may qualify for survivor or child benefits. If a person has not lived and worked in Canada long enough to qualify for a Canadian or Quebec pension, Canada or Quebec counts his or her pension credits from another country to help qualify for a pension. If this person now lives in Canada or Quebec after having immigrated or returned from a country with which Canada has a social security agreement, he or she may qualify for a pension from that country.

If retirees are relocating to another province or territory, a review of their financial and estate affairs should not overlook life insurance, registered retirement savings plans (“RRSPs”) and registered retirement income funds (“RRIFs”)³⁸. The issue that frequently arises concerns beneficiary designations.

With respect to life insurance, the implications of relocating from one common law jurisdiction to another will be relatively minor, insofar as beneficiary designations are concerned. As a general principle, the mere fact of relocation should not affect the designation, since the law governing the insurance contract prevails, if the statutory law of a jurisdiction expressly provides that its laws will govern contracts made in that jurisdiction. It is of interest to note that if a husband subscribes for life insurance in Quebec designating his wife as the beneficiary of his life insurance and they subsequently divorce elsewhere, the spousal beneficiary designation is automatically revoked pursuant to Quebec law which governs the contract unless the husband clearly indicates a contrary intention.³⁹

In contrast to life insurance, there is more uncertainty and lack of uniformity with respect to beneficiary designations for RRSPs and RRIFs. For example, Quebec has restrictive rules and only recognizes the validity of beneficiary designations in very few instances. As a cautionary measure, a testator or testatrix in Quebec should include a particular legacy of RRSP and RRIF benefits in his or her will to cover any possible deficiencies in the beneficiary designation made on the institution's application form. The topic is too broad to cover at this time. Practically speaking, it is advisable for a client who relocates to a new jurisdiction to make a new beneficiary designation in accordance with local rules.

D. HEALTH INSURANCE

The importance of adequate health insurance for Snowbirds cannot be overly emphasized. It is an absolute necessity.

1. Provincial Health Insurance Plans

Under provincial health insurance plans, generally, the criteria for eligibility, ineligibility, prolonged absence and extent of coverage is similar but not uniform throughout Canada. The following sets out the salient features of the Quebec Health Insurance Plan with occasional comparative comments with Ontario's plan.⁴⁰

(a) **Eligibility**

Every permanent resident of Quebec is eligible for health care funded by the province. Persons who are considered residents of Quebec consist primarily of anyone who:

- is a Canadian citizen or is legally entitled to remain in Canada;
- makes his or her permanent and principal home in Quebec;
- spends at least 183 days per year in Quebec (for the Ontario plan, the period is 153 days)

(b) **Prolonged Absence**

Residents of Quebec, as well as their spouse and dependents who accompany them, remain eligible even if they spend more than 183 days outside Quebec (for the Ontario plan, it is 212 days) per calendar year, as long as they notify the Régie. These persons are allowed to be absent for specified periods for study or work. Residents of Quebec remain eligible for a 12-month vacation outside of Quebec once every seven years (up to two years in a lifetime, for the Ontario plan).

(c) **Ineligibility**

Persons who leave Quebec to take up residence in another country cease to be eligible for the health insurance plan on the day of their departure.

Persons who leave Quebec to take up residence in another province cease to be eligible for the Health Insurance Plan on the first day of the third month after the month of their arrival in the new province.

For example, persons who spend 183 days or more outside Quebec during a calendar year, lose their eligibility for the health insurance plan for that year (periods of

21 consecutive days or less are not counted). Since this could be a significant and serious gap in coverage for Snowbirds, it is strongly suggested that they take out private insurance during the waiting period. However, persons unable to return to Canada as a result of being hospitalized may remain eligible in certain cases.

(d) Health Care Services Insured

Provincial health insurance only covers specific health expenses incurred in the home province.

If a Snowbird requires medical assistance of any kind while abroad, in the United States or even in the next province – including medication, physician visits, or a hospital stay – it will cost. The provincial health insurance plans only provide minimal coverage for medical expenses while the Snowbird is out of Canada.

i) Inside Canada

If a Snowbird meets the eligibility requirements, he or she is insured under the Quebec Health Insurance Plan for fees for professional services rendered by a physician. Payment is made at the rates in force in Quebec. If the physician in the other province refuses to accept payment at Quebec rates, the individual will have to assume payment of the fees the physician charges.

Fees for hospital services received at an outpatient clinic or during hospitalization (e.g., ward accommodation) are covered.

ii) Outside Canada

If a Snowbird meets the eligibility criteria, he or she is insured for fees for professional services received from a physician but only at the rates in force in Quebec.

Fees for hospital services are paid only in emergency situations as a result of a sudden illness or an accident. Elective services or procedures available in Quebec are not covered. The amounts are set by regulation, as for example:

- up to \$100 (Cdn) per day of hospitalization;
- up to \$220 (Cdn) per hemodialysis treatment;
- up to \$50 (Cdn) for all other treatment, including diagnostic and therapeutic services

To put these rates into context, if, for example a Quebec Snowbird suffers a heart attack while in the United States, the Quebec Health Insurance Plan would provide coverage at \$100 (Cdn) per day for hospitalization when the actual cost in the United States could probably range from \$2,000 to \$4,000 (U.S.) per day.

2. Supplementary Health Insurance

In the United States and other countries, many hospitals will not even admit patients lacking appropriate medical coverage.

Access to American Medicare is only available to those who have permanent resident status in the United States. Snowbirds are not eligible since they have visitor status.

Private health insurance is essential for Snowbirds when travelling out of Canada.⁴¹ It is advisable that even if Snowbirds are travelling to another province, they make inquiries of both their provincial plan and private insurance to ensure they are adequately covered.

A particularly worrisome aspect of private health insurance for Snowbirds spending time in the United States is that it often does not fully cover all contingencies and expenses. It is important to know what the exclusions and limitations are. For example, if a Snowbird becomes ill and certain diagnostic procedures would normally be done while he or she were hospitalized,

insurance coverage may be denied if it were not an imminent life-threatening situation. The Snowbird will be in a double state of shock upon learning not only that the cost of the procedure is staggering but that the insurer will not pay. Faced with this reality, the Snowbird's only recourse is an air ambulance homebound, having personal effects and vehicle shipped and settling any outstanding lease obligations.⁴²

E. CONCLUSION

The flight of Snowbirds across borders to escape the annual deep freeze or to satisfy wanderlust at a leisurely retirement pace may not be an entirely carefree experience. Rather, Snowbirds and their advisers should give careful consideration to many of the issues canvassed in this paper. Pre-trip planning will ensure that their roamings are not marred by problems and complexities that might have been avoided. To paraphrase one credit card advertisement, "don't leave home without it". Pre-trip planning is, indeed, in the words of another credit card advertisement, "priceless".

¹ Translated as "my country is not a country, it is winter".

² New York: Dell Publishing, 1990.

³ Ibid., at page 36 and as cited by Paul Marchand, "The International Estate: Non Fiscal Considerations", in *Meredith Lectures 1991; Estate Planning*, Cowansville: Les Éditions Yvon Blais Inc., 1992, 221 at 223.

⁴ Article 3085 of the *Civil Code of Québec* ("C.C.Q.").

⁵ Article 3109 C.C.Q.

⁶ Article 3110 C.C.Q.

⁷ Article 2166 C.C.Q.

⁸ Article 3116 C.C.Q.

⁹ William L. Prosser, "Interstate Publication", (1953) 51 *Michigan Law Review* 959 at 971.

¹⁰ John R. Price, "The Right to Die in the United States after the Supreme Court Decision in *Cruzon v. Director, Missouri Department of Health*", in proceedings of the International Academy of Estate and Trust Law, Victoria, British Columbia, 1991, 18.1 at 18.9.

¹¹ Ibid., page 18.1.

¹² Alberta's *Personal Directives Act*, R.S.A. 2000, chapter P-6.

¹³ Article 3084 C.C.Q. reads: "In cases of emergency or serious inconvenience, the law of the court seised of the matter may be applied provisionally to ensure the protection of a person or of his property." Article 3081 C.C.Q. reads: "The provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations."

¹⁴ See Jeffrey Schoenblum *Multiple State and Multi-National Estate Planning*, Vol. 1, Boston and Toronto: Little, Brown & Company, 1982.

¹⁵ 56 N.Y. (2d) 973 (1982); see also Marchand, *supra*, note 3, page 227.

¹⁶ [1992] R.J.Q. 1525 (S.C.).

¹⁷ The *Convention Providing a Uniform Law on the Form of an International Will* (the "Convention") was promulgated in 1973 by the Institute for the Unification of Private Law (UNIDROIT).

¹⁸ The court used to issue "letters probate" to validate a will and "letters of administration" to appoint an administrator if there was no will. The court now issues a "certificate of appointment of estate trustee with a will" or, if there is no will, a "certificate of appointment of estate trustee without a will".

¹⁹ R.S.O. 1990, chapter E.21, subsection 32 (3).

²⁰ (1998), 156 D.L.R. (4th) 557 (Ont. Gen. Div.); see discussion by Sheila Crummey and Steven Roth, "Tax and Probate Planning", *Financial and Estate Planning for the Mature Client in Ontario*, Markham: Lexis Nexis, 1997, updated as at December 2003, 5.1 at 5.15 to 5.16.

²¹ Article 887 of the *Code of Civil Procedure*, R.S.Q., chapter C-25.

²² Crummey and Roth, *supra*, note 19, page 5.9.

²³ 2004 BCSC 70; the appeal was abandoned by the province because of the recent amendment to the *Probate Fee Act*, S.B.C. 1999, c.4, in response to the *Bloom* decision. The amendment is to the effect of levying probate fees on the value of all intangible personal property of the deceased, irrespective of whether it was situated within or without B.C., if the deceased was ordinarily resident in British Columbia at the time of death. The amendment was made retroactive to January 30, 2004, the date of the judgment of Bloom.

²⁴ Even though notarial wills executed in Quebec do not require probate, if the deceased left property outside of Quebec or there are claims against persons residing in another jurisdiction, it is possible to obtain letters of verification pursuant to article 615 C.C.Q.

²⁵ *Income Tax Act*, R.S.C. 1985, chapter 1 (5th Supp.), as amended, section 40 (2) (6).

²⁶ *Definition of Spouse Amendment Act, 1999*, S.B.C. 1999, chapter 29 and the *Definition of Spouse Amendment Act, 2000*, S.B.C. 2000, chapter 24; see also Helen H. Low, "Entitlements of an Unmarried Person on Death of the Partner", (2000) 20 *Estates, Trusts & Pensions Journal*, 61.

²⁷ *An Act Instituting Civil Unions and Establishing New Rules of Filiation*, S.Q. 2002, chapter C-6; a new amendment has been introduced in Bill 59, *An Act to amend the Civil Code as regards marriage*, (but not yet in force) which would allow a couple in a civil union to marry.

²⁸ For a criticism of the private international law aspects of the civil union in Quebec, see Gerald Goldstein and Jeffrey Talpis, “Réflexions critiques sur l’avènement de l’union civile boiteuse en droit international privé québécois” (2003) 82 *The Canadian Bar Review*, 1.

²⁹ S.A. 2002, chapter A. 4.5.

³⁰ *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003).

³¹ Faye L. Woodman explores these issues with particular attention to the legislation of Nova Scotia and Ontario in “Financial Obligations of Parents to Adult Disabled Children, Part 1” and “Financial Obligations of Parents of Adult Disabled Children, Part II”, (1998) 17 *Estates, Trusts & Pensions Journal*, 131 and 221.

³² R.S.A. 2000, chapter A-45.

³³ *Ibid.*, subsection 9(2).

³⁴ There must be an express reference to joint ownership in the title deed otherwise the property is deemed to be a tenancy in common and the owners will hold an undivided interest in the property that will devolve according to the testamentary provisions or, in the absence of a will, the rules on intestacy, governing the estate of the deceased owner.

³⁵ C.A. Montreal, no. 200-09-000606-860, March 29, 1989.

³⁶ [1983] C.S. 481.

³⁷ Jeffrey A. Talpis, “La planification successorale dans le nouveau droit international privé québécois,” (Deuxième partie), (1995) 97 *La Revue du Notariat* 425, at 441 to 443.

³⁸ For a more detailed discussion on these issues, see Barry S. Corbin, “How Portable is your RRSP RRIF/Life Insurance,” (2003) 23 *Estates, Trusts & Pensions Journal*, 71.

³⁹ Article 2459 C.C.Q.

⁴⁰ Québec Régie de l’assurance maladie website, updated to April 22, 2004; for a discussion of the Ontario health insurance coverage, see June E. Meadus, “Medical Issues, Housing Costs and Special Care Arrangements: Practical Considerations” *Financial and Estate Planning for the Mature Client in Ontario*, Markham: Lexis Nexis, 1997, updated to December 2003, paragraph 9.1 at paragraphs 9.26 and ff.

⁴¹ The Canadian Life and Health Insurance Association Inc. (“CLHIA”), representing most insurers in Canada, provides a free brochure listing issuers who provide insurance for Canadians travelling outside of Canada (its toll-free number is 1-800-268-8099).

⁴² *Jull v. Destination: Travel Health Plans*, [1999] O.J. No. 5288 (Ontario Superior Court of Justice), Toronto: in this case, the plaintiff was refused coverage under private insurance for a hysterectomy which was recommended by a Florida physician to be performed immediately. The insurer denied coverage on the basis it was not an emergency. Mr. Justice Pepall ordered the insurer to pay on the basis that the plaintiff had a reasonable expectation that such treatment would be covered.

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